TC03061

Appeal number: TC/2011/05762

INCOME TAX – procedure – limited liability partnership – amendment to partnership return – whether member has authority to pursue the appeal – whether member should be added or substituted as a party – section 31 TMA 1970 – whether member has a right of appeal against an amendment to the partnership return

FIRST-TIER TRIBUNAL
TAX CHAMBER

MCASHBACK SOFTWARE 6 LLP **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in London on 31 July 2013 with subsequent written submissions on 13 and 27 September 2013

Mr Jonathan Crystal of counsel instructed by Bradshaw Tax Services appeared for the Applicant

Ms Rebecca Murray of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs appeared for the Respondents

The Appellant did not appear and was not represented

DECISION

Background

1. This decision concerns the extent to which a member of a limited liability partnership ("LLP") is entitled to pursue an appeal against a closure notice following an enquiry into the LLP's return.

2. Mr Frank Warren is a member of MCashback Software 6 LLP which is the appellant in this appeal. The respondents opened an enquiry into the appellant's partnership return for tax year 2006-07. It appears that Mr Warren had already made a claim for relief outside of his self-assessment return for his share of losses made by the appellant. As a result the respondents opened an enquiry into that claim under Paragraph 5 Schedule 1A Taxes Management Act 1970. That enquiry remains open.

3. The respondents issued a closure notice on 28 June 2011 in relation to the appellant's partnership return. The closure notice amended the partnership statement in the return so as to deny entitlement to first year capital allowances which had been claimed by the appellant. I do not need to set out the issues which arise in relation to that amendment but in broad terms the respondents contend that the appellant was the vehicle for a tax avoidance scheme which did not achieve its objective.

4. On 28 July 2011 the appellant lodged the present appeal with the tribunal. On 12 January 2012 the respondents served their statement of case. Since then the appeal has not progressed. During 2012 the designated members who acted on behalf of the appellant resigned as members of its board. I understand that the appellant has approximately 20 members, one of whom is Mr Warren. There appears to be no internal consensus on the part of the appellant's members as to whether the appellant should pursue the appeal.

5. During 2012 Bradshaw Tax Services ("BTS") entered into correspondence with the Tribunal. BTS represents only Mr Warren. The respondents raised an issue as to whether BTS had authority to pursue the appeal on behalf of the appellant. On 28 March 2013 I gave directions with a view to resolving that issue and any associated applications any party might wish to make.

6. On 17 May 2013 BTS on behalf of Mr Warren made an application for permission to continue the appeal in the name of the appellant partnership and/or in his own name as a member of the appellant partnership. The respondents oppose that application and contend that Mr Warren has no standing to continue the appeal and there is no basis upon which he should be added as a party to the appeal. The respondents also applied, effectively in their skeleton argument served shortly before the hearing, to strike out the appeal. I indicated to the parties at the hearing that because of the short notice of the application to strike out I would not deal with that application in this decision. Indeed the appellant itself has not taken any part in this hearing because, as I understand it there is no person duly authorised to act on behalf of the appellant.

7. The issues which I must deal with on these applications may therefore be summarised as follows:

(1) Does Mr Warren have authority or standing to pursue this appeal on behalf of the appellant?

(2) Should Mr Warren be added as a party to the appeal or substituted as the appellant?

8. These issues raise questions of general importance in the context of partnership taxation which have to some extent previously been considered by the First-tier Tribunal but upon which there is, as yet, no authoritative guidance.

9. I was referred by both parties to the Limited Liability Partnerships Act 2000 ("LLPA 2000") governing LLPs generally, and to the statutory provisions which govern the tax treatment of LLPs. I was also referred to the terms of the partnership agreement which governs the appellant.

The Appellant as a Limited Liability Partnership

10. Section 1(2) LLPA 2000 provides that an LLP is a body corporate with legal personality separate from that of its members. It is formed by being incorporated under the Act.

11. Section 5 provides that relations between the members of an LLP and relations between an LLP and its members are governed by agreement between the members or between the LLP and its members. In the absence of agreement as to any matter those relations are governed by any provision in regulations made under section 15(c).

12. Section 6 provides as follows:

" *(1) Every member of a limited liability partnership is the agent of the limited liability partnership.*

(2) But a limited liability partnership is not bound by anything done by a member in dealing with a person if—

(a) the member in fact has no authority to act for the limited liability partnership by doing that thing, and

(b) the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership."

13. There is an LLP partnership agreement in the present case which was executed on 4 April 2006. This agreement ("the Partnership Agreement") governs the relationship between members themselves and between members and the appellant. In so far as relevant it provides for a Board to manage and control the business of the appellant and to carry out acts on behalf of and in the name of the appellant. Clause 6 provides that no member, unless he is a member of the Board or is authorised by the Board shall act on behalf of the appellant. The Board is to be comprised of at least two members and is required to act "in the best interests of the LLP and its members".

