



Neutral Citation: [2025] UKFTT 00986 (TC)

Case Number: TC09610

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[Taylor House, London]

Appeal references: TC/2013/00122
TC/2013/00114

PROCEDURE whether the Tribunal has already determined an issue in an earlier decision – yes – whether an authority produced after the hearing should be considered – no – whether the Tribunal should look beyond the unambiguous words of an earlier decision - no

Heard on: 20 September 2024
Judgment date: 12 August 2025

Before

**TRIBUNAL JUDGE KIM SUKUL
TRIBUNAL MEMBER DUNCAN MCBRIDE**

Between

**INSIDE TRACK 3 LLP
INGENIOUS FILM PARTNERS 2 LLP**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Jonathan Peacock KC and Edward Waldegrave of counsel, instructed by White & Case LLP

For the Respondents: Michael Jones KC and Nicholas Macklam of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This case forms part of long-running litigation concerning the tax treatment of film production activities involving several limited liability partnerships, including a 45-day hearing before the First-tier Tribunal ('FTT') *Ingenious Games LLP and others v HMRC* [2016] UKFTT 521 (TC) initially issued on 2 August 2016 and then re-issued, with revisions, on 6 November 2017 (the 'First FTT Decision'), *Ingenious Games LLP and others v HMRC* [2017] UKFTT 429 (TC) released on 17 May 2017 (the 'Second FTT Decision'), a 22-day appeal before the Upper Tribunal ('UT') in 2019, and a further appeal to the Court of Appeal in 2021.

2. Following the Court of Appeal's decision in August 2021, the parties attempted to agree on the tax implications for Inside Track 3 LLP and Ingenious Film Partners 2 LLP (the 'LLPs') and their members. The key point of disagreement before us is whether the FTT previously decided the 'Asset Classification Issue', which concerns whether certain rights ('the Rights') acquired by the LLPs in film production transactions qualify as "intangible fixed assets" under Part 8 of the Corporation Tax Act 2009 ('CTA 2009'). This classification affects the availability of tax relief for corporate LLP members.

3. The LLPs contend that the FTT has already determined this issue in its earlier decision and, as that issue was not appealed, the matter is now settled. The Respondents ('HMRC') contend that the FTT has not yet ruled on the classification and that the issue remains unresolved and must now be determined.

4. The hearing lasted 1 day. The documents to which we were referred were contained within the hearing bundle (2,413 pages), a bundle of authorities (1,070 pages), and skeleton arguments from both parties. We also have the benefit of a transcript of the hearing and we received further written representations which we requested from the parties during the hearing, submitted on 24 and 27 September and 3 October 2024. We also received further correspondence from the parties on 5, 16, 17 and 18 December 2024 regarding an additional authority, which we have addressed at [54] below.

5. Having carefully considered all the submissions made by the parties and the evidence adduced during the hearing, we have decided that the FTT has already determined the Asset Classification Issue in its earlier decision. Our conclusions regarding the key arguments are set out below.

BACKGROUND

6. The LLPs engaged in film production transactions which, according to their case before the FTT, generated significant initial accounting losses which they argued were available for tax relief by their members. HMRC disputed both the existence of these losses and their eligibility for tax relief.

7. The scheme was structured to generate large first-year trading losses, enabling LLP members, typically wealthy investors, to claim tax relief. The LLPs claimed these losses arose from their film production activities. The full production cost was said to be incurred by the LLPs, with 30% funded by capital contributions from individual members and 70% provided as a loan from the distributor to the LLP's corporate member, who then contributed it to the LLP. Assuming the LLPs were trading, the scheme aimed to create large first-year losses by valuing each film at its net realisable value ('NRV') at the end of the accounting period, typically only 20% of the production cost, thus generating an 80% loss for allocation to the partners. The FTT ultimately rejected key elements of this scheme, including the assertions that the LLPs genuinely produced the films or bore the full production costs.

8. The FTT considered that each film-related transaction involved two key agreements:
- (1) Commissioning and Distribution Agreement ('CDA'): Between the LLP and a commissioning distributor ('CD'). The LLP was commissioned to produce and deliver a film. In return, the LLP would receive a share of the film's revenue.
 - (2) Production Services Agreement ('PSA'): Between the LLP and a production services company. The LLP paid the full film budget to the production company, which handled the film's production.
9. For accounting purposes, the LLPs treated the Rights during the film's production as stock, valued at NRV, which was typically much lower than the production budget. This valuation created substantial accounting losses. Once the film was completed, the LLPs reclassified the stock as a debtor, representing their right to receive income from the distributor.

PREVIOUS FTT PROCEEDINGS

The First FTT Decision

10. This decision considered several key issues, particularly around the accounting treatment of the LLPs' film-related transactions. The headline issues decided by the FTT were: whether the LLPs were trading; whether the LLPs were carrying on their activities with a view to profit; whether the LLPs incurred expenditure equal to 100% of the budget of the film; whether the LLPs' expenditure was incurred wholly and exclusively for the purposes of their trade or business; whether the LLPs' losses were computed correctly as a matter of generally accepted accounting practice ('GAAP'); and whether the expenditure on the rights to income acquired by the LLPs was in the nature of revenue or capital.

