Mark Higgins Rallying (a firm) v Revenue & Customs [2011] UKFTT 340 (TC) (20 May 2011)
INCOME TAX/CORPORATION TAX
Profits

[2011] UKFTT 340 (TC)

TC01200

Appeal number: TC/2010/1682

Partnership – place of control and management – whether non-UK domiciled partner entitled to remittance basis for his share of firm's non-UK source income – s 112(1A) ICTA 1988

FIRST-TIER TRIBUNAL

TAX

MARK HIGGINS RALLYING (a firm) Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Respondents

TRIBUNAL: Judge Peter Kempster
Mrs Caroline de Albuquerque

Sitting in public at 45 Bedford Square, London WC1 on 7 & 8 April 2011

Mr Patrick Soares and Mr Imran Afzal of counsel (instructed by Philip Swales & Co) for the Appellant

Mr Brendan Hone (HMRC Appeals& Reviews Unit) for the Respondents

DECISION

1. Mr Mark Higgins is a successful motor rally driver, being a three times British Rally Champion. His rally driving skills are exploited through a partnership between himself and Mr Roy Dixon ("the Partnership"). Mr Higgins is domiciled outside the UK and the Partnership's income is from a mix of UK and non-UK sources. The Respondents ("HMRC") contend that Mr Higgins' share of the non-UK source profits of the Partnership should be taxed on him as they arise, on the basis that the Partnership is controlled and managed at least partly inside the UK. The Partnership contends that it is managed and controlled wholly outside the UK, and thus the remittance basis applies to Mr Higgins' share of the firm's non-UK source income.

The Appeals and the hearing

2. The Partnership appeals against income tax closure notices and discovery assessments as follows. The Partnership does not dispute the validity of the assessments or the calculations.

Tax year	Amount £
1998-99	33,785
1999-2000	83,643
2000-01	66,132
2001-02	189,145
2002-03	16,131
2003-04	29,590
2004-05	28,207

3. The Tribunal was provided with several binders of documentation. For the Partnership Mr Roy Dixon confirmed and adopted two witness statements dated 23 November 2010 and 17 March 2011 and gave oral evidence; and Mr Mark Higgins confirmed and adopted a witness statement dated 19 November 2010 and gave oral evidence. For HMRC Mr John Roberts (the officer who conducted the enquiry) confirmed and adopted a witness statement dated 20 December 2010 and gave oral evidence.

The Legislation

4. All statutory references are to the Income and Corporation Taxes Act 1988. Legislation is cited as in force for the tax years in dispute.

5. Section 111 states, so far as relevant:

> "111 **Treatment of partnerships**
>
> (1) Where a trade or profession is carried on by persons in partnership, the partnership shall not, unless the contrary intention appears, be treated for the purposes of the Tax Acts as an entity which is separate and distinct from those persons.
>
> (2) So long as a trade or profession is carried on by persons in partnership, and any of those persons is chargeable to income tax, the profits or losses arising from the trade or profession ("the actual trade or profession") shall be computed for the purposes of income tax in like manner as if—

(*a*) the partnership were an individual; and

(*b*) that individual were an individual resident in the United Kingdom.

(3) A person's share in the profits or losses arising from the actual trade or profession which for any period are computed in accordance with subsection (2) above shall be determined according to the interests of the partners during that period.

(4) Where a person's share in any profits or losses is determined in accordance with subsection (3) above, sections 60 to 63A [which are the relevant charging provisions] shall apply as if—

(*a*) that share of the profits or losses derived from a trade or profession carried on by him alone; …

(7) Where—

(*a*) subsections (2) and (3) above apply in relation to the profits or losses of a trade or profession carried on by persons in partnership; and

(*b*) other income or other relievable losses accrue to those persons by virtue of their being partners,

those subsections shall apply as if references to the profits or losses arising from the trade or profession included references to that other income or those other relievable losses. …

(10) Subsections (1) to (3) above apply in relation to persons in partnership by whom a business which is not a trade or profession is carried on as they apply in relation to persons in partnership by whom a trade or profession is carried on.

(11) In subsections (2) and (3) above as applied by subsection (10) above, references to the profits or losses arising from the trade or profession shall have effect as references to any income or relievable losses arising from the business.

(12) In this section— …

"income" means any income (whether or not chargeable under Schedule D); …"

6. Section 112 states, so far as relevant:

"112 **Partnerships controlled abroad**

(1) So long as a trade, profession or business is carried on by persons in partnership and any of those persons is not resident in the United Kingdom, section 111 shall have effect for the purposes of income tax in relation to the partner who is not so resident as if—

(*a*) the reference in subsection (2)(*b*) to an individual resident in the United Kingdom were a reference to an individual who is not so resident; and

(*b*) in subsection (4)(*a*), after "carried on" there were inserted "in the United Kingdom".