14. The Partnership Agreement provides that the Board shall comprise the "Designated Members" and such other persons who may be co-opted on to the Board. There must be at least two Designated Members. If at any time there are less than two Designated Members then all members become Designated Members and members of the Board. The Board may delegate a matter to any member.

15. Generally the Board acts by a majority. Certain matters are reserved for decision by the Board together with a 75% vote of members. Those matters are set out in Schedule 2 of the Partnership Agreement and include commencing "any litigation or other legal proceedings …".

16. In clause 4 the appellant undertakes to keep members informed of the progress of the business and in addition to provide all information as may from time to time be reasonably requested by any member in relation to the business or assets of the appellant. The Board is responsible for ensuring compliance with this undertaking.

Tax Treatment of LLPs

17. The Taxes Acts make provision for the taxation of partnership profits. The following provisions of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005") and the Taxes Management Act 1970 ("TMA 1970") are relevant for present purposes, with emphasis added.

Section 848 ITTOIA 2005:

> " *Unless otherwise indicated (whether expressly or by implication), a firm is not to be regarded for income tax purposes as an entity separate and distinct from the partners.*"

Section 850 ITTOIA 2005:

> " *(1) For any period of account a partner's share of a profit or loss of a trade carried on by a firm is determined for income tax purposes in accordance with the firm's profit-sharing arrangements during that period.*"

Section 863 ITTOIA 2005:

> " *(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit—*
>
> *(a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),*

(b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, …"

18. These provisions have the effect of treating the activities of an LLP as though they were carried on by the members, and of allocating to the individual members their share of the profits and losses of the LLP according to the terms of the partnership agreement.

19. The administration and collection of tax, and the appeals process, is governed by the TMA 1970.

20. Section 8 TMA 1970 makes provision for personal returns by individual taxpayers. In relation to partners it provides:

" (1B) In the case of a person who carries on a trade, profession or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, loss, tax, credit or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which , as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

…

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete."

Section 12AA TMA 1970:

(1) Where a trade, profession or business is carried on by two or more persons in partnership, for the purpose of facilitating the establishment of the following amounts, namely-

(a) the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such partner, and

(b) …

an officer of the Board may act under subsection (2) or (3)below (or both).

…

(2) An officer of the Board ***may by notice given to the partners*** *require such person as is identified in accordance with rules given with the notice or a successor of his –*

(a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents relating to information contained in the return, as may reasonably be so required.

(3) An officer of the Board may by notice given to any partner require the partner or a successor of his –

(a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts and statements as may reasonably be so required.

and ***a notice may be given to any one partner or separate notices may be given to each partner or to such partners as the officer thinks fit****.*

...

(10A) In this Act a "partnership return" means a return in pursuance of a notice under subsection (2) or (3) above.

(11) In this Act "successor", in relation to a person who is required to make and deliver, or has made and delivered, a partnership return, but is no longer available, means—

(a) where a partner is for the time being nominated for the purposes of this subsection by a majority of the relevant partners, that partner; and

(b) where no partner is for the time being so nominated, such partner as—

(i) in the case of a notice under subsection (2) above, is identified in accordance with rules given with that notice; or

(ii) in the case of a notice under subsection (3) above, is nominated for the purposes of this subsection by an officer of the Board;

and "predecessor" and "successor", in relation to a person so nominated or identified, shall be construed accordingly.

Section 12AB TMA 1970:

" *(1) Every partnership return shall include a statement (a partnership statement) of the following amounts, namely –*

(a) in the case of the period in respect of which the return is made … -

(i) the amount of income or loss … which, on the basis of the information contained in the return … has accrued to or has been sustained by … the partnership for the period in question,

…

(b) in the case of each such period … and each of the partners, the amount which … is equal to his share of that income, loss … "

Section 12ABA TMA 1970:

"(1) A partnership return may be amended ***by the partner who made and delivered the return****, or his successor, by notice to an officer of the Board.*
…

(3) Where a partnership return is amended under this section, the officer shall by notice to each of the partners amend –

(a) the partner's return under section 8 … of this Act, or

(b) …

so as to give effect to the amendment of the partnership return."

Section 12AC TMA 1970:

" *(1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ('notice of enquiry') –*

(a) ***to the partner who made or delivered the return****, or his successor…*

…

(6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry –

(a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 … or at any subsequent time makes such a return …"

21. Sections 28A and 28B contain provisions relating to the completion of enquiries into personal returns and partnership returns respectively. Sections 29 and 30B contain provisions relating to assessments and amendments where a loss of tax is discovered in relation to personal returns and partnership returns respectively. The relevant parts of Section 28B and Section 30B (applying to partnership returns) provide as follows:

Section 28B TMA 1970:

"*(1) An enquiry under section 12AC(1) of the Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.*

In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor

(2) A closure notice must either-

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) Where a partnership return is amended under subsection (2) above, the officer ***shall*** *by notice to each of the partners amend-*

(a) the partner's return under section 8 … of this Act …

so as to give effect to the amendments of the partnership return.

