NCN: [2021] UKFTT 231 (TC)

**TC08180**

*INCOME TAX – amendments required to partnership return following determination of "lead case" of which this appeal was a "related case" under rule 18 of the Tribunal procedure rules – disagreement as to two amendments proposed by appellant – first proposed amendment not in line with lead case – second proposed amendment outside scope of appellant's appeal – held: amendments proposed by appellant not required to be made*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2012/06401**

**BETWEEN**

**LOCHURST LLP** **Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE ZACHARY CITRON**
**MS SONIA GABLE**

**The hearing took place on 14 June 2021. The form of the hearing was V (video) on the HMCTS Video Hearing Service platform. A face to face hearing was not held because of the coronavirus pandemic. The documents to which we were referred were an electronic hearing bundle (579 pdf pages), authorities bundle (144 pdf pages), and supplementary bundle (12 pdf pages).**

**Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.**

**Mr S Cotton of Investor-Rescue.org for the Appellant**

**Mr J Davey QC and Mr Macklam, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### BACKGROUND TO THE HEARING AND ISSUES BEFORE THE TRIBUNAL

1. The background to the hearing held on 14 June 2021 was an order (the "**2018 Order**") of the Tribunal (Judge Sinfield) of 29 May 2018 under which the appellant's appeal was allowed in part, on the terms of a "lead case" of which the appellant's case was a "related case" (terms taken from rule 18 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**rule 18**")). The 2018 Order invited the parties to determine the detail of the amendments required to the appellant's partnership return (the "**partnership return**") for the 2008-09 tax year which followed from that determination; and provided that if they were not able to so agree, then, within a year, either party could apply to the Tribunal for the appellant's appeal to be continued for the purpose of the determination of the detail of the necessary amendments to the partnership return. The respondents made such application and on 6 September 2019 the Tribunal (Judge Cannan) made directions for the purpose of determining the detail of the amendments required to the partnership return pursuant to the 2018 Order (including the listing of the hearing that eventually took place on 14 June 2021).

2. The parties were in agreement that the following amendments to the partnership were required:

   (1) a sum called the "final minimum sum", amounting to £4,047,200, should not be deductible; and

   (2) a sum called the "advisory fee", amounting to £126,475, should not be deductible.

3. The parties were also agreed that no amendment to the partnership return was required as regards a sum called the "balance", amounting to £546,800, which had been treated as deductible in the partnership return.

4. There were, however, two amendments to the partnership return, both proposed by the appellant, which were disputed:

   (1) as regards a sum called the "administration fee" (payable immediately on capitalisation of the appellant), amounting to £202,360 and treated as deductible in the partnership return: the respondents considered that this should be deductible in full, and so no amendment to the partnership return was required; the appellant, however, considered that only £40,472 of this sum should be deductible, and so the partnership return should be amended to disallow the difference; and

   (2) as regards "other costs" of £6,276 shown in the partnership return: the respondents considered that these should be deductible in full, and so no amendment to the partnership return was required; the appellant, however, considered that the partnership return should be amended to disallow these costs in full.

5. The matter before the Tribunal was to determine whether or not the two disputed amendments to the partnership return were required to be made.

6. We had witnesses statements from Mr C Cox of HMRC, and from Mr Cotton; and Mr Cox gave oral evidence at the hearing.

### POSITIONS OF THE PARTIES IN BRIEF

7. The respondents' position was that the first of the disputed amendments should not be made because, in the "lead case", the "administration fee" (paid "immediately" on capitalisation of the LLP) was found to be deductible in full. The respondents submitted that this aspect of the decision in the "lead case" was binding on the parties.

8. The appellant's position was the first of the disputed amendments should be made because 80% of the "administration fee" was artificial or fraudulent and so should not be deductible.

9. The respondents' position was the second of the disputed amendments should not be made because the deductibility of the "other costs" was not challenged by HMRC (i.e. not amended in the closure notice against which the appellant had appealed) and so was not one of the matters considered in the "lead case". It was therefore not an amendment to the partnership return that (in the words of the 2018 Order) followed from the determination of the "lead case".

10. The appellant's position on this disputed amendment was that the payments to the appellant's auditor represented in these "other costs" were artificial and/or not for trading purposes, and so should not be deductible.

