

CASE NOTE

MARK HIGGINS RALLYING V HMRC

PARTNERSHIP “RESIDENCE”

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Introduction

Mark Higgins Rallying v HMRC TC/2010/1682 is the first case in which the principles governing the place of control and management of a partnership’s activities have been subject to detailed analysis. The author of this case note appeared as junior counsel¹ for the partnership, and the following is a summary of the facts and the First-Tier Tribunal’s decision.

Facts

A partnership was formed in the Isle of Man in 1991. There were two partners: Mr. Dixon and Mr. Higgins. Mr. Dixon had significant commercial experience, e.g. he was a solicitor and had been involved with a number of large businesses. Mr. Higgins was a rally driver, he had no management experience, and he was considerably younger than Mr. Dixon. The aim of the partnership was to combine Mr. Higgins’ rally driving skills with Mr. Dixon’s commercial experience, and thereby to generate income from rally driving and related activities.

At the time the partnership was formed both partners were resident, ordinarily resident and domiciled in the Isle of Man. Subsequently Mr. Higgins moved to the United Kingdom although he remained Manx domiciled.

The appeal related to the 1998/99 to 2004/05 tax years. Throughout that period the partnership’s activities were carried on partly inside and partly outside the United Kingdom.

Issue

The question was where the profession of the partnership was controlled and managed during the relevant years. In shorthand one might term this as a question of where the partnership was resident.

The issue was relevant due to ss.111-112 ICTA 1988. Broadly the effect of those provisions was that, if the profession of the partnership was controlled and managed outside the United Kingdom, then the profits of a partner who was UK-resident but non-UK domiciled (i.e. Mr. Higgins) would be taxed on the remittance basis so far as those profits arose outside the United Kingdom. Similar provisions are now contained in s.857 ITTOIA 2005.

Appellant’s Contentions

For the partnership it was contended that control and management was outside the United Kingdom. In particular the following arguments were made.

First, reference was made to cases which touched on the place of control and management of a partnership’s activities, although the guidance in those cases was limited.

In *Padmore v IRC* 63 TC 352 a Jersey partnership consisted of over 100 partners, who were mostly UK resident. The day-to-day business of the partnership was carried on by two managing partners who were resident in Jersey. General meetings of partners were held in Jersey or Guernsey,

about four times a year. Policy decisions taken at these meetings were then given effect to by the managing partners in Jersey. It was not in dispute that control and management was outside the United Kingdom. The key factors appeared to have been the location of the general meetings, and the fact that policy decisions were taken at those meetings. By analogy this was relied upon by the appellant in *Mark Higgins Rallying*.

In *Newstead v IRC* 53 TC 535 a Bahamian company and an individual had entered into a partnership. The General Commissioners found that the activities of the partnership were controlled and managed in the Bahamas. This was not challenged in the courts. The relevant factors included: partnership meetings were held in the Bahamas, decisions relating to the partnership were taken abroad, and all the activities were abroad. There was a lack of clarity as to which of the factors were critical, and their relative weight, but to the extent possible an analogy was drawn between this case and the partnership in *Mark Higgins Rallying*.

Secondly, given the limited judicial guidance in a partnership context, and the fact that the common law test for company residence uses similar wording, i.e. the place of central control and management, reliance was placed by the appellant on company residence case law. It was submitted that the latter case law demonstrated a number of key principles, and in particular:

1. There is a wealth of case law which shows that one looks to the place where directors meet and in particular where they take high level decisions. The focus of the test is on core policy decisions rather than day-to-day management. For example, in *Laerstate BV v HMRC* 2009 SFTD 551 the Tribunal said “*one needs to ask who was managing the company by making high level decisions and where*”.
2. The place where business activities are actually carried on does not matter. For example, in *Cesena Sulphur Company v Nicholson* 1 TC 83 a company was held to be resident in England even though the whole of its business was transacted in India.
3. In *Laerstate BV* the Tribunal held that the facts must be looked at as a whole, such that a small element of high level decision taking in the UK will not *per se* result in UK residence.

Thirdly, against the above background, it was argued that the profession of the partnership was controlled and managed outside the United Kingdom for the following reasons:

1. No partnership meetings were held in the United Kingdom.
2. The partners had agreed that no important decisions would be taken on the telephone, whilst one of the partners was in the United Kingdom, and instead Mr. Higgins would fly to the Isle of Man.
3. Almost all contracts were negotiated and signed outside the United Kingdom. Although there were a few exceptions, these were due to special circumstances.
4. Mr. Dixon was the dominant partner. He was the one who had the management experience, he was based in the Isle of Man, and he conducted his activities there.
5. Mr. Higgins’ decision taking in the United Kingdom was limited to purely ministerial matters, e.g. attending to the practical arrangements relating to his participation in rallies. He would not decide which motoring contracts to enter into himself and instead would discuss this with Mr. Dixon outside the United Kingdom.

HMRC's Contentions

HMRC contended that Mr. Higgins was conducting part of the control and management in the United Kingdom such that the remittance basis would not apply. It made the following arguments:

1. Since coming to the United Kingdom, Mr. Higgins had become more experienced. He was an established rally driver and sought out opportunities for sponsorship, teaching and for the testing of rally cars.
2. The business of the partnership was to exploit Mr. Higgins' rally driving skills. He was the heartbeat of the operation, parties would make first contact with him, and it was from his activities that all the profits were generated.
3. Rallying was a highly technical support and so business contacts must have wanted to deal with Mr. Higgins personally.
4. Although Mr. Dixon could give legal advice and a view on whether contracts with rallying teams were fair, his activities were of a background nature.
5. Although contracts were signed outside the United Kingdom this was not determinative. The important point was the scope of Mr. Higgins' activities in the United Kingdom, and in this respect he would consider opportunities in the United Kingdom.
6. Mr. Higgins was the main partner and he had the larger share of profits.

The Tribunal's Decision

It was held that the appropriate test for determining the place of control and management of a partnership's activities is the same as that adopted by the courts in relation to company residence.

In particular, the Tribunal stated the following. First, although the place of control and management must be determined on a year-by-year basis, as highlighted in *Laerstate BV* the facts must be looked at as a whole. Secondly, the place where contracts were signed was not a determinative factor: it was an indication of where decisions were being made, but it is the location of decision making not where contracts are signed that is important.

In relation to the facts of the case, the Tribunal held that the purpose of the partnership was to combine Mr. Dixon's business acumen with Mr. Higgins' rallying skills. Further, Mr. Higgins continued to rely on Mr. Dixon's commercial experience and would not enter into significant contracts without referring them to Mr. Dixon for a decision. High level decisions of the partnership were taken outside the United Kingdom because they were determined by Mr. Dixon's views. Therefore control and management was outside the United Kingdom.

Concluding Comments

The decision of the First-Tier Tribunal, which was not appealed by HMRC, is helpful in clarifying the principles that apply in determining the place of control and management of a partnership's activities. The overlap with the common law test for the place of a company's residence is likely to mean that much of the thinking relating to companies can be transported to a partnership context. Equally, in ensuring that a partnership's activities are controlled and managed outside the United Kingdom, much of the practical advice given to companies in ensuring that they are not UK resident is likely to be relevant.