(1A) Where—

(*a*) any persons are carrying on a trade, profession or business in partnership,

(*b*) the trade, profession or business is carried on wholly or partly outside the United Kingdom,

(*c*) the control and management of the trade, profession or business is situated outside the United Kingdom, and

> (*d*) any of the partners who is an individual resident in the United Kingdom satisfies the Board that he is not domiciled in the United Kingdom or that, being a Commonwealth citizen or a citizen of the Republic of Ireland, he is not ordinarily resident in the United Kingdom,
>
> section 111 shall have effect in accordance with subsection (1) above as if that partner were not resident in the United Kingdom and, in addition (as respects that partner as an individual who is in fact resident in the United Kingdom), his interest as a partner, so far as it entitles him to a share of any profits arising from the carrying on of the trade, profession or business otherwise than within the United Kingdom, shall be treated for the purposes of Case V of Schedule D as if it were a possession outside the United Kingdom."

7. Section 65 states, so far as relevant:

> "… (4) Subsections (1) to (3) above and section 65A below shall not apply to any person who, makes a claim to the Board stating that he is not domiciled in the United Kingdom, or that, being a Commonwealth citizen or a citizen of the Republic of Ireland, he is not ordinarily resident in the United Kingdom.
>
> (5) Where subsection (4) above applies the tax shall be computed—
>
> …
>
> (*b*) in the case of tax chargeable under Case V, on the full amount of the actual sums received in the United Kingdom in the year of assessment from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom, without any deduction or abatement other than is allowed under the provisions of the Income Tax Acts in respect of profits charged under Case I of Schedule D."

8. It was common ground that the combined effect of the above provisions is that Mr Higgins' share of the non-UK source profits of the Partnership in the relevant years should be taxed on him as they arise if the Partnership is controlled and managed at least partly inside the UK. If instead the Partnership was managed and controlled wholly outside the UK in that period, then the remittance basis applies to Mr Higgins' share of the firm's non-UK source income.

Witness evidence

Evidence of Mr Higgins and Mr Dixon

9. Both Mr Higgins and Mr Dixon are Manxmen. They are both domiciled in the Isle of Man for UK tax purposes.

10. Mr Dixon was born in 1938 and since at least 1991 has (with a small exception not material to the current proceedings) been resident in the Isle of Man for UK tax purposes. He qualified as an English solicitor and practiced in Manchester before becoming a successful business investor. He has extensive legal and commercial experience in dealing with partnerships and companies. Since 1959 he has been a keen rally driver, latterly specialising in historic rallying. In 1990 he met Mr Higgins, who was then working as a junior insurance clerk in the same building as the Manx International Rally Office. Mr Higgins was born in 1971. His father was a keen rally driver and Mr Higgins displayed a precocious talent for the sport. Mr Dixon identified Mr Higgins as a future star and became his mentor, providing encouragement, financial sponsorship, and introductions in the world of professional rallying.

11. In October 1991 Mr Dixon and Mr Higgins signed a partnership agreement. The plan was to combine Mr Dixon's management and commercial experience with Mr Higgins' driving skills. Mr Dixon's plan was for Mr Higgins to compete on the world rally scene, rather than concentrating solely on the British championship.

12. In 1993 Mr Higgins' family moved to Wales to take over a rally school. Mr Higgins had introduced his father to this opportunity through contacts he had made through rallying. Mr Higgins decided he would follow his family to the UK. This provoked a disagreement with Mr Dixon but the settlement was that Mr Higgins would go to the UK and develop his teaching and demonstration work, while continuing to pursue opportunities on the world rally scene.

13. Up until this point the taxation affairs of the Partnership had been inconsequential. The activities were still running at a deficit and the only taxation matter Mr Dixon had had to consider was VAT in the Isle of Man. Now with Mr Higgins relocating to UK and the prospect of his successful rally driving, and other activities leading to profits for the Partnership, Mr Dixon considered the tax implications going forward. Mr Dixon had the benefit of his legal training and commercial experience. He prepared an "Aide Memoir to Partnership Tax" to guide himself in these matters, a copy of which was provided to HMRC during the enquiry. In his words, "I knew that the partners had to control and manage the Partnership's trade from the Isle of Man, or otherwise outside the UK. I am a solicitor and was aware what was required of the partners, as to whether the acts, which the partners carried out, show that the trade was controlled and managed in the Isle of Man ... ".

14. In September 1997 it appeared that the Partnership would turn to profit and the partners varied the terms of the partnership agreement primarily to change the profit-sharing arrangements (so that Mr Dixon did not receive any of the UK source income of the Partnership).