11. We give further elaboration of the appellant's position below, but first provide further background as to rule 18 and the "lead case".

**FURTHER BACKGROUND ABOUT RULE 18 AND THE "LEAD CASE"**

12. Under rule 18 (text set out in the appendix to this decision), where two or more cases before the Tribunal give rise to common or related issues of fact or law, the Tribunal may give a direction specifying one or more such cases as a lead case or lead cases, and staying the other cases (called 'related cases'). When the Tribunal makes a decision in respect of the common or related issues, the Tribunal must send a copy of that decision to each party in each of the related cases and, subject to a rule 18(4) direction, that decision shall be binding on each of those parties. Rule 18(4) has a procedure by which by which a party, within 28 days of being sent a copy of the Tribunal's decision in respect of the common or related issues, may apply for a direction that the decision does not apply to, and is not binding on the parties to, that case.

13. As set out in the recitals to the 2018 Order, the Tribunal gave lead case directions (per rule 18(2)) in 2011; in 2012 the parties agreed that Starbrooke LLP shall stand as the lead case for the appellant in respect of the appeal which is the subject matter of this decision (against HMRC's closure notice issued on 15 December 2011).

14. Starbrooke LLP was one of the so-called "Icebreaker" lead cases that were determined by the Tribunal in *Acornwood LLP and others v HMRC* [2014] UKFTT 416 (TC) (the "**lead case decision**"). The appellant's appeal is listed in the appendix to the Tribunal's decision as one of the related cases; the decision refers to the 51 "Icebreaker partnerships" (of which the appellant is one) which comprise the lead cases and the related cases (see [12]). The lead case decision was upheld by the Upper Tribunal in a case of the same name: [2016] UKUT 361 (TCC)).

15. The Upper Tribunal's decision at [6] gave an outline sketch of the contractual arrangements which the Icebreaker partnerships entered into; this included an explanation of the "administration fee", which is at issue in the first disputed amendment here. We adopt the terminology and explanations set out there, for the purposes of this decision.

16. The lead case decision found that the entirety of the "immediate" administration fee paid on closure of the partnership (as opposed to the ongoing annual fee) was of a revenue nature incurred in the year of payment (see [59]). The "immediate" administration fee for Acornwood LLP, one of the two Icebreaker partnerships described by the Tribunal as "typical" (see [25]), was calculated as 4% of the members' contributions to the LLP. The Tribunal explained its conclusion thus at [319]:

> **"**The structure of the administrative services agreements in [*Icebreaker 1 LLP v HMRC* [2010] UKUT 477 (TCC)] and these cases is similar, in providing for both an immediate and an annual fee. In the absence of evidence that there

> was anything artificial about the determination of each of those elements it seems to us that there is no basis on which we can properly distinguish *Icebreaker 1* and we accordingly conclude that the immediate administrative services fee in each case is to be treated as revenue expenditure of the partnership in the year to which the closure notice relates. We should add, in case it should be relevant elsewhere, that we are satisfied from the evidence that IML's administrative services were rendered to the partnership as and immediately after it closed and, even if the matter were at large, we would not conclude that any part of that fee represented payment for the structure or package, or a pre-payment."

17. The "immediate" administration fee in the appellant's case was 4% of the members' capital contributions: see clause 3.1.1 of the administrative services agreement between the appellant and IML dated 2 April 2009.

**FURTHER ELABORATION OF THE APPELLANT'S POSITION**

18. The disputed amendments, for which the appellant contended, would result in a greater tax liability for the appellant. The reason the appellant took this position was that it took the view that its involvement in the Icebreaker arrangements had been due to a fraud committed on it; that the disputed amendments better represented this view of matters; and that the making of these amendments might assist it when bringing proceedings in the courts in respect of the fraud it alleged.

19. In particular the appellant's case was that the administration fee should be allowable only as to 20%, due to the fact that only 20% of the initial capital contributions to it were from the members' own resources – the other 80% was borrowed by the members from a bank (which the appellant regards as a hallmark of artificiality or fraud).

20. As part of its case the appellant made certain procedural arguments:

(1) that its case was not properly a 'related case' in relation to the Starbrooke LLP lead case;

(2) that the Starbrooke LLP lead case should not be binding on the parties to the appeal, per the procedure in rule 18(4);

(3) that there were certain documents held by third parties that provided evidence of the fraud it alleged, and that these should have been before the Tribunal.

