15 April 2021 | Aparna Nathan QC | Harry Sheehan

Daarasp and anor v HMRC

On 13 April, The Upper Tribunal ('UT') handed down its judgment in the case of *Daarasp & Betex v HMRC* [2021] UKUT 87 (TCC), dismissing the Appellants' appeal. Aparna Nathan QC and Harry Sheehan acted for HMRC, the successful Respondents.

The case concerned two LLPs which took part in a marketed tax avoidance scheme aimed at securing capital allowances for the acquisition of information or communications technology assets. The First-tier Tax Tribunal ('FTT') had found that the allowances sought by the appellants were not allowable for a number of reasons: inter alia, the FTT found that the Appellants were not carrying on a trade at the relevant time so no trading losses were available. This was one of the "knock out points" run by HMRC. That apart, the FTT held, applying the *Ramsay* principle, only a small fraction of the expenditure that the appellants claimed to have incurred on acquiring the software licenses had actually been 'incurred on' the software licenses.

The appellants pursued two grounds of appeal before the UT: (1) that the scope of the closure notices did not include any "knock out" arguments (the "Closure Notice Ground"), and (2) that the FTT had erred in holding that only a small proportion of the expenditure was incurred on acquiring the software licences (the "Expenditure Ground").

Closure Notice Ground

Both closure notices stated, "*I conclude of the losses claimed only a currently unquantifiable part may be allowable"*. The appellants contended that the wording of the closure notices implied that at least *some* of the losses were allowable, and that it was outside the scope of that conclusion for HMRC to argue any "knock out points" the effect of which would deny the allowances in their entirety.

The UT concluded that the closure notices, properly construed, were wide enough to include all of the "knock out points". Accordingly, the FTT was permitted to determine the "knock out points".

Expenditure Ground

Given its decision in relation to the Closure Notice Ground, the UT did not need to, and did not address, the Expenditure Ground.

Outcome

The appeal was dismissed in its entirety.

Commentary

It is settled law that the conclusions in a closure notice may be justified by reasons not articulated in the closure notice and both HMRC and the taxpayer may rely on new arguments to defend, or challenge, the conclusions (subject to case management considerations). Nevertheless, the jurisdiction of the FTT is defined by the matter to which the appeal relates which in turn depends on the right of appeal set out in s31 TMA. Section 31(1)(b) TMA permits a right of appeal against the conclusions stated in or amendments made by the closure notice.

Of interest is the UT's detailed discussion of how closure notices operate to determine the jurisdiction of the FTT including the Court of Appeal's recent decision in *Investec Asset Finance Plc and anor v HMRC* [2020] EWCA Civ 579.

It is well known that both the original notices of enquiry and correspondence preceding the closure notices are relevant to the construction of a closure notice and hence the scope of the FTT's jurisdiction on an appeal against the closure notice (see for example *B & K Lavery Property Trading Partnership v HMRC* [2016] UKUT 525 (TCC) and *BNP Paribas SA (London Branch) v HMRC* [2017] UKFTT 0487 (TCC)). The UT's guidance confirms that (i) such documents cannot expand the scope of a narrowly worded closure notice (see [31(3) and (4)]), but (ii) they are relevant to the proper construction of a closure notice.

In construing the closure notices the UT took into account: (1) the context of the enquiry that preceded the closure notices, (2) the wording of the closure notices, and (3) the amendments that were made to give effect to the closure notices (see [36]). Ultimately, despite finding that the FTT had erred in its

approach, the UT accepted the submissions made for HMRC and reached the same conclusion namely that the closure notices were sufficiently broad to encompass all of the “knock out points”.

Aparna Nathan QC is a highly sought-after tax barrister. She has a high-profile litigation practice, often involving millions, sometimes billions in tax, and represents clients in all forums including the Supreme Court. Her equally impressive advisory practice involves advising ultra-high net worth individuals (whether UK or foreign domiciled), historic estates and foreign royalty on tax planning as well as residence and domicile issues.

Harry Sheehan has a broad practice in tax. He has experience in both contentious and non-contentious matters and acts on behalf of both taxpayers and the revenue. He has experience in Capital Gains Tax, Inheritance Tax, Stamp Duty Land Tax, and overseas issues such as the Transfer of Assets Abroad regime, as well as the procedural aspects of challenging decisions by the Revenue.