15. No records were kept of any partners' meetings. The partners reconstructed a diary of Partnership meetings from 1991 to 2006. Mr Dixon was very aware of the need to maintain control and management of the Partnership outside the UK. Mr Higgins was rather perplexed at the rules that Mr Dixon laid down, but bowed to Mr Dixon's professional knowledge in these matters.

16. The means by which Mr Higgins' driving skills were exploited to earn profits for the Partnership in the relevant period were mainly as follows.

(1) Contracts to drive for works teams in World Rally Championship events, with Nissan (which lasted three years), Vauxhall (two seasons) and Volkswagen.

(2) Teaching rallying skills to other aspiring drivers.

(3) Testing the setup of rally cars in conjunction with engineers.

(4) Work as a television presenter.

17. The working basis of the Partnership has always been that Mr Higgins concentrates on fulfilling his passion for driving, while Mr Dixon contributes his considerable commercial and management experience. In response to questions put in cross-examination Mr Dixon stated that as well as providing guidance on contractual and other legal matters he also exploited his long-standing connections in the rally world to line up contracts, such as the manufacturers team's contracts with Vauxhall, Volkswagen and Nissan. While he had been able to provide driving advice to Mr Higgins at the very start of Mr Higgins' career, it soon became clear that

he could offer no more on that front, and contributed to the success of Mr Higgins' career by his financial support and commercial acumen.

18. When contract opportunities arose the car manufacturer would present a standard form contract; there was little scope for negotiation of the commercial terms. Mr Dixon would always review these contracts to decide whether they were appropriate. All bar one of the major contracts entered into by the Partnership in the years in question was executed by the Partnership outside the UK. The only exception to this was a 1998 contract with Volkswagen where there was some urgency for it to be signed.

19. Apart from the works teams contracts, most of the opportunities that arose came through personal contacts of Mr Higgins in the rallying world. People would contact Mr Higgins by e-mail and telephone with specific propositions – eg driving coaching sessions.

20. Mr Higgins' brother is more closely connected than himself with the family's rally school business and his brother is a rival driver, often competing for the same driving opportunities. For those and other reasons he did not discuss his professional rally career with his family.

Evidence of Mr Roberts

21. Mr Roberts explained his conduct of the enquiry into the UK tax affairs of the Partnership for the tax years in dispute.

22. He had formed the view that there was a trading partnership. Some of its trading activities were outside the UK and so, in looking at s 112(1A), he needed to investigate whether the control and management of the Partnership was entirely outside the UK during the period in question.

23. He had correspondence and telephone conversations with the Partnership's accountant, Mr Swales. He decided a meeting would be constructive but felt there was opposition to the idea of a meeting at which matters could be discussed. Mr Swales had stated he did not want a free-ranging discussion because Mr Higgins might not understand the implications of his answers. Mr Roberts had tried to agree a broad agenda for a meeting but Mr Swales wanted a detailed list of questions. That was not acceptable to Mr Roberts because the nature of his questions would be steered by responses to other questions. Mr Roberts had no problem with producing an agenda for the meeting and this was often done in enquiry work, but it was unacceptable to be asked to produce a verbatim list of questions from which there would be no deviation. Mr Roberts understood the concerns about giving unguarded answers, but he would have made allowance for that aspect.

24. Mr Roberts considered that professional rallying was a highly technical sport and business contacts would want to deal personally with Mr Higgins, as a professional rally driver. The explanation being given to him by Mr Swales was that Mr Dixon was the dominant partner and that control and management of the Partnership was entirely outside the UK. Mr Roberts felt a meeting with Mr Dixon was necessary. Mr Dixon agreed to a meeting provided it would take place in the Isle of Man. HMRC assured him that conducting the meeting in the UK would not be held against the taxpayers in relation to the determination of where control and management of the Partnership took place. Mr Dixon insisted on the meeting being in the Isle of Man. Mr

Roberts obtained permission from his head office to go to the Isle of Man but it subsequently proved not possible to arrange the meeting.

25. Mr Roberts had considered the relevant guidance in the HMRC manuals and also the caselaw on place of residence. Denied the opportunity to meet and ask questions of the partners, the picture he had formed was of a trader who based himself in the UK, where he had extensive contact with manufacturers' teams, teaching, training, and other business opportunities. Mr Higgins was astute and could see the potential for his parents in acquiring the rally school. It seemed obvious that he had come to the UK to succeed on the international competitive circuit. Mr Higgins must have the detailed technical knowledge of the sport. Mr Dixon could give legal advice and a view on whether the contract terms were fair but his activities were of a background nature and did not amount to control and management of the Partnership. Although Mr Roberts had not been able to put questions directly to the partners, it seemed most likely that issues such as obtaining introductions, negotiating contracts and so on would be done by Mr Higgins from the UK.