(5) The taxpayer may apply to the tribunal for a direction requiring the officer of the Board to issue a closure notice within a specified purpose."

Section 30B TMA 1970:

"*(1) Where an officer of the Board or the Board discover, as regards a partnership statement made by any person (the representative partner) in respect of any period-*

(a) that any profits which ought to have been included in the statement have not been so included, or
(b) that an amount of profits so included is or has become insufficient, or
(c) that any relief or allowance claimed by the representative partner is or has become excessive,

the officer …. may, subject to subsections (3) and (4) below, ***by notice to that partner*** *so amend the partnership return as to make good the omission or deficiency or eliminate the excess.*

(2) Where a partnership return is amended under subsection (1) above, the officer shall by notice to each of the relevant partners amend-

(a) the partner's return under section 8 … of this Act, …

so as to give effect to the amendments of the partnership return.

…

(9) In this section –

…

'relevant partner' means a person who was a partner at any time during the period in respect of which the partnership statement was made…"

22. The rights of appeal following a closure notice under section 28B or a discovery amendment under section 30B are covered by section 31 TMA 1970 which provides as follows:

" 31 (1) An appeal may be brought against-

(a) …
(b) any conclusion stated or amendment made by a ***closure notice*** *under section 28A or* ***28B*** *of this Act (amendment by Revenue on completion of enquiry into return),*
(c) any amendment of a partnership return under ***section 30B(1)*** *of this Act (amendment by revenue where loss of tax discovered), or*
(d) any assessment to tax which is not a self-assessment."

23. There are provisions in Section 49A for a review of the matter in question following an amendment where notice of appeal has been given to HMRC.

Alternatively an appeal may be notified to this tribunal. Section 49A provides as follows:

" *(1) This section applies if notice of appeal has been given to HMRC*

(2) In such a case –

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question.…

(b) HMRC may notify the appellant of an offer to review the matter in question … or

(c) the appellant may notify the appeal to the tribunal …"

24. The effect of a successful appeal is set out in section 50 TMA 1970. If the tribunal finds that the appellant is overcharged by a self-assessment or that the amounts contained in a partnership statement are excessive it shall reduce them accordingly. Subsection (9) states:

" *(9) Where any amounts contained in a partnership statement are reduced under subsection (6) above … an officer of the Board shall by notice to each of the relevant partners amend –*

(a) the partner's return under section 8 …

(b) …

So as to give effect to the reductions …"

25. It is not controversial to say that the scheme of the TMA 1970 involves the making of partnership returns by the partner or partners who are given notice by HMRC that they are required to do so. Any enquiry into a partnership return is commenced by a notice of enquiry to a partner who made the partnership return or his successor. Such an enquiry automatically opens an enquiry into all the partners' personal returns. The closure notice is given to the partner or partners to whom the notice of enquiry was given. Where an amendment to the partnership return is made, HMRC will also give a "notice" to each of the partners amending their personal returns so as to give effect to the amendment to the partnership return.

Discussion

26. I shall consider separately the two issues identified above. I do so in the context of the Tribunal Rules 2009 which in so far as relevant provide as follows:

" *9(1) The Tribunal may give a direction substituting a party if--*

(a) the wrong person has been named as a party; or

(b) the substitution has become necessary because of a change in circumstances since the start of proceedings.

(2) The Tribunal may give a direction adding a person to the proceedings as a respondent.

(3) A person who is not a party to proceedings may make an application to be added as a party under this rule.

(4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.

(5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate."

(1) Authority to Pursue the Appeal

27. I was told by Mr Crystal on instructions that at least some of the other members are aware that Mr Warren wishes to pursue this appeal and are content for him to do so. However it is accepted that Mr Warren has not been duly authorised by the appellant to pursue the appeal.

28. Mr Crystal submitted that the tribunal has broad powers to permit Mr Warren to pursue this appeal on behalf of the appellant. I do not accept that submission in so far as it implies that the tribunal is entitled to ignore the absence of authority when the absence of authority becomes apparent. The tribunal cannot grant any member of an LLP authority to pursue an appeal in the name of the LLP. The jurisdiction of the tribunal is defined by statute. The tribunal cannot grant a right of appeal to any person where statute has not conferred such a right on that person. Nor can it interfere in the internal constitution of a legal entity such as an LLP. In effect that is what Mr Crystal invites me to do in this part of his application.

29. Mr Crystal relied upon section 6 LLPA 2000. He submitted that as Mr Warren was an agent of the appellant he had actual, implied or ostensible authority to act on behalf of the appellant. It is clear however that section 6 confers power on a member to bind the LLP only where the LLP has authorised the member to do so. It is accepted that the LLP has not validly authorised Mr Warren to act on behalf of the LLP in this appeal.