**DISCUSSION**

21. We first address the procedural points raised by the appellant. It is clear from the documentation before us, including the recitals to the 2018 Order and the text of the lead case decision, that this appeal is a related case in relation to the lead case of Starbrooke LLP; and no direction was made by the Tribunal under rule 18(4) that the lead case decision does not apply to, and is not binding on the parties to, this case (we are aware that the appellant made an application under rule 18(4), but this was withdrawn by the appellant in May 2017 at the hearing of the application). Equally, it is clear to us that the appellant had ample opportunity to seek an order of the Tribunal (under rule 16 of its procedure rules) for production of documents – the Tribunal had spelled out that right to the appellant when giving reasons for directions (of 6 September 2019) that declined to make such an order at that point in the proceedings – but no such application was thereafter made. We were therefore not persuaded by the appellant's procedural arguments.

22. Turning now to the first disputed amendment: it seems to us inescapable that the lead case decision in respect of the "immediate" administration fee is binding on the parties in this appeal: it has not been argued or suggested that the facts regarding the administration fee in

this appeal were materially different from the administration fees of the other Icebreaker partnerships considered in the lead case decision. That decision at [319], cited above, referred to the Tribunal being bound by the Upper Tribunal decision in *Icebreaker 1* in the absence of evidence that there was anything artificial about the determination of the "immediate" versus "ongoing annual" administration fees. Despite the generalised allegations of "fraud" and "artificiality" in the appellant's arguments, we did not find any evidence before us persuasive as to artificiality in the way these two administration fees were determined in the appellant's case, such as to mount an argument distinguishing the facts of the appellant's case from those of the lead case. Indeed, the "immediate" administration fee in the appellant's case was determined in exactly the same way as one of the typical Icebreaker partnerships in the lead case (4% of the members' initial contributions).

23. We therefore consider that rule 18(3)(b) applies to the "immediate" administration fee paid by the appellant, and so that the lead case decision's finding that it was deductible, is binding on the parties in this case. We thus decide that the first disputed amendment is not required to be made.

24. As for the second disputed amendment – it is clear from the documentation before us that the "other costs" claimed as deductible in the partnership return were not challenged by HMRC on enquiry or in the closure notice that the appellant appealed, and therefore do not fall within the subject matter of the appellant's appeal (or indeed of the lead case). The Tribunal's powers to determine the amendments required to be made to the partnership return – referred to in the 2018 Order and arising from the binding nature of the lead case decision under rule 18(3)(b) – do not therefore extend to these "other costs". Quite simply, this is not a matter with which the Tribunal can interfere in the particular circumstances of this appeal. We thus decide that the second disputed amendment is also not required to be made.

**CONCLUSION**

25. The following are the only amendments required to be made to the partnership return pursuant to the 2018 Order:

(1) the sum called the "final minimum sum", amounting to £4,047,200, shall not be deductible;

(2) the sum called the "advisory fee", amounting to £126,475, shall not be deductible;

(3) as a result of the above two changes, the partnership loss figure of £4,928,775 should be replaced with the figure of £755,100.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

26. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ZACHARY CITRON**
**TRIBUNAL JUDGE**

**Release date: 23 June 2021**

**APPENDIX**
**Rule 18**

**Lead cases**

(1) This rule applies if—

(a) two or more cases have been started before the Tribunal;

(b) in each such case the Tribunal has not made a decision disposing of the proceedings; and

(c) the cases give rise to common or related issues of fact or law.

(2) The Tribunal may give a direction—

(a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and

(b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) ("the related cases").

(3) When the Tribunal makes a decision in respect of the common or related issues—

(a) the Tribunal must send a copy of that decision to each party in each of the related cases; and

(b) subject to paragraph (4), that decision shall be binding on each of those parties.

(4) Within 28 days after the date that the Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, that case.

(5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further steps in those cases.

(6) If the lead case or cases are withdrawn or disposed of before the Tribunal makes a decision in respect of the common or related issues, the Tribunal must give directions as to—

(a) whether another case or other cases are to be heard as a lead case or lead cases; and

(b) whether any direction affecting the related cases should be set aside or amended.