11. The FTT decided the trading issue and view to profit issue in favour of the LLPs and all of the remaining issues in favour of HMRC. The income/capital issue was decided in HMRC's favour in the Second FTT Decision. Although the FTT accepted that the LLPs were carrying on a trade, it clarified that this trade was not one of producing films. Rather, the LLPs' business was characterised as the payment of money to one party in exchange for a potential future financial return from another.

12. The FTT concluded that the LLPs did not acquire two assets (stock during production and a debtor after completion), as they had claimed. Instead, the LLPs acquired only one asset: a right to receive payment from the CD. This right was held "for use on a continuing basis in the business" and therefore was not a current asset. In rejecting the LLPs' accountancy treatment, the FTT concluded that the correct treatment was to classify this as an "intangible fixed asset". The LLPs had treated the film as stock during production and then as a debtor upon delivery. The FTT rejected this "two-asset" approach, finding it did not reflect the substance of the transactions.

13. The FTT used the term "intangible fixed asset" multiple times, including in its final conclusions. It stated that the asset acquired under the relevant agreements should be treated as a fixed intangible asset and not as stock or work-in-progress.

14. HMRC did not appeal this "intangible fixed asset" conclusion.

The Second FTT Decision

15. In 2017, the FTT resolved an issue focused on whether certain expenditure, although deductible under GAAP, was nonetheless non-deductible for tax purposes. The matter was addressed through written submissions, without a further hearing. HMRC acknowledged in their submissions that the FTT had previously concluded the LLPs' rights to income under the CDAs were "intangible fixed assets" for accounting purposes.

16. The FTT referred to its earlier finding that, for accounting purposes, the Rights were held ‘for use on a continuing basis in the business’, and so were not current assets for those purposes and, in substance, the Rights were not stock and should be treated as fixed intangible assets (see [2(vii)] of the Second FTT Decision).

17. The FTT concluded that the Rights were capital assets. Consequently, the expenditure incurred to acquire those rights was capital in nature and, under the relevant provisions of the Income Tax Act, not deductible for tax purposes.

18. The Second FTT Decision was therefore consistent with the First FTT Decision, both in terms of the nature of the asset and the broader tax consequences.

19. HMRC did not appeal this decision.

AGREED APPROACH

20. The approach agreed by the parties and this Tribunal to resolve the current dispute is the following process:

(1) At this first stage, we are invited to determine whether, by the First FTT Decision, the FTT has already determined that the Rights constitute intangible fixed assets. This is the ‘Scope of Decision Issue’. If we determine that the FTT has already decided that the Rights are intangible fixed assets then, subject to any appeal(s), that will be the end of the process.

(2) If we conclude that the FTT did not by the First FTT Decision determine how the Rights should be characterised, then the next stage will be for the FTT to determine the Asset Classification Issue itself. This would be the subject of a separate hearing.

21. The ‘Scope of Decision Issue’ is defined in recital H(a) to the Directions endorsed by the FTT on 29 November 2023 as follows:

“where “intangible assets” in Part 8 of the [CTA 2009] has the meaning it has for accounting purposes (section 712(1) of the [CTA 2009]) and “intangible fixed asset” is a sub-set of “intangible asset” (see section 713(1) of the [CTA 2009]), whether the FTT has already determined that the assets acquired by the LLPs as a result of their entry into the transactions [i.e. the Rights] are “intangible fixed assets” for the purposes of Part 8 of the [CTA 2009]”.

22. The parties’ agreed definition of the ‘Asset Classification Issue’ in recital H(b) to the Directions is as follows:

“whether those assets are “intangible assets” or, alternatively, “financial assets” for the purposes of Part 8 of the Corporation Tax Act 2009 (those terms each having the meaning they have for accounting purposes: ss 712(1) and 806(2) of the Corporation Tax Act 2009) (the “Asset Classification Issue”).”

LEGISLATION

23. The legislation referred to by both parties includes the following provisions from the CTA 2009:

(1) Section 711(1) – Introduces Part 8 of the CTA 2009, which governs the taxation of gains and losses on “intangible fixed assets”.

(2) Section 712(1) – Defines “intangible asset” as having the meaning it has for accounting purposes.

- (3) Section 713(1) – Defines “intangible fixed asset” as an intangible asset acquired or created by a company for use on a continuing basis in the course of its activities.
- (4) Section 806(1) – States that Part 8 does not apply to “financial assets”.
- (5) Section 806(2) – Defines “financial asset” as having the meaning it has for accounting purposes.
- (6) Section 1259 – Provides that where an LLP carries on a trade and a member is within the charge to corporation tax, the profits or losses of the trade are treated as if the company carried on the trade.

24. Schedule 29 to the Finance Act 2002, contains predecessor provisions equivalent to those in Part 8 of the CTA 2009.

ACCOUNTING STANDARDS

25. The classification of assets as either “intangible fixed assets” or “financial assets” lies at the heart of the dispute in this case, and the distinction is governed by both accounting standards and tax legislation. The relevant accounting definitions are found in three key financial reporting standards: FRS 10, FRS 25, and FRS 13.