30. The Respondents submitted that there is no evidence there was ever the 75% vote of members required by the Partnership Agreement to commence the present proceedings. That is a matter raised for the first time in the written submissions made for the purposes of the case management hearing and is not something Mr Warren has addressed by way of evidence or in his submissions. If it is established that any person exceeded his or her authority in commencing the appeal then that may give grounds to support a strike out application. There is no strike out application before me and it is

not something I propose to consider in this decision, save in so far as it may be relevant to whether there has been a change in circumstances for the purposes of Tribunal Rule 9(1)(b).

31. I would say in passing that the need for a 75% vote of members applies to the commencement of litigation or other legal proceedings. It is not immediately apparent that a 75% vote is required to withdraw from or compromise legal proceedings. The Partnership Agreement does not say as much, nor is it necessarily to be implied from Schedule 2 of the Partnership Agreement. It may be therefore that the Board, properly constituted, could withdraw the appeal by a simple majority vote or by delegation to another person. However there appears to be deadlock because no members of the Board other than Mr Warren are prepared to authorise the appellant to pursue the appeal. In those circumstances the appellant can neither pursue the appeal nor withdraw from the appeal.

32. Mr Crystal also relied upon what is now section 863(1)(b) ITTOIA 2005 as giving Mr Warren authority to pursue the appeal on behalf of the appellant.

33. The effect of this provision was considered by Henderson J in *Tower MCashback LLP v Commissioner for HM Revenue & Customs [2008] EWHC 2387 (Ch)*. He stated at [28]:

> " *The general rule is that a limited liability partnership ("LLP") which carries on a trade is treated for tax purposes in the same way as a partnership, despite its separate legal personality. This follows from section 118ZA of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), subsection (1) of which provides as follows:*
>
> > *"(1) For the purposes of the Tax Acts, where a limited liability partnership carries on a trade, profession or other business with a view to profit –*
> >
> > *(a) all the activities of the partnership are treated as carried on in partnership by its members (and not by the partnership as such),*
> >
> > *(b) anything done by, to or in relation to the partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and*
> >
> > *(c) the property of the partnership is treated as held by the members as partnership property."*
>
> *It should be noted that although subsection (1)(b) imputes anything done by, to or in relation to the partnership to the individual members, and thus looks through the separate corporate identity of the LLP, there is no deeming provision in the opposite direction which imputes the actions of the individual partners to the LLP. I mention this point because the Special Commissioner seems at times in the Decision to have lost sight of it, and to have proceeded on*

the footing that the LLPs and their members could for all practical purposes be treated as interchangeable."

34. It is clear that section 863(1)(b) gives no authority to Mr Warren to pursue the appeal on behalf of the appellant.

35. If this appeal is to be pursued with the appellant as the sole appellant then it must be pursued by the appellant. Acts necessary to pursue the appeal must be taken by the Board of the appellant or someone else with authority properly delegated by the Board.

36. In general an LLP will itself decide in accordance with its constitution whether it wishes to pursue litigation or not. If an individual member disagrees with a decision of the Board then his remedy will lie against the LLP or the other members. For example, if a member considers that an LLP is breaching its obligations to him as a member then he may be able to obtain an injunction, have a receiver appointed by the court or obtain damages. Similarly if there is a position of deadlock such that the LLP is unable to act, a member will have a remedy elsewhere whereby he can obtain appropriate relief.

37. Further considerations may arise in the context of a tax appeal. In particular whether the TMA 1970 gives a member of a partnership the right to appeal an amendment to the partnership return in his own right. I consider that matter below in relation to the question of whether Mr Warren should be added as a party.

38. Mr Crystal also submitted that HMRC has a discretion to nominate a partner or a successor under section 12AA TMA 1970. He went on to submit that if HMRC does not exercise its power to nominate Mr Warren then Mr Warren becomes entitled to pursue the appeal on behalf of the appellant. There is no authority for that proposition and Mr Crystal did not suggest by reference to any provision why that result should follow.

39. Section 12AA(11)(b) makes provision for a successor to act where the person who made and delivered the partnership return is no longer available. In my view such a person is identified solely for the administrative purposes set out in the TMA 1970. That is making the partnership returns under section 8, making amendments to a return under section 12ABA, receiving notices of enquiry under section 12AC and receiving a closure notice under section 28B. Once an enquiry is closed the TMA 1970 does not expressly require any act to be done by or to the person who made the partnership return or his successor. In those circumstances there would be no point in HMRC nominating a partner as successor pursuant to section 12AA.

40. For the reasons given above I reject Mr Crystal's submissions that I have jurisdiction to permit an appeal in the name of the appellant to be pursued by Mr Warren.

(2) Addition of Mr Warren as a Party

41. The next issue I must consider is whether I should add Mr Warren as a party so that he can pursue the appeal against the amendment to the partnership return. In submissions before me the principal issue was whether Mr Warren as a member has any right to appeal an amendment to a partnership return.