26. Mr Roberts also had to consider whether the Partnership had been established as a tax avoidance device.

27. Mr Roberts accepted that there may have been perceived delays in the course of the investigation which may have frustrated the taxpayers. These were caused simply by his requirement to consult his head office on several technical issues, such as the possible application of s 739. Head office advice had eventually been that s 739 was not in point, but there were periods of time when Mr Roberts did not have control of the file.

28. The Partnership applied for closure notices. Mr Roberts decided that as he was not going to get a free-ranging discussion with the taxpayers he would close his enquiries and issue closure notices on the basis he was satisfied on the balance of probabilities that some, probably most, of the control and management of the Partnership took place in the UK. The enquiry had been conducted on an entirely fair basis. Some tax returns had in fact been completed on the basis that control and management was taking place in the UK - Mr Roberts had accepted that was a simple clerical error and permitted the returns to be corrected. Also, he had agreed to extensions of time in which to appeal against the closure notices.

29. Having concluded the enquiry and issued the closure notices, Mr Roberts was still unsure of the true state of affairs, given that he had never had satisfactory answers to legitimate questions. He still felt that on the balance of probabilities control and management had not been entirely outside the UK in the relevant tax years.

Submissions on behalf of the Partnership

30. Mr Soares for the Partnership submitted that in determining where "the control and management of the trade, profession or business is situated" (s 112(1A)(c)) one must look to the place where the highest level of decision making takes place. In the case of a partnership this will generally be where the partners hold their partnership meetings.

31. In *Padmore v IRC* the parties accepted that the control and management of a Jersey partnership was situated outside the UK. The Special Commissioner stated [1987] STC 36 at 38 (repeated by the High Court [1987] STC 36 at 44 and the Court of Appeal [1989] STC 493 at 495):

> "The partners in CPA are numerous: there were 110 when the current deed was executed in 1979 and there are now 140 or more. All are either chartered patent agents or members of the Institute of Trade Mark Agents; and the overwhelming majority of them are resident in the United Kingdom and are partners or employees in various firms of patent and trade mark agents practising in the United Kingdom. The business of CPA has, however, always been carried on from its offices in St Helier, Jersey; and its day-to-day business is dealt with by two managing partners who are Jersey residents. General meetings of the partners are held in Jersey or Guernsey (but nowhere else) four times a year, or more frequently as occasion demands. At those meetings policy matters are discussed and the decisions taken are thereafter implemented by the Jersey resident managing partners. It is common ground that the control and management of the business of CPA is situated abroad, …"

32. In *Newstead v Frost* [1978] STC 239 the General Commissioners (at 246) found that the control and management of a Bahamian partnership was situated outside the UK (and such a finding was not amenable to review on appeal – at 248).

> "(6) We found as a fact that the partnership meetings took place as stated ... and that all the activities of the partnership took place outside the United Kingdom.
>
> (7) We further found as a fact that control and management of the partnership business was situated abroad …"

33. That the place of control and management of a partnership is the place of the highest level of management was accepted by HMRC not just in *Padmore* but also in their own manual - International Tax Handbook paragraph ITH1612:

> "**Partnerships: international aspects: control/management**
>
> What determines whether a partnership is within Section 112 Is the place of control and management of its business. We are concerned with statutory words but there is no judicial guidance on their meaning. This contrasts, somewhat paradoxically, with the control and management aspect of "company residence" work where the words are not statutory but on which there is a good deal of somewhat ancient judicial guidance.
>
> What then do we do? Generally speaking we follow the thinking on companies and look at the place of the highest level of management rather than day-to-day management. Outside textbooks follow the same line.
>
> In deciding the location of the control and management of a firm with both United Kingdom and overseas partners, we would usually regard as significant such factors as the comparative seniority of the partners in age and experience (a simple head count will not do of course), the extent of their interests in the firm, the source and control of the finance, the places of decislon on policy and major transactions, the places and locations of partners' meetings and what was done at those meetings. The place of meetings incidentally is not a conclusive factor any more than it is - or ought to be - for companies. So the nature of the business done at the meeting is important. Is it really about control and management or just part of a facade to mislead us about the place of actual control and management?"

34. HMRC's Manual did not constitute authority, but the taxpayers agreed that it constituted a good summary of the relevant law. Mr Soares submitted that this was indeed the correct analysis, and the one which should be adopted by the Tribunal. Moreover, the Manual states, at paragraph 1630, "When an overseas partnership of non-residents expands its activities into the UK, at least one of the overseas partners may become resident here but not domiciled. In that situation the partnership is likely to be clearly controlled and managed abroad." Those were exactly the circumstances of the Partnership following Mr Higgins' move to the UK in 1993. These paragraphs had now been withdrawn by HMRC from their website.