26. FRS 10 *Goodwill and Intangible Assets* defines an “intangible asset” as a non-financial fixed asset that does not have physical substance but is identifiable and controlled by the entity through custody or legal rights. This definition explicitly excludes financial assets, thereby establishing that intangible and financial assets are mutually exclusive categories.

27. FRS 25 *Financial Instruments: Disclosure and Presentation* provides the definition of a “financial asset” as any asset that is a contractual right either to receive cash or another financial asset from another entity, or to exchange financial assets or liabilities under conditions that are potentially favourable to the entity. FRS 25 explicitly states that intangible assets are not financial assets.

28. FRS 13 *Derivatives and Other Financial Instruments: Disclosures* echoes the definition found in FRS 25, again focusing on the concept of a contractual right to receive cash or other financial instruments.

29. The parties agree that under the relevant accounting standards, the categories of “intangible asset” and “financial asset” have always been mutually exclusive.

RELEVANT EVIDENCE BEFORE THE FTT

30. The First FTT Decision refers to the evidence of several witnesses, including Mr Neil Forster, the Chief Financial and Chief Operating Officer of the LLPs, who explained their approach involving the “two-asset” accounting model. The FTT also heard from three expert accounting witnesses: Mr Peter Holgate and Mr Luke Steadman for the LLPs, and Mr Richard Cannon for HMRC. Their oral testimony spanned nearly four days, and the accounting issues were further explored over five days of submissions, supported by extensive written materials.

31. Mr Holgate supported the LLPs’ two-asset approach and appended a 2004 letter from PricewaterhouseCoopers (‘PwC’) to his report (the ‘PwC Letter’). The PwC Letter outlined two acceptable accounting treatments: the LLPs’ adopted method (stock then debtor), and PwC’s preferred method, which was to treat the Rights as an intangible fixed asset throughout. Mr Holgate disagreed with PwC’s preference, maintaining that the stock-to-debtor model better reflected the LLPs’ business.

32. Mr Steadman also supported the LLPs’ approach and resisted the classification of the Rights as intangible fixed assets. He suggested that such treatment was more appropriate for

assets used within a business, which he believed did not reflect the LLPs' activities. However, he acknowledged that from a studio's perspective, film rights might be considered intangible fixed assets.

33. Mr Cannon challenged the LLPs' accounting treatment. His view was that the LLPs should have accounted for only 30% of the film budget, the portion actually funded by members, rather than the full 100%. He believed the LLPs' accounts overstated losses by including write-downs of assets that should not have been recognised. Mr Cannon preferred accounting under long-term contract principles and suggested in oral evidence that the Rights might be better classified as financial assets.

34. The FTT engaged deeply with the expert evidence, questioning all three experts about a set of hypothetical scenarios designed to test whether the LLPs had acquired one or two assets and to clarify whether the Rights should be treated as stock, debtor, or a single intangible fixed asset. Ultimately, the FTT rejected the LLPs' two-asset approach and concluded that the LLPs had acquired only one asset, namely a right to receive payment from the CD which was held for use on a continuing basis in the business and should be treated as a fixed intangible asset.

THE FTT'S CONCLUSIONS

35. We consider the following to be relevant extracts from the First FTT Decision:

"CHAPTER X: GAAP

Introduction

[911] The successor to s 42(1) FA 1988, s 25 [Income Tax (Trading and Other Income) Act] 2005 provides that:

'(1) The profits of a trade must be calculated in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in calculating profits for income tax purposes.'

[912] We use 'GAAP' to refer to generally accepted accounting practice.

...

The Issues Arising

[919] The accounting practice adopted by the LLPs gave rise to a number of questions:

...

(3) Is it correct to treat the relevant agreements as giving rise first to one asset, the Rights in respect of the film, and then, on completion of the film, to a second asset, the debtor (the right to payment by the CD)? Alternatively should the relevant agreements be viewed ab initio as giving rise only to one asset, namely a right to the receipt of distributions from the CD? Is the asset (a) stock/WIP, or a particular species of stock, a long-term contract, or (b) a fixed intangible asset?

...

5. The Tribunal's Three Scenarios

[991] Each expert was asked about the correct accounting for the following three transactions:

(a) Under a contract between A and B: A agreed to pay B 100; B agreed to make a film; B agreed to pay A x% of the income from the film.

(b) Under a tripartite contract between A, B and C: A agreed to pay B 100; B agreed to make a film; B agreed to transfer the film to C when made; and C agreed to pay A x% of the income from the film. A had no right to play, and did not play, any role in the making of the film.

(c) Under a tripartite contract between A, B and C: A agreed to pay B 100; B agreed to make a film; B agreed to transfer the film to C when made; and C agreed to pay A x% of the income from the film. A was entitled to interfere in the making of the film.

[992] The experts agreed that:

(a) In the first example, A should recognise a fixed intangible asset from which it derives income;

(b) In the second example, A should recognise a fixed intangible financial asset from which it would derive income; and

(c) In the third example, the correct treatment depended on the role taken by A in relation to the making of the film.