42. I must first consider the jurisdiction of the tribunal.

43. Rule 9(1) of the Tribunal Rules permits substitution of a party, that is an appellant or a respondent. Rule 9(2) permits the addition of a respondent. Rule 9(3) appears simply to provide for an application by a person to be substituted or added as a party under paragraphs (1) and (2). That is reinforced by the power to give consequential directions found in paragraph (5) which is limited to the situation where the tribunal has given a direction under paragraphs (1) or (2) with no reference to paragraph (3). The effect of Rule 9 therefore is that Mr Warren would have to bring himself within paragraph (1) or (2) to be added as a party.

44. In any case where the tribunal refuses an application under paragraph (3) it must consider whether to permit the applicant to provide submissions or evidence to the tribunal.

45. Difficulty in the present case arises due to the fact that it does not appear that the appellant wishes to proceed with the appeal. In those circumstances it would not be appropriate to add Mr Warren as a respondent because in fact he supports the appeal and there would be no-one to prosecute the appeal. If I did not consider it appropriate to substitute Mr Warren as the appellant I would then have to consider whether to allow him to provide submissions or evidence.

46. I am aware of one case at least where the FtT has added an interested party (*DCC Realisations Ltd (in liquidation) v HM Revenue & Customs [2010] UKFTT 201*). The basis upon which it did so is not clear. Indeed Tribunal Rule 1 defines a party as "*a person who is … an appellant or respondent in proceedings before the Tribunal*". Rule 9 does not expressly contain the power contained in Rule 9(1) of the Upper Tribunal Rules to add an interested party. It seems likely that the FtT in DCC Realisations had simply made a direction under Rule 9(4) permitting that person to provide submissions or evidence to the Tribunal.

47. Mr Warren's present application does not specify whether it is made under Rule 9(1) or Rule 9(2). As I understood Mr Crystal's submission he puts his application under both subparagraphs.

48. It is clear that Rule 9(1) gives the tribunal discretion to substitute a party in the two circumstances mentioned in subparagraphs (a) and (b). The jurisdiction to substitute an appellant arises where substitution has become necessary because of a change in circumstances since the proceedings began. Even if there has been a change in circumstances, use of the word "may" indicates that the tribunal has a discretion whether or not to direct substitution.

49. The change in circumstances, if any, arises out of the position of the appellant. It commenced the proceedings but now it appears that it is not in a position to pursue them because it is without any effective management. In the ordinary course it seems to me that those facts would amount to a change in circumstances. However as stated above Ms Murray suggested that there was no evidence that the partnership had ever had the necessary 75% vote to authorise the bringing of proceedings.

50. I have not heard any evidence as to whether there was a 75% vote of members to authorise the proceedings. Nor have I heard evidence as to whether, in the light of subsequent events, the members may have ratified or acquiesced in the bringing of the appeal. Notwithstanding the absence of such evidence it seems to me that there has been a change in circumstances. The Notice of Appeal was lodged by a Mr Stephen Marsden who at the time it was lodged appears to have been a Designated Member. No doubt he at least believed he had authority to commence the appeal. Even if he did not have authority, a subsequent finding that he was acting outside his authority under the Partnership Agreement would amount to a change in circumstances. Similarly the resignation of the Board and the lack of internal consensus amongst the members would also amount to a change in circumstances. I am satisfied therefore that there has been a change in circumstances so as to engage Tribunal Rule 9(1)(b).

51. The present position appears to be therefore that the appellant is either unable or unwilling to pursue the appeal. That would usually give grounds to strike out the appeal unless someone else with standing to pursue the appeal came forward. If Mr Warren does have standing to pursue the appeal then substitution would be necessary, subject to the discretion of the tribunal.

52. I must therefore consider whether Mr Warren has standing to pursue the appeal as a member of the appellant, and if so whether I should exercise my discretion to substitute him for the appellant. The parties focussed in their submissions on whether Mr Warren as a member of the appellant was entitled to appeal an amendment to the partnership return.

53. In *Phillips v Commissioners for HM Revenue & Customs [2009] UKFTT 335 (TC)* the First-tier Tribunal (Tribunal Judge Mosedale) was concerned with whether a partner could appeal the consequential amendment to his personal return under section 28B(4) following an amendment to the partnership return. The FtT held that he could. It also expressed the view that any partner could appeal under section 31 TMA 1970 an amendment to a partnership return. At [105] and [106] the Tribunal Judge stated as follows:

> *" 105. As stated above, the TMA does not specify who can exercise a right of appeal. S31 merely says "An appeal may be brought…." Clearly not everyone can bring a right of appeal against any assessment to tax. It is a general rule that anyone wanting to bring an appeal must show that they have in law a sufficient interest in the matter. The latin tag for this is "locus standi". There have been a number of VAT cases where locus standi has been considered and, not surprisingly, in the context of an indirect tax where the burden of the tax can fall on the taxpayer's customer as well as the taxpayer, the Tribunal has*

decided in many cases that the customer does have locus standi, such as in Williams and Glyn's Bank Ltd v C & E Comrs (1974) VTD 118.

106. In my view a partner does have a sufficient legal interest in an amendment to a partnership return under s30B as it leads automatically to an amendment to his personal tax return. He can therefore exercise the right of appeal under s31 against assessments of the partnership or amendments to partnership returns."