35. The well established rule for place of residence of companies was stated by Lord Loreburn LC in *De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes)* 5 TC 198 at 212–213:

> "A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business … the decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills v. Nicholson* (1876) 1 Ex. D. 428 and the *Cesena Sulphur Company v. Nicholson* (1876) 1 Ex. D. 428, now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

36. One looked to the place where the high level decisions are made, as distinct from the place where day-to-day business operations are carried out. In *De Beers* all the mining operations were carried out in South Africa, but the fact that high level decisions were made at the board meetings which took place in the UK was sufficient to make the company tax resident in the UK. In the current case it was accepted that the rally driving, coaching and testing were performed in the UK (and elsewhere). However, the highest level decisions - for example, entry into a significant contract with a manufacturer's works team - were undertaken at partnership meetings, and those took place outside the UK. The manufacturer's team contracts were significant and longer term commitments - such decisions did not need to be made very often.

37. Mr Soares submitted that the relevant case law established a partnership could be controlled and managed outside the UK even though it engaged within the UK in any of four types of activities.

(1) First, it was clear that carrying on the business in the UK - in the current case rally driving, teaching and car testing - had no effect on where the control and management of the business of the Partnership was situated. This was clear from the wording of section 112(1A)(b). It was the situation in *De Beers*, and also in *Cesena Sulphur Company Limited v Nicholson* 1 TC 88 where "the whole business is transacted in India" (at 97) but again the company was tax resident in England.

(2) Second, business decisions which were "non high level" could be carried on in the UK without impacting the place of control and management of the Partnership. Only the highest level of decision-making was relevant.

(3) Third, appointing agents, including one of the partners themselves, to carry out activities in the UK did not impact on the control and management test – *Cesena Sulphur Company* at 95 and 107.

(4) Fourth, even if some acts of high-level management were performed in the UK, that did not of itself affect the control and management of the Partnership. See the Tribunal decision in *Laerstate BV v HMRC* [2009] SFTD 551 (at 29):

> "… the residence of a company will not fluctuate merely by reason of individual acts of management and control taking place in different territories. The whole picture must be considered in each case."

Also *Untelrab Limited v McGregor* [1996] STC (SCD) 1 at 22-23:

> "… when deciding the issue of residence one should stand back from the detail and make up one's mind from the picture which the whole of the evidence presents."

38. Mr Soares submitted that the following facts were relevant.

(1) No partnership meetings were ever held in the UK. At Mr Dixon's insistence, the partners would never take major decisions over the telephone if Mr Higgins was in the UK. Mr Dixon was the dominant partner, having significant business experience. Mr Higgins brought his driving skills, but all the commercial and management experience was with Mr Dixon and Mr Higgins relied on that for business decisions of the Partnership. Mr Dixon was clearly based in the Isle of Man. Mr Dixon was throughout conscious of the importance for UK tax purposes of ensuring that the high-level decisions of the Partnership were taken outside the UK, and he actively took steps to ensure that this was the case.

(2) It was clear that nearly all business contracts were executed outside the UK.

(a) The Partnership agreement itself was signed in the Isle of Man.

(b) The Partnership's accounts were routinely signed in the Isle of Man.

(c) In 1996 a works team contract with Nissan was signed in the Isle of Man.

(d) The amendments to the Partnership agreement were signed in the Isle of Man.

(e) In 1988 a works team agreement with Nissan was signed in Oporto.

(f) In 1998 a works team agreement with Volkswagen was signed in Milton Keynes for reasons of urgency.

(g) In 1999 a works team agreement with Volkswagen was signed in Germany.

(h) In 1999 a co-driver agreement was signed in Nairobi.

(i) In 1999 a works team contract with Volkswagen was signed in the Isle of Man,

(j) In 1999 a works team contract with Vauxhall (covering the 2000 and 2001 seasons) was signed in the Isle of Man.

(k) In 2002 a test driving contract with Ford was signed in the Isle of Man.

(l) In 2002 a television contract was signed in the Isle of Man.

(m) In 2003 a contract with an instructor organisation was signed in the Isle of Man.

(n) In 2005 a testing contract with Ford was signed in the Isle of Man.

There were other documents to show the same pattern was followed in years subsequent to those covered by the assessments under appeal.

The fact that the 1998 Volkswagen contract (item (f) above) was signed the UK was not fatal to the Partnership's contention that it was controlled and managed outside the UK. Negotiation of the contract had taken place in San Remo and it was only signed in the UK due to time pressures. Mr Dixon had approved the contract from the Isle of Man and the execution should be viewed as a function delegated by the Partnership from the Isle of Man. Further, as noted in *Untelrab* and *Laerstate*, a very limited extent of activity in the UK was clearly outweighed by the extent of control and management outside the UK.