[993] In the third example Mr Holgate said that the accounting treatment would be different if A had a substantive role in the film-making process; Mr Steadman said that if there was sufficient activity by A then it should recognise a current asset debtor, and Mr Cannon said that if A had sufficient control over the making of the film it should account for the asset as a current asset.

...

Was the Film “Sold” to the CD: One Right or Two?: The Nature of the Asset

[1051] Mr Holgate and Mr Steadman considered that the LLP should be treated as acquiring a film as stock which it held until it was transferred to the CD, when it should recognise a debtor. Mr Cannon's report was prepared on the basis that the LLPs operated a film production business, producing, completing and delivering films. He did not dissent from the approach of Mr Holgate and Mr Steadman.

[1052] A contrary preference is expressed in PwC's letter. They prefer treatment under which the LLP recognises a single fixed intangible asset, namely the right against the CD to payment.

[1053] Mr Holgate's rejection of the fixed intangible presentation rested on his conclusion that the film was an asset of the LLP which it held, and then transferred to the CD. We have noted that Mr Holgate's description of the transactions fails to take into account the fetters on the LLP's right in the film imposed by the licence and the agreements. It seems to us that treating an event under which there is no substantial economic change in the Rights of the CD to exploit the film, and no substantial change in the Rights the LLP controls to receive economic benefits from the film or otherwise as being of commercial significance does not accord with the substance of the transaction. Further the circumstances of the Avatar Hedge (Chapter IV) indicate that it was not essential to an LLP's business that a completed film should be delivered to it for onward delivery.

[1054] Further the analysis treats the copyright in the film as being an asset of the LLP. FRS5 defines an asset as the right or access to future economic benefits controlled by the entity. But in the light of the fetters on its use of the film, it seems to us that the LLP has no right to control the benefits of the film rights (ie to ensure that those benefits accrue to itself and not others): although it was entitled to payments from the CD in respect of the CD's use

of the film, its control was over the Rights to payment against the CD, not over the film. Accordingly we view the right as against the PSC to the film as it was being made as having no commercial substance and as not being able to give rise to economic benefit controlled by the LLP. As a result it does not fall within the definition of an asset in the standards.

[1055] Moreover, the Rights and obligations of the LLP under the CDA and the PSA are no different from those which would arise under a tripartite agreement incorporating the terms of those agreements. Save in relation to the fact that there is a formal assignment of the copyright to the CD and the provision of the licence, such an agreement would be similar to that in our Scenario 3. In that example all three experts agree that unless A (the LLP) has a substantial role ('altering the product, adding value, decision making') in the making of the film it should be treated as having one intangible fixed asset, namely the right against the CD. As we explain elsewhere we do not regard the LLP's role in the making of the film as substantial although we accept that prior to contract Ingenious may have had some input.

[1056] The difference between our Scenario 3 and the contracts of the LLP is that the PSA and CDA provide for the accrual of the copyright in the film (or 95% of it) to the LLP and the later transfer of 100% of it to the CD (the 5% passing in much the same way as the film on Scenario 3). But in the light of our conclusions as to the commercial substance of the Rights in the film held by the LLP, this cannot make any difference to the correct accounting treatment.

[1057] In our view, there was in substance no sale of rights in the film by the LLP to the CD: for FRS5 purposes the LLP only ever had one asset of substance, namely its rights against the CD. That right was held 'for use on a continuing basis in the ... business'. It was therefore not a current asset.

[1058] We conclude that intangible asset treatment is correct, and that the recognition of the film (the right against the PSC) as stock or [work-in-progress] is not permitted by GAAP since it does not reflect the substance of the transactions.

...

9. Summary Conclusions

[1106] The accounts of the LLPs do not comply with GAAP. The following changes are required in order to produce profits or losses computed in accordance with GAAP, and thus, subject to other required adjustments, to produce profits and losses for the purposes of income tax:

(a) whilst an LLP may be taken to have agreed to treat the CM as making a capital contribution equal to 70, the nature of that contribution cannot be shown as a liability in the LLP's accounts as it has no substance: representing no obligation of the LLP to transfer economic benefit, at the time of recognition or at any other future time;

(b) in relation to ITP no debtor should be recognised in the accounts for any liability of the CM to contribute capital; in the case of IFP2 a debtor should be recognised together with the corresponding Additional Capital Contribution before the signing of a relevant agreement. On any recognition of capital as a result of signing the agreements both the debtor and the Additional Capital Contribution should be reduced and no liability should be recognised in respect of the contribution;

(c) on signing the relevant agreements the LLP should recognise the liability of 30 (to the PSC), not 100, and a corresponding asset initially of the same amount;

(d) the LLP should not treat itself as having an asset in the form of the Rights in the film. It should treat itself as acquiring under the relevant agreements only the Rights to payment from the CD;

(e) cash payments made by the LLP to the PSC (as they did) should reduce the recorded liability of the LLP, but payments made by the CD to the PSC should not affect that liability;

(f) the asset acquired under the relevant agreements should be treated as fixed intangible asset; that asset should be accounted for at cost (30) less any permanent impairment, and if necessary a provision for an onerous contract should be recognised.