54. The Tribunal Judge in Phillips also considered that Article 1 Protocol 1 of the European Convention on Human Rights required the same result. Further she considered that the result was consistent with the observations of the Tribunal in *Morgan & Self v Commissioners for HM Revenue & Customs [2009] UKFTT 78 (TC)*.

55. In *Morgan & Self* the first issue was whether certain sums paid by the partnership to two partners were profits of the firm and taxable on the two partners. The partnership statement included them as such. If the sums paid were not profits, an issue arose as to whether the two partners were chargeable to tax in any event because the sums appeared as chargeable in the partnership statement. In the event the First-tier Tribunal (Tribunal Judge Brice) held that the sums were chargeable as profits so that the second issue did not arise. However the Tribunal Judge did set out her views on the second issue.

56. Essentially the second issue amounted to whether individual partners could challenge on appeal the contents of a partnership return and in particular the partnership statement. HMRC contended that they could not. The remedy of an individual partner was to raise the matter in the partnership.

57. The Tribunal Judge expressed the view that section 31 TMA 1970 would not naturally be construed so as to give an individual partner a right of appeal against a partnership return which had not been amended by HMRC. However she said that the individual partner could make an individual return under section 8 effectively adjusting the partnership statement so that the income or gains returned by the individual were seen by that individual to be correct. HMRC could then open an enquiry into the individual return of the partner and the partner could appeal any amendment, even if it were an amendment so as to ensure consistency with the partnership statement.

58. The issue which arises in the present appeal is similar, in that Mr Warren disagrees with the partnership return, albeit a partnership return which has been amended by HMRC. As such it would at least more naturally fall within section 31 than an unamended partnership return.

59. Tribunal Judge Brice referred to *re Sutherland & Partners' Appeal [1994] STC 387* where the Court of Appeal was concerned with the jurisdiction of the General Commissioners to state a case for the High Court. In particular whether one partner

was entitled to appeal a decision of the General Commissioners which the other partners had decided not to appeal. It was concerned with the construction of section 31 TMA 1970 as it stood prior to the introduction of self-assessment and which provided as follows:

> "*An appeal may be brought against an assessment to tax by a notice of appeal in writing …*".

60. At that time the framework of partnership taxation was very different. Unlike today, income tax payable in respect of partnership profits was the subject of a single assessment made in the partnership name. The partners had a joint but not several liability to pay the income tax arising. The majority partners applied to the High Court to strike out the case stated. In contrast with the present appeal the Inland Revenue supported the case of the single partner that as he was named in a joint assessment he himself should have a right of appeal.

61. At 391j Sir Donald Nicholls VC said as follows:

> *" Legislation is to be interpreted so as to give effect to Parliament's presumed intention, so long as this is clear, provided always the language of the statute fairly admits of the interpretation in question. Here, having carefully considered the procedural code for tax appeals set out in Part IV of the [TMA 1970] we are of the clear view that Parliament must have intended that one jointly assessed taxpayer shall have a right of appeal even if the other person or persons named in the assessment do not wish to appeal. Accordingly, section 31 is to be construed as enabling any person assessed to tax to bring an appeal in respect of the assessment, whether he has been assessed alone or jointly with others."*

62. The relevant statutory provisions in ICTA 1988 and TMA 1970 have been the subject of wholesale changes since 1994. Partners are now taxed on their share of the partnership's profits and self assessment has been introduced. There is force in Ms Murray's argument that it is implicit in the scheme of TMA 1970 that any dispute between partners as to tax appeals is to be resolved between the partners themselves. She argues that such disputes must be resolved between the partners according to the terms of the partnership agreement and in the light of the mutual rights and obligations of the partners.

63. The question of whether a partner is entitled to appeal an amendment to a partnership return involves construing section 31 TMA 1970. Just as the position was prior to 1994, the current section says nothing about the identity of the appellant. Whether it should be construed as enabling an individual partner to appeal an amendment to a partnership return depends on the presumed intention of Parliament. In that regard it is relevant to consider whether such a construction would be consistent with the other provisions in relation to partnership taxation in TMA 1970.

64. The provisions of TMA 1970 which I have set out above provide a scheme to govern the relationship between HMRC and partnerships. In particular the

identification of a specific partner or partners who must make a partnership return and who receive notice of an enquiry and a closure notice. The scheme operates in a perfectly clear and straightforward way, at least until the time at which it is necessary for the partners to consider whether to appeal or not. Until then it might be described as an administrative regime. It is only once there has been an amendment to the partnership return under section 28B that the right of appeal under section 31 becomes relevant.

65. Consideration of the review rights in section 49A does not assist in construing section 31. Whilst it refers to an "appellant" having such rights it does not define the term. I would suggest that the term is likely to be construed as meaning someone who has given a notice of appeal to HMRC under section 49A(1). However it does not say who is entitled to give a return to HMRC.

