

## UK Tax Authorities Respond to the Supreme Court Decision in *Anson v. HM Revenue & Customs*

### US LLCs Generally Opaque for UK Tax Purposes

In our [July alert memorandum](#) we discussed the uncertainty in the UK tax classification of US LLCs following the Supreme Court of England and Wales' judgement in [Anson v. HM Revenue & Customs \(2015 UKSC 44\)](#).

On September 25, 2015 HMRC released a [Revenue & Customs Brief](#) in response to the decision. Despite the Supreme Court's conclusion that the members of the particular LLC under consideration should be entitled to treaty relief on the basis that they were automatically entitled to the profits of the LLC as they arose, HMRC have confirmed that they generally intend to continue their long-standing practice of treating US LLCs as opaque companies for UK tax purposes. In HMRC's view the decision is specific to the facts found in that case and does not affect other cases where an LLC is treated as a company by a UK taxpayer. The brief states that:

*"HMRC has after careful consideration concluded that the decision is specific to the facts found in the case. This means that where US LLCs have been treated as companies within a group structure HMRC will continue to treat the US LLCs as companies, and where a US LLC has itself been treated as carrying on a trade or business, HMRC will continue to treat the US LLC as carrying on a trade or business."*

*HMRC also proposes to continue its existing approach to determining whether a US LLC should be regarded as issuing share capital. Individuals claiming double tax relief and relying on the Anson v HMRC decision will be considered on a case by case basis."*

The response will be applauded by some as seeking to maintain the status quo. Whilst the drafting of the Brief is not as clear as might have been hoped, our understanding is that HMRC generally intend to treat US LLCs as opaque in both current and future arrangements. On that basis, UK corporate investors in US LLCs who expect to receive exempt distributions can therefore continue to do so. Individual investors can also expect to be taxed only on distributions rather than profits as they arise. UK pension funds that hold their interests in investment funds through US LLCs can continue to expect the source of their income to be the interest in the LLC rather than any activity conducted by the LLC.

The confirmation that HMRC will continue its existing approach to determining whether US LLCs should be regarded as issuing share capital (including, for example, taking into account whether the LLC issues certificates to members as evidence of their limited liability company interest) will

also be helpful to taxpayers who have relied on that to treat US LLCs as eligible to form part of a corporate group for UK tax purposes.

Conversely, for those UK taxpayers seeking to rely on the Supreme Court's decision in *Anson* to claim treaty relief, the Brief may be less welcome. However, HMRC have not ruled out the possibility of such claims being accepted, rather that they will consider each case on its own facts. It therefore remains possible that US LLCs could be treated as opaque in some circumstances and transparent in others – depending on the facts relating to the particular LLC and the position taken by the relevant taxpayer.

Although the Brief does not have the force of law and merely represents HMRC's current practice, and although in certain respects its drafting could have been clearer, it can nevertheless be expected that taxpayers will seek to rely on it. It remains to be seen, however, if HMRC's position will be subject to scrutiny under future court decisions and whether the *Anson* decision will lead to a new line of case-law on the UK tax classification of foreign entities more generally.

If you have any questions, please feel free to contact [Jason Factor](#), [Richard Sultman](#) or [Jennifer Marques](#) or any of your regular contacts at the firm. You may also contact our partners and counsel listed under "[Tax](#)" located in the "Practices" section of our website at <http://www.clearygottlieb.com>.

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