(g) the LLP should recognise any receipts comprising the Sch 7 amounts reduced by BDR/BR;

(h) in setting the NRV of its rights in relation to each film the LLP should make the adjustments set out in 6(5) and 7 above, in particular the limitation on the NRV of a Studio film to 66% of cost. If contrary to our view, the LLP should be regarded as having the film as a current asset, it should be valued at NRV so calculated. If we are right and the correct treatment is as a fixed intangible asset, then the combined effect of impairment and onerous contract provision would give rise to the same profit and loss account effect.

(i) the adjustments in respect of the deduction for the Operator's fee described above should be made."

HMRC's POSITION

36. HMRC's position is that the FTT did not consider, let alone decide, the Asset Classification Issue. They make the following submissions in support of their position.

The FTT took a simplified, binary approach to the classification

37. HMRC argue that the FTT approached the classification of the asset in a simplified, binary way, essentially asking whether it was "stock" produced for sale or not. The term "fixed intangible asset" was used by the FTT as a shorthand to describe the right to receive payment from the CD, rather than as a precise accounting classification. This terminology did not reflect the more complex Asset Classification Issue.

The point was not in issue

38. HMRC argue that the question of whether the LLPs' assets were "intangible assets" under Part 8 of the CTA 2009 or the relevant accounting standards was never an issue before the FTT. This point was not raised in the pleadings, skeleton arguments, expert evidence, or any written or oral submissions, nor was it addressed in the FTT's decisions.

39. Since the definition of an "intangible asset" under FRS 10 excludes "financial assets", HMRC contend that the FTT would have had to first determine that the asset was not a financial asset, something it never did. If the FTT had made such a determination, it would have done so without being asked, without argument from either side, without referencing the issue, and without providing any reasoning. Such an approach, HMRC argue, would amount to an error in law, which is a highly unlikely scenario especially given the FTT's reputation for thoroughness, as praised by both the UT and the Court of Appeal.

40. HMRC further argue that the expert witnesses consistently referred to the asset as a "fixed financial asset" or "fixed asset investment", and the FTT did not challenge or clarify

these terms. This silence, HMRC contend, suggests that the precise accounting classification was not in issue and the main focus was on the valuation of the asset which directly impacted the losses the LLPs could claim.

41. Ultimately, the FTT's use of varied and sometimes contradictory terminology, including the phrase "fixed intangible financial asset" which, given the uncontroversial exclusivity of the two concepts, is simply not possible, indicates that it was not applying technical accounting definitions. The FTT's focus was on the economic substance of the transactions, not on resolving the Asset Classification Issue.

42. HMRC argue that, read in context, it is clear that by "intangible asset" the FTT meant a contractual right to payment from the CD, and was thus using it in its ordinary sense, and by way of a distinction to "stock", rather than in the strict accounting sense. Whether or not that asset was "stock" was a secondary point on which little of substance turned; and the precise classification of that asset for accounting purposes was not in issue at all.

43. HMRC say this is demonstrated by the following exchanges on Day 46:

"JUDGE HELLIER: So, properly accounted for, you say 30 per cent of the cost and 30 per cent of the income.

MR JONES: In broad terms, yes.

JUDGE HELLIER: Whether you treat that as an item of stock or whether you treat it as fixed asset is a secondary question.

MR JONES: It is a secondary question.

JUDGE HELLIER: If it is stock or work progress, then you have a write-down which would be the same in either case, the computation of it subject to the question of whether virtually certain is the same as estimated value.

MR JONES: Yes.

JUDGE HELLIER: And to Mr Cannon's point about the recognition of uncertain future income.

MR JONES: Yes, in respect of the turnover in future periods.

JUDGE HELLIER: Yes.

MR JONES: Yes.

JUDGE HELLIER: And if you recognised it as a fixed intangible asset, then you recognise impairment on a long-term basis.

MR JONES: I think you recognise impairment. I will just check ... (pause). I am told -- and this really is giving evidence, but I am told that you would amortise it unless you had reason to recognise an impairment upfront.

JUDGE HELLIER: There was some evidence given about impairment in the
—

MR JONES: I will check that over the short adjournment. The questions that the Tribunal put to witnesses, in my respectful submission, were very perceptive in the sense that they pick up on the point about what the LLP is really acquiring and, if the LLP is really acquiring a fixed financial asset under the income stream, which is what it is acquiring, then that helps support, gives some corroboration, to the legal analysis which is that -- when the touch paper is lit, that is all they are ever going to get. That tells you something about what they are acquiring. It is not stock, it is an investment that they acquire and hold and they never deal in."

Inconsistent terminology taken out of context

44. HMRC argue that, when viewed in context, it is clear that the FTT was not applying the technical accounting definitions of “intangible asset” and “financial asset” because the FTT used inconsistent terminology throughout its decision, at times referring to the assets as “fixed intangible financial assets”, “fixed intangible assets” and even “financial assets”. The term “fixed intangible financial asset” is internally contradictory, and HMRC argue that these conflicting labels suggest that the FTT was not focused on the precise classification of the asset under accounting standards but on whether the LLPs had acquired “stock” or a different kind of asset. HMRC contend that the FTT was using the term “intangible asset” in a general sense to distinguish the asset from “stock” and not as a classification for accounting purposes.