66. It is notable that there is no provision for an individual partner to appeal a consequential amendment to his personal return following a discovery under section 30B(2) TMA 1970. Section 31(1)(c) is expressly limited to amendments under section 30B(1). That suggests that if the individual partner does have any redress other than through the partnership then it would have to be through an appeal against the partnership amendment. In Phillips at [104] the FtT recognised the absence of a right of appeal against a consequential amendment following a discovery under section 30B but at the same time stated that any partner could appeal the amendment of the partnership return.

67. Similarly, an appeal under section 31(1)(b) is against a **closure notice** under section 28B. It is notable that the notice to be given to the individual partner under section 28B(4) is not in terms described as a closure notice. It is simply described as a "notice". The FtT in Phillips did not draw this distinction and concluded that section 31(1)(b) gave an individual partner a right of appeal against a consequential amendment to his personal return following an enquiry. However the same judge reached a different conclusion in the case of *Gibbs v Commissioners for HM Revenue & Customs [2013] UKFTT 236 (TC)* where she found that there was no right of appeal against a consequential amendment, whether it followed an enquiry or a discovery.

68. I agree with the conclusion of Tribunal Judge Mosedale in Gibbs. The only way to construe section 31 is that an individual partner has no right to appeal the consequential amendment of a personal return whether the amendment is under section 28B(4) or 30B(2). If an individual partner is to have an opportunity to ensure that he pays the right amount of tax it could only be through an appeal against an amendment to the partnership return.

69. In both Phillips and Gibbs the view was expressed that an individual partner can appeal the partnership amendments, even though there is no requirement that HMRC should give the individual partner notice of those amendments. If Parliament did intend that an individual partner should be able to appeal against a closure notice amending a partnership return it is perhaps surprising that HMRC was not required to give closure notices to the individual partners. However that in itself might be viewed

as administratively cumbersome where the partner receiving the closure notice would have a duty to notify at least all those other partners involved in the management of the firm and where HMRC are required to issue a notice to all of the partners amending their personal returns either under section 28B(4) or 30B(2).

70. Ms Murray submitted that the procedural code for the taxation of partnerships and LLPs set out in the TMA 1970 would be unworkable if any member could pursue an appeal against an amendment to the partnership return. She suggested, no doubt rightly, that there are hundreds of thousands of LLPs each with a number of members. There could be a flood of appeals if individual members were able to bring separate appeals against an amendment to the partnership return. That, she said, cannot have been what Parliament intended.

71. The argument appears to rely on there being only one partnership return and one enquiry into that partnership return. Under section 12AA(2) HMRC may give notice to "the partners" requiring a person identified in the notice to make a return. Also in section 12AA(3) HMRC may give separate notices requiring each partner or such partners as the officer thinks fit to make a return. The circumstances in which it might be necessary or desirable for notice to be given to more that one partner are not immediately apparent. The return of each partner in response to such a notice is defined as a partnership return by section12AA(10A), and by section 12AB(1) every partnership return must contain a partnership statement. Parliament anticipated therefore the possibility of more than one partnership return. Adopting the argument of Ms Murray, each partner would be able to appeal only the partnership return that that partner had submitted which would itself be administratively cumbersome.

72. I do not consider that the scheme set out in TMA 1970 is in any way inconsistent with an individual partner having a right of appeal against an amendment to the partnership return. Indeed I do not consider that Parliament would have made provision for HMRC to require a number of partnership returns if the individual partners were not intended to have a right of appeal against amendment of a partnership return where only one was required. Otherwise the existence of a right of appeal would depend on which partners HMRC required to make a return.

73. The scheme makes provision in section 12AC(6) for a notice of enquiry to be automatically opened into the individual partners' returns whenever an enquiry is opened into a partnership return. It also makes provision in section 28B(4) for an officer who has amended a partnership return to also give a notice to each of the partners amending their personal tax returns. Use of the word "shall" makes such a notice mandatory.

74. In the present case no such notice has yet been given to Mr Warren. There is no time limit within which such a notice is to be given to the individual partners. Nor has there been any notice closing the enquiry into Mr Warren's claim under Schedule 1A TMA 1970. I should note that I have not been addressed on the provisions in Schedule 1A as they apply to Mr Warren's claim or as to how they apply to a free standing claim made by partnerships. If such notices had been given I am sure Mr Warren would have sought to appeal them. On the basis of the respondents' submissions for

the purposes of this application, they would have sought to strike out any such appeals contending that Mr Warren had no right of appeal against the consequential amendment of his own return or the refusal of his claim when it depended on an amendment to a partnership return.

75. The Court of Appeal in re Sutherland approached the issue in that case on the basis that fairness and justice required that a taxpayer named in a joint assessment should himself have a right of appeal without having to resort to legal remedies against the other partners. For the same reasons it seems to me that Parliament must have intended that an individual partner would have an opportunity to ensure that he pays the right amount of tax. The fact that the other partners do not wish to challenge an amendment to the partnership return should not mean that the individual partner has no right to challenge the assessment and must instead find an alternative remedy against the other partners.