It was accepted that some contracts had been identified where it was not certain where these had been executed, however these took place in tax years outside those under appeal and, again, any significance they had was far outweighed by the overwhelming weight of control and management from outside the UK.

(3) The matters attended to by Mr Higgins through telephone calls and emails were not high-level decisions. They related to the day-to-day matters of dates for events, arranging accommodation, flight arrangements etc.

(4) Although Mr Higgins acquired more knowledge with regards to rallying, teaching etc over the years, he wished to concentrate on driving and preferred to, and did, leave business and management issues to Mr Dixon as the expert in that field. The Partnership bank account was in the name of Mr Higgins simply because the driving activities and teaching activities were carried out by Mr Higgins.

(5) None of Mr Higgins' family in the UK took part in the business affairs of the Partnership.

(6) The fact that Mr Higgins received the majority of the profits of the Partnership was not determinative, in *Newstead v Frost* Mr Frost owned all the profit but that was not a detrimental fact.

39. The allegation that the formation and operation of the Partnership was a tax avoidance scheme was unsustainable. The Partnership was formed at a time when both partners were, and expected to continue to be, based in the Isle of Man. Mr Soares accepted (indeed, drew our attention to the fact) that *Davies v Braithwaite* 18 TC 198 held that a UK resident but non-domiciled individual carrying on a profession both inside and outside the UK would not be entitled to the remittance basis in respect of the non-UK income - the analysis in that case is that there is a single profession and all the income (including that derived from non-UK sources) is taxable on an arising basis. For a partnership s 112 ameliorated that rather harsh result, so that each of the partners could be examined separately and a distinction drawn between UK and non-UK sources.

Submissions on behalf of HMRC

40. Mr Hone for HMRC submitted that from the information made available to them HMRC concluded that it was not the case that control and management of the Partnership was wholly outside the UK in the tax years 1998-99 to 2004-05. The question of whether the control and management of the Partnership was wholly outside the UK must be looked at for each tax year in issue. As far back as 1993 Mr Higgins moved from the Isle of Man and became resident and ordinarily resident in the UK for UK tax purposes. HMRC accepted that in the early days of the Partnership Mr Higgins looked to Mr Dixon for support and help - at that time Mr Higgins was young and inexperienced. However, since moving to the UK in 1993 Mr Higgins had become an established and successful professional, competing in numerous events and seeking out opportunities for sponsorship, testing and teaching.

41. The business of the Partnership is the exploitation of Mr Higgins' skills as a professional rally driver. Parties make first contact with him. He is the heartbeat of the business and it is his activities that generate all the profits. The view of HMRC was that Mr Higgins in fact has extensive knowledge of business matters and only he at length weighs up the benefits of opportunities available. Mr Higgins has close relationships with many people in the sport and they contact him by e-mail or on his mobile phone, usually already aware of his usual commercial rates, and he controls all these aspects.

42. The involvement of Mr Dixon is confined to his legal experience. HMRC accepted that Mr Dixon looked at the contracts but considered Mr Higgins made the decisions. Great weight had been made of the fact that these various contracts were usually signed outside the UK. HMRC did not accept that was determinative of control and management.

43. The position had clearly moved on from the early days of the Partnership when both partners were based in the Isle of Man. It was not possible to carry out all the control and management of the Partnership confined to Mr Higgins' occasional visits to the Isle of Man. Concentration on the settlement and signature of certain commercial agreements was not determinative and could be misleading. Other factors and considerations were more important - the rallying, teaching, and seeking sponsorship opportunities were all done by Mr Higgins. Mr Dixon's own evidence was that from 1998 his expertise could no longer assist Mr Higgins. All day-to-day operational activities are done from the UK and this clearly outweighed the factor of where certain contracts were signed.

44. Mr Higgins is the main partner in the business and has by far the largest share of profits. Since 1998 he has had sufficient experience to act on his own authority. Since that time it was not the case that Mr Dixon was the dominant partner. Business given to the Partnership by Ford arose from Ford's knowledge over four years of Higgins' experience and that led to his appointment; similarly with other parties.

45. The Partnership never kept notes of any partnership meetings. If those were available HMRC submitted they would merely confirm that certain agreements were signed. What was more important is what occurred between those meetings. Mr Higgins would consider opportunities, discuss them with his immediate family, and all this was done from Mr Higgins' base in the UK. The Partnership bank account was in Mr Higgins' name.

46. The view of HMRC was that the aim of Mr Dixon from the outset has been to create an artificial structure designed to achieve a tax advantage. The idea that the Isle of Man is the centre of control of the Partnership is just to create the required picture. It is not in fact the case.