The relevant law and accounting standards were not before the FTT

45. HMRC argue that determining whether the LLPs acquired an “intangible fixed asset” under Part 8 of the CTA 2009 requires reference to both the legislation and the relevant accounting standards, specifically FRS 10, FRS 25, and FRS 13. These standards define what constitutes an “intangible asset” and distinguishes it from a “financial asset” which is excluded from Part 8. However, the FTT did not refer to any of these materials in its decision, nor were they included in the hearing bundle. HMRC submit that this absence is consistent with the fact that the Asset Classification Issue was not before the FTT for determination and the claim that the FTT decided the classification issue without referencing any of the necessary materials stands in stark contrast to the Tribunal’s otherwise meticulous approach.

The FTT got the answer conspicuously wrong

46. HMRC submit that the CTA 2009 relies on accounting definitions to distinguish between “intangible assets” and “financial assets” and according to FRS 10, an intangible asset is a non-financial fixed asset without physical substance, while FRS 25 defines a financial asset as a contractual right to receive cash or another financial asset. These definitions are mutually exclusive.

47. When comparing these definitions to the FTT’s findings, HMRC contend that the FTT repeatedly described the assets as contractual rights to receive payments from the CD. The FTT explicitly stated that the LLPs did not control the film rights themselves but only had rights to payment, and that there was no substantive sale of film rights, only a single asset namely the right to payment. This description, HMRC argue, aligns almost exactly with the definition of a financial asset under FRS 25 and if the FTT had truly considered the relevant accounting definitions, it would have had to conclude that the asset was a financial asset, not an intangible one.

48. The FTT gave no explanation for treating the asset otherwise which, HMRC contend, makes it implausible that the Tribunal addressed or resolved the Asset Classification Issue, and there is no convincing explanation as to how the FTT could have reached a different conclusion without addressing the financial asset definition directly.

The common view of the experts

49. HMRC submit that the FTT occasionally used terms like “intangible asset” or “fixed intangible financial asset” when summarising expert evidence, but these were either misquotations or imprecise descriptions. In fact, the experts had consistently agreed that the asset in question should be classified as a “financial asset”.

The comments of the UT

50. HMRC argue that, during the appeal to the UT, HMRC explicitly stated that the LLPs’ assets were “financial assets” under accounting standards and the LLPs did not challenge this assertion or argue that the FTT had already ruled on the matter. The UT itself acknowledged

that the correct accounting label was “financial asset”, though it noted that the legal label might differ and that nothing in the case turned on the label used by the FTT. In its decision, the UT said (at [527]):

“We should add for clarity that our understanding is that, strictly speaking, the correct label to be given to the asset acquired by the LLPs in accounting terms is that it is a “financial asset” rather than an “intangible asset”, although the latter is the correct legal description. However, it was not suggested that anything turned on the correctness or otherwise of the label that the FTT attached to the asset concerned.”

51. HMRC contend that if the LLPs truly believed the FTT had decided the classification issue, or that the label mattered, they would have raised it during the appeal. Their failure to do so further supports HMRC’s position that the Asset Classification Issue was never determined by the FTT.

THE LLPs’ POSITION

52. The LLPs argue that the FTT determined the Asset Classification Issue as set out in the First FTT Decision and that HMRC’s position is flawed. They submit that:

- (1) the FTT clearly did consider the classification and had before it materials such as the PwC Letter and expert testimony that directly addressed whether the Rights should be treated as intangible fixed assets. The FTT also demonstrated awareness of the definition of “financial asset”, as shown in its discussion of the expert evidence;
- (2) the distinction between intangible and financial assets was discussed at the hearing, referencing Mr Cannon’s evidence that the Rights were financial assets, evidence the FTT ultimately rejected. Since intangible and financial assets are mutually exclusive, the FTT’s conclusion that the Rights were intangible fixed assets necessarily implies they were not financial assets;
- (3) it is incorrect to say that the FTT only considered whether the Rights were “stock”. The FTT went further, explicitly addressing how the Rights should be categorised if not stock, and explored this through its “three scenarios” and questioning of expert witnesses;
- (4) the FTT’s use of the term “fixed intangible financial asset” was a mistake but it was minor and occurred in a summary of evidence, not in the FTT’s conclusions; and
- (5) HMRC claims that if the FTT had properly applied accounting definitions, it would have concluded the Rights were financial assets is an improper attempt to re-litigate the substance of the issue. If HMRC believed the FTT reached the wrong conclusion, it should have appealed. Instead, HMRC previously accepted the FTT’s conclusion that the Rights were intangible fixed assets and cannot now reverse that position.

DISCUSSION

53. In arriving at our conclusion as to whether the FTT has already determined that the Rights constitute intangible fixed assets, we have carefully considered the submissions made by the parties and the evidence and authorities set out in the documents we have referred to at [4] above.

New Authority Post-Hearing

54. On 5 December 2024 HMRC wrote as follows to the Tribunal:

“During the hearing of the Scope of Decision Issue, Judge Sukul and Tribunal Member McBride asked Mr Jones KC whether he was aware of

authority in support of the proposition that, when determining whether or not an issue had previously been decided by a court or tribunal, it is proper to look at material other than the decision itself (for example, submissions made to the court or tribunal or the evidence that was before the court or tribunal): see the transcript at page 71, line 12 to page 72, line 7. Mr Jones KC stated that, at the time, he was not aware of such authority.