76. I accept Ms Murray's submissions that these provisions are intended to ensure that there are defined formal procedures to regulate the dealings between the respondents and partnerships or LLPs. Otherwise the self-assessment procedure as it applies to partnerships would be practically unworkable. However a distinction is to be drawn between the practicality of the administrative regime and appeal rights designed to ensure that there is an opportunity for taxpayers to challenge the amount of tax claimed by HMRC. In any event there are procedures available to the tribunal to minimise duplication if for any reason a number of partners separately seek to appeal an amendment to a partnership return.

77. It seems to me that the administrative regime for dealing with partnerships is not simply designed to prevent the theoretical possibility of numerous appeals by different partners. Rather in permitting such appeals it takes into account the practical likelihood that partnerships will in most cases agree on whether to pursue an appeal.

78. For the reasons given above I find that under section 31 as properly construed Mr Warren does have a right of appeal against an amendment made to the appellant's partnership return. In reaching that conclusion I do not need to resort to arguments based on Article 1 Protocol 1.

79. I must now consider in the light of that conclusion whether I should substitute Mr Warren for the appellant.

80. It was not suggested that Mr Warren would have to give a separate notice of appeal before he was entitled to be substituted. Nor that he might have to extend the time for lodging a notice of appeal of his own if that was necessary.

81. One factor in the exercise of my discretion is the extent to which Mr Warren has a financial interest in the outcome of this appeal. Ms Murray submitted that Mr Warren is "unaffected by the outcome of the appeal". I do not consider that can be right. It is undoubtedly the case that Mr Warren has a significant financial interest in the outcome of the appeal. If the appeal is successful his personal return will not be amended pursuant to section 28B(4) and the decision will no doubt bind the

respondents in dealing with Mr Warren's free standing claim under Schedule 1A TMA 1970. Effectively Mr Warren would have the benefit of the loss relief to which he claims entitlement.

82. Mr Crystal relied on a number of cases in the civil courts where a third party has been joined in proceedings, in particular *Nottinghamshire County Council v Bottomley [2010] EWCA Civ 756, Gurtner v Circuit [1968] 2 QB 587* and *Tchenguiz-Imerman v Imerman [2012] EWHC 4277 (Fam)*. Broadly his submission was that cases should not fail because of non-joinder or mis-joinder of a party.

83. The authorities cited were all cases where the primary liability was with the defendant but the party seeking to be joined had a financial interest in the outcome. In Gurtner the proceedings were not being defended as such and the third party was seeking to be joined as a defendant so that any proper defences could be put forward. It is analogous to the present proceedings to the extent that one party was not putting forward a case and the third party wished to do so. Significantly, however, in the present appeal it is a person in a position analogous to a claimant who is not apparently putting forward any case. In the ordinary course such a claim would be struck out unless another person is substituted as a claimant.

84. The decisions relied on by Mr Crystal were each concerned with different procedural codes. The civil procedure rules, the rules of the supreme court and the family procedure rules respectively. I do not consider that they give any real assistance in the context of the discretion I must exercise.

85. There have been cases in the past concerning the jurisdiction of the VAT Tribunal to add parties. See for example *Barclays Bank v The Commissioners of Customs & Excise 13 July 1992* and *Schwarcz v Aeresta Ltd and Customs & Excise Commissioners [1989] STC 230*. Neither of these case was cited presumably because they dealt with the VAT Tribunal Rules. However they do at least show that the focus in exercising jurisdiction to add a party is the interests of justice.

86. Ms Murray submitted that Mr Warren is not entitled to information from the appellant and therefore in practical terms he could not pursue the appeal in his own name. I do not accept that there would be any such obstacle. Mr Warren is a Designated Member and therefore a member of the Board. As such I am satisfied that he is entitled to access to all necessary information and documentation held by the appellant. That entitlement goes beyond what is contained in clause 4 of the Partnership Agreement.

87. If I were not to direct Mr Warren to be substituted as the appellant I would effectively be leaving him to pursue remedies against the appellant and possibly its other members. If the appellant does not seek to pursue the appeal, and that appears to be its present stance, then the alternative of allowing Mr Warren to provide submissions or evidence would be futile. The respondents would no doubt apply on notice to strike out the appeal.

88. In all the circumstances and taking into account the overriding objective of dealing with cases fairly and justly I have decided that it is appropriate for Mr Warren to be substituted as the appellant. I do however propose to give the appellant a final opportunity to pursue the appeal. The direction for substitution will not take effect if the appellant indicates in writing within a time to be specified that it intends to pursue the appeal. If the appellant does end up pursuing the appeal I would be content for Mr Warren, if so advised, to renew his application to provide submissions or evidence to the tribunal pursuant to Tribunal Rule 9(4).

89. There was a measure of agreement as to the directions I should give if Mr Warren were added as a party to the appeal. I have issued separate directions for the future conduct of the appeal.

90. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 25 October 2013