47. The Tribunal should ask itself how credible is the picture that the partners never discussed important matters on the telephone and that Mr Higgins was summoned to fly to the Isle of Man for meetings that were never minuted. All taken together this smacks of artificiality.

48. Any element of control and management within the UK in the relevant tax years will result in the section 112 test being failed and the appeals being unsuccessful.

Consideration

What test is to be applied for s 112(1A)(c)?

49. Although the point was mentioned by both sides we received no particular submissions on the fact that the Partnership is established under and governed by Manx law, and we proceed

on the basis (which we understand was the intention of the parties) that the legal position of the Partnership is the same as under English law.

50. There was some discussion as to whether the activities of the Partnership constituted a trade or instead a profession. We do not consider that anything turns on that distinction, as ss 111 and 112 cover both trades and professions, and also other businesses carried on in partnership.

51. We consider the appropriate test for the location of control and management of the business of a partnership is that adopted by the courts in relation to residence of companies. We note the same conclusion was reached by HMRC and stated in their Manual; also that it was the one argued for before us by the Partnership.

52. We have found helpful the summary put forward by the Special Commissioners in *Untelrab* (at ¶ 74):

> "From these authorities we have identified the following principles: that the residence of a company is where the directors meet and transact their business and exercise the powers conferred upon them; that if the directors meet in two places then the company's residence is where its real business is carried on and the real business is carried on where the central management and control actually abides; that a determination as to whether a case falls within that rule is a pure question of fact to be determined by a scrutiny of the course of business and trading; that the actual place of management, and not the place where a company ought to be managed, fixes the place of residence of a company; … and that when deciding the issue of residence one should stand back from the detail and make up one's mind from the picture which the whole of the evidence presents."

53. Also, the views of the Tribunal in *Laerstate* (at ¶¶ 27-29):

> "There is no assumption that [central control and management] must be found where the directors meet. It is entirely a question of fact where it is found. Where a company is managed by its directors in board meetings it will normally be where the board meetings are held. But if the management is carried out outside board meetings one needs to ask who was managing the company by making high level decisions and where, even where this is contrary to the company's constitution.
>
> It is significant, we think, that Lord Loreburn [in *De Beers*] referred to the test as being where central management and control 'abides'. This is a test that does not confine itself to a consideration of particular actions of the company, such as the signing of documents or the making of certain board resolutions outside the UK if, in a given case, a more general overview of the course of business and trading demonstrates that as a matter of fact central management and control abides in the UK. As Lord Loreburn said [at 212-213], the factual question must be considered 'upon a scrutiny of the course of business and trading'.
>
> This is consistent with the analogy with individual residence which was the basis on which Lord Loreburn propounded the central management and control test. Just as for an individual, for example, where a temporary departure from the UK would not of itself give rise to a change of residence, the residence of a company will not fluctuate merely by reason of individual acts of management and control taking place in different territories. The whole picture must be considered in each case."

54. Turning to the caselaw concerning partnerships, we note that in both *Padmore* and *Frost* all the activities of the partnerships took place outside the UK (see passages quoted at ¶¶ 31 and 32 above). That may explain the agreement of HMRC in *Padmore* that the partnership was controlled and managed outside the UK, and the similar finding of the Special Commissioners in *Frost*. In the current appeal it is accepted that the activities of the Partnership took place inside as well as outside the UK.

55. The position must be considered for each tax year under appeal but, as per *Laerstate*, the place of residence of the Partnership will not fluctuate from year to year merely by reason of individual acts of management and control taking place in different territories.

56. We need to determine, on the basis of the evidence before us: taking the picture as a whole who was managing the Partnership by making high level decisions and where did that take place?

The Burden of Proof

57. Mr Soares referred us to the following caselaw authorities concerning where the burden of proof lies in appeals on grounds of non-residence. In chronological order: *Cesena Sulphur Company* at 105; *Wood v Holden* 78 TC 1 at 85 and 86; *Untelrab* at ¶¶ 66 and 67; and *News Datacom Ltd v Atkinson* [2006] STC (STD) 732 at ¶¶ 154 and 155.

58. The normal position in appeals before this Tribunal, which is inherent in the wording of s 50 Taxes Management Act 1970 and confirmed by well-established authority, is that the burden of proof of demonstrating overcharging by an assessment (or closure notice) rests on the appellant taxpayer. The caselaw cited by Mr Soares states that where HMRC are alleging that a taxpayer is resident in the UK then the burden can shift to HMRC. The position was summarised by the Special Commissioners in *News Datacom* at ¶¶ 154 and 155:

> "*The Evidential Burden Question*
>
> 154. Chadwick LJ noted ([2006] STC 443 at [31]) that at para [63] of his judgment in *Wood v Holden* [2005] STC 789 the judge (Park J) said this:
>
> > '[63] … in so far as the Commissioners decided this appeal against Mr and Mrs Wood on grounds relating to the burden of proof (and the opening part of para SC145 suggests that those were the critical grounds for the decision), I consider that they were in error.'
>
> Chadwick LJ continued:
>
> > 'He could not have been intending to suggest, in that paragraph, that the Special Commissioners had been wrong in principle to approach the matter on the basis that it was for Mr and Mrs Wood to show that the adjustments to their self-assessments had been wrongly made. Rather, I think, he was stating his conclusion that the Special Commissioners had been wrong in failing to appreciate that the evidential burden had passed to the Revenue in the present case.'
>
> 155. Accordingly, we have proceeded on the basis that it is for the appellants to show that the assessments had been wrongly made. We also accept that the evidential burden can shift to HMRC. However, we do not reach our decision purely on grounds relating to the burden of proof in the *Wood v Holden* sense. Rather we reach a positive decision that [the appellant was UK resident], not that there is a failure to discharge the evidential burden that this is the case. We

> consider the evidential burden discharged having had the benefit of seeing the witnesses."

59. Having considered the documentary evidence provided to us and the oral evidence of the witnesses for both sides, all of whom were cross-examined, we are satisfied that wherever the burden of proof lies it has been sufficiently discharged, in that we have made our findings of fact and reached our conclusions (set out below) on the basis of that evidence, judged to the appropriate standard of the balance of probabilities.

Findings of fact

60. We find that HMRC's enquiry was entirely reasonable and was conducted properly and fairly. Any delays by either party were explicable by adequate reasons. As the parties could not agree on the terms for a meeting to discuss the affairs of the partnership, it was proper for Mr Roberts to form a view on the basis of the information then available to him and issue the closure notices in their terms.

61. We find there is no support for the suggestion that the Partnership is an artificial structure motivated by tax planning concerns. When it was formed the Partnership was, in Mr Dixon's words, two Manx people doing business from the Isle of Man. When Mr Higgins relocated to the UK in 1993 the Partnership was retained and Mr Dixon took careful note of how its future operation should be carried out, in view of the possible UK tax implications if the Partnership should become profitable. He prepared his "Aide Memoir to Partnership Tax" to guide himself in these matters, and he imposed a veto on any important Partnership matters being discussed or decided except at meetings in the Isle of Man. In Mr Higgins' words,

> "Roy made me aware of the importance of where the Partnership was controlled and managed. He made it clear that this had to the outside of the UK. His persistence in how I must not discuss with him or make any decisions in the UK seemed strange to me, especially since very little money was made at that time other than from new car launches and teaching work. Nonetheless I followed his advice, and would travel back to the Isle of Man, when he requested, for meetings to discuss major decisions and to sign contracts. I often thought it was an unnecessary use of time and money but nevertheless I did so because Roy said it was crucial. Roy often stopped me discussing anything that might affect the future of the Partnership on the telephone unless I was in the Isle of Man, or otherwise outside of the UK. I have occasionally flown to the Island to deal with a partnership matter and then returned to the UK the same day. "

62. We find that the place where certain contracts – even important ones such as the manufacturers' works team agreements – were signed is not in itself a determining factor. It is evidence towards where decisions were being made but it is the location of the decision-making, rather than where the contracts were signed, which is important.

63. We find that the basis of the formation of the Partnership was to combine Mr Higgins' driving skills with Mr Dixon's business acumen and experience. We find that even after many years that continues to be the position of the Partnership. Mr Higgins relied, and continues to rely, on Mr Dixon's commercial expertise, and would not enter into any significant commercial commitments without referring them to Mr Dixon for a decision. It is clear that Mr Higgins relies on Mr Dixon extensively if not completely in relation to the business side of his rally driving. This doubtless stems from the fact that Mr Dixon both started and developed Mr

Higgins' professional driving career. Mr Higgins stated that without Mr Dixon's support he would still be an insurance clerk in the Isle of Man.

64. We find that the high level decisions of the Partnership were made outside the UK, because those were determined by the views of Mr Dixon, as the commercial brains of the Partnership, with Mr Higgins being only too happy to defer to Mr Dixon in all business matters, so that he could concentrate on driving rally cars in competition and for training and testing purposes.

Conclusions on location of control and management of the Partnership

65. From our findings of fact in ¶¶ 60 to 64 above we conclude that taking the picture as a whole Mr Dixon was managing the Partnership by making high level decisions and that took place in the Isle of Man. Accordingly, the control and management of the Partnership in the relevant years was situated wholly outside the UK.

Decision

66. For the reasons stated at ¶ 65 above, we allow the appeals in full.

67. 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.

Peter Kempster
TRIBUNAL JUDGE
RELEASE DATE: 20 May 2011