Such an authority has now come to the attention of HMRC's counsel: *Carl Zeiss Stiftung v Rayner and Keeler Limited (No 2)* [1967] 1 AC 853, a copy of which is attached. That was a case concerning issue estoppel, which requires consideration, in a subsequent case, of what issues were decided in an earlier case. At page 965B-E, Lord Wilberforce said this:

*"One way of answering this is to say that any determination is involved in a decision if it is a "necessary step" to the decision or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision" (Reg. v. Inhabitants of Hartington Middle Quarter Township). **And from this it follows that it is permissible to look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence** (Brunsden v. Humphrey) **and if necessary other material to show what was the issue decided** (Flitters v. Alfrey). The fact that the pleadings and the evidence may be referred to, suggests that the task of the court in the subsequent proceeding must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, though I do not think that this point has yet been decided, that he had a fair opportunity, or that he ought, to have raised it."* (emphasis added)

Since the Tribunal asked whether there was authority on the point, and the position is that there is House of Lords authority on the point, HMRC's counsel considered that this authority needed to be brought to the Tribunal's attention.

For completeness, the relevant passage from *Stiftung* was cited with approval by Coulson J (as he then was) in *Seele Austria GmbH Co and Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC) at [18].

Since this accords with the approach HMRC were, and are, inviting the Tribunal to take in relation to the Scope of Decision Issue (see the transcript, page 73, line 5 to page 85, line 18), HMRC are not seeking to provide further submissions to the Tribunal in relation to this. However, HMRC will, of course, do so if the Tribunal wishes."

55. On 16 December 2024, the LLPs sent the following response:

"We refer to the email from HMRC's representatives sent at 11.06 on 5 December 2024, and the communication from the Tribunal by which it invited the Appellants to provide any response by 16 December 2024. The Appellants' response to HMRC's email is as follows. We would be grateful if this email could be placed before Judge Sukul and Mr McBride.

HMRC has put before the Tribunal an additional authority, being the House of Lords' decision in *Carl Zeiss Stiftung v. Rayner & Keeler Limited* [1967] AC 853. Despite stating that it is "not seeking to provide further submissions to the Tribunal" HMRC has, in effect, made such further submissions in the body of its email.

The Appellants respectfully submit that HMRC should not be permitted to put a further authority before the Tribunal, and make submissions on it, nearly three months after the hearing. This is not a situation in which a

decision which may have a bearing on the issue before the Tribunal has been released after the hearing (in which case it would generally be appropriate for the parties to bring it to the Tribunal's attention). Despite the impression given in HMRC's email, HMRC's authority and submissions are also not an attempt to answer a question raised for the first time by the Tribunal at the hearing. Rather HMRC is attempting, months after the hearing, to bolster the positive case which it advanced before the Tribunal. HMRC's counsel sought to draw an analogy with "issue estoppel" at the hearing: see in particular [T/74.21-75.18]. It would have been open to HMRC to adduce authority in support of this argument at the hearing. It chose not to do so, and should not be permitted to do so now.

Accordingly, the Appellants invite the Tribunal to disregard HMRC's email and the additional authority it seeks to rely on.

In any event, *Zeiss* does not in fact support HMRC. The principle which HMRC seeks to draw from *Zeiss* is that, in ascertaining what has been decided in a previous case, it is permissible to look at materials (such as evidence etc.) which are extraneous to the decision in question. On this basis HMRC seeks to bolster its submission (about which the Tribunal rightly expressed scepticism at the hearing) that the Tribunal should go beyond the terms of the decision made by Judge Hellier and Mr Stafford. However, this invitation faces at least three difficulties:

1. First, properly understood, the point made by Lord Wilberforce in *Zeiss* is not relevant to the question before the Tribunal in this case. *Zeiss* was concerned (in so far as is relevant) specifically with issue estoppel. Lord Wilberforce thought that, in the context of issue estoppel, it was necessary for the court to form a view as to whether the party against whom the estoppel would operate had himself raised the issue in the previous proceedings. This was why, in the specific context of issue estoppel, he thought that it could be permissible for the court to consider pleadings and evidence (i.e. to see whether the party in question had raised the "critical issue"). This is apparent from what Lord Wilberforce said at page 965D: "The fact that the pleadings and the evidence may be referred to, suggests that the task of the court in the subsequent proceeding must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue..." Accordingly, where the debate is about issue estoppel, it may be permissible for the court to look at extraneous materials. But in the present proceedings the debate does not concern issue estoppel (and the Tribunal should treat with considerable caution HMRC's attempt to draw an analogy with it). Lord Wilberforce's comments in *Zeiss* are therefore not applicable.

2. In any event, none of the speeches in *Zeiss* suggest that extraneous materials should be considered where the prior decision is clear on its terms. In that case, the relevant decision (made by a West German court) was clear on its terms. For example, Lord Hodson noted at page 926E that "[t]he West German judgment is detailed and elaborate and leaves no doubt as to the precise issue about which the parties were contending...", and Lord Guest said that there was "little doubt" as to what the West German court had decided: see page 935B. Even Lord Wilberforce did not suggest that it was actually necessary to refer to extraneous materials to work out what the West German court had decided. In this case, the Appellants say (for the reasons explained at the hearing) that the decision made by Judge Hellier and Mr Stafford is clear on its terms and so there is no warrant for this Tribunal to consider extraneous material.

3. Moreover, even if the Tribunal decides that it should go beyond the words of the decision made by Judge Hellier and Mr Stafford, the Appellants' case (as explained at the hearing) is that the relevant extraneous material (principally the written and oral accounting evidence) supports the Appellants' argument that the "Asset Classification Issue" was in fact decided by Judge Hellier and Mr Stafford.

The Appellants would of course be willing to provide any further assistance to the Tribunal in connection with this matter."

56. Having considered these submissions, and being mindful of the requirement of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that we deal with cases fairly and justly, we declined the offer of further representations from the parties on this new authority. We agree with the LLPs that, whilst it may be appropriate to bring to the attention of the Tribunal a decision released after the hearing which could be of material assistance in determining an appeal, we do not consider it to be in the interest of fairness and justice to permit HMRC to refer the Tribunal to a new authority in support of an argument made during the hearing, which could have been produced prior to the hearing and avoided the inevitable prejudice to the LLPs from not being given an opportunity to fully consider and respond to the authority during the hearing.

57. We therefore have not considered this authority in arriving at our decision.

Wording of the Decision

58. In determining whether or not an issue has previously been decided by the FTT, where the wording of the FTT's conclusions is unambiguous, we do not consider it to be appropriate to look beyond the decision itself.

59. In the First FTT Decision, the clear conclusions, as set out at [1106], were that the accounts of the LLPs did not comply with GAAP, and the asset acquired under the relevant agreements should be treated as fixed intangible asset to produce profits or losses computed in accordance with GAAP. The FTT continued, that if contrary to its view, the LLP should be regarded as having the film as a current asset, it should be valued at NRV so calculated, and if "we are right and the correct treatment is as a fixed intangible asset, then the combined effect of impairment and onerous contract provision would give rise to the same profit and loss account effect."

60. We find the wording of the FTT's conclusions to be unambiguous. We therefore consider that the FTT explicitly determined how the Rights should be categorised for accounting purposes, and determined that the correct treatment is fixed intangible asset.

Material Other Than the Decision

61. If we are wrong and it is appropriate to look beyond the decision itself, then we consider the FTT reached its conclusion having heard extensive accounting evidence, which included references to FRS 25 and "financial assets" by the experts, as well as the PwC Letter, which discussed when intangible fixed asset treatment would be appropriate. We accept that the relevant accounting standards on this issue were not included in the hearing bundle, and it is our understanding that the experts consistently agreed that the asset in question should be classified as a financial asset. However, the FTT heard the evidence in full, questioned experts and, although some experts resisted the intangible fixed asset classification based on their interpretation of the transactions, the FTT reached different conclusions about the substance of those arrangements.

62. In assessing which accounting model was correct, the approach taken by the FTT was to go further than simply determining whether the asset was "stock" produced for sale or not,

and to consider whether the Rights should be treated as stock or as an intangible fixed asset, ultimately concluding they were the latter.

63. Although the classification of the Rights as either intangible or financial assets was not the central issue being determined, the FTT was presented with a wide range of expert views on the matter. The Tribunal's clear conclusion, that the LLPs had acquired a single fixed intangible asset, was based on its assessment of the substance of the transactions and their rejection of the LLPs' accounting treatment as inconsistent with GAAP.

Matter for Appeal

64. We have considered the UT comments that, strictly speaking, the correct label to be given to the asset acquired by the LLPs in accounting terms is that it is a "financial asset" rather than an "intangible asset". We consider this reinforces our view that the FTT determined "intangible asset" to be the correct label, as opposed to supporting the conclusion that no determination was made.

65. The UT did not consider the correctness or otherwise of the FTT's "intangible asset" label because it was not suggested that anything turned on the correctness or otherwise of the label that the FTT attached to the asset. In our view, it would clearly have been appropriate to challenge the correctness of the FTT's label on appeal. Such a challenge would have provided HMRC with an appropriate opportunity to make their submissions regarding the FTT's use of the incorrect phrase "fixed intangible financial asset" and their view that the FTT was conspicuously wrong on this point. However, HMRC did not appeal this conclusion and we do not consider the arguments made here by HMRC, although they may have amounted to meritorious appeal grounds, provide a proper basis for us to conclude that no such determination was made.

CONCLUSION

66. We have therefore concluded that the FTT has already decided that the Rights are intangible fixed assets.

67. For the reasons set out above, we determine the Scope of Decision Issue in favour of the LLPs based on our conclusion that the FTT has already decided the Asset Classification Issue.

68. We have concluded that the Rights fall to be categorised as "intangible fixed assets" for the purposes of Part 8 of the CTA 2009.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

Release date: 12th AUGUST 2025