of "computer" in tax law (in section 113(1B) TMA 1970[27]) celebrated its 50th anniversary! What HMRC said is, at the least, unforgivably ignorant. ☙

**Richard Thomas***

## Section 104: returns relating to LLP not carrying on business etc with view to profit

### Introduction

It has long been assumed by HMRC and practitioners that limited liability partnerships (LLPs) should be assessed to tax using the partnership provisions in the Taxes Management Act 1970 (TMA 1970). As with many such assumptions, everyone operates perfectly happily on the basis of the assumed state of affairs until someone starts questioning its technical basis. Those questions were first raised directly by the First-tier Tribunal (Tax Chamber) (FTT) in *Mr Martin Margott as representative member of MDL Property Consultants LLP v HMRC* (*MDL Property*),[1] and then in *Inverclyde Property Renovation LLP, Clackmannanshire Regeneration LLP v HMRC* (*Inverclyde* (FTT)).[2]

Section 104(1) of the Finance Act 2020 (FA 2020)[3] (which introduces a new section 12ABZAA TMA 1970) is meant to clarify the situation and to "put beyond doubt that LLPs should be treated as general partnerships under income tax rules".[4] However, at the time of writing,[5] it is unclear whether this section goes as far as promised. In particular, it appears not to address the main issues raised by the FTT's decisions in *MDL Property* and *Inverclyde* (FTT). Fortunately, clarity on those issues has now been provided by the Upper Tribunal's (UT) decision in *HMRC v Inverclyde Property Renovation LLP, Clackmannanshire Regeneration LLP*(*Inverclyde* (UT)),[6] (released on 27 May 2020), albeit that that decision was, of course, made on the basis of the law prior to the introduction of the new section 12ABZAA TMA 1970.[7]

[27] Inserted by FA 1970 Sch.4, para.10.

☙ keywords to be inserted by the indexer

* Retired Judge (and previously member) of the First-tier Tribunal (Tax Chamber) and retired Assistant Director, HMRC.

[1] *Mr Martin Margott as representative member of MDL Property Consultants LLP v HMRC* [2017] UKFTT 894 (TC).

[2] *Inverclyde Property Renovation LLP, Clackmannanshire Regeneration LLP v HMRC* [2019] UKFTT 408 (TC).

[3] FA 2020 s.104(1).

[4] HM Treasury, *Budget 2020* (March 2020), HC 121, available at: *https://www.gov.uk/government/publications/budget-2020-documents* [Accessed 16 October 2020], para.2.262; see also HMRC, Policy paper, *Tax treatment of limited liability partnerships* (11 March 2020), available at: *https://www.gov.uk/government/publications/tax-treatment-of-limited-liability-partnerships/tax-treatment-of-limited-liability-partnerships* [Accessed 16 October 2020].

[5] Time of writing October 2020.

[6] *HMRC v Inverclyde Property Renovation LLP, Clackmannanshire Regeneration LLP* [2020] UKUT 161 (TCC); [2020] STC 1348.

[7] Subject to an onward appeal to the Court of Appeal.

**Legislation**

LLPs are bodies corporate.[8] However, section 863 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA), contains the following deeming provisions:

> "(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit—
>
> (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),
>
> (b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and
>
> (c) the property of the limited liability partnership is treated as held by the members as partnership property.
>
> References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.
>
> (2) For all purposes, except as otherwise provided, in the Income Tax Acts —
>
> (a) references to a firm or partnership include a limited liability partnership in relation to which subsection (1) applies,
>
> (b) references to members or partners of a firm or partnership include members of such a limited liability partnership…."[9]

There are two parts to this. First, if the LLP carries on a trade, etc. with a view to profit, its activities, actions and property are deemed, for income tax purposes, to be those of its members. In other words, the LLP is treated as transparent and its profits and losses are allocated proportionately among its members as if it were a general partnership.[10] Second, references in "the Income Tax Acts" to partnerships and firms include LLPs which fall within the scope of the first deeming provision, and references to members or partners of a firm or partnership include members of such an LLP.[11] Section 1273 of the Corporation Tax Act 2009 (CTA 2009) contains parallel provisions for corporation tax.

TMA 1970 provides for the assessment of general partnerships. In particular:

1. sections 12AA to 12AD TMA 1970 make provision for the submission of returns by partnerships and the making of enquiries into those returns;
2. section 12AA(2) TMA 1970 empowers HMRC to give notice to the partners requiring a person identified in the notice to submit a partnership return;

[8] Limited Liability Partnerships Act 2000 s.1(2).

[9] ITTOIA s.863(3) and (4) provide that subs.(1) continues to apply to an LLP that is no longer carrying on a trade, profession or business with a view to profit if either (a) the cessation is only temporary or (b) it is in the course of being wound up (otherwise than by a liquidation) following a permanent cessation, provided that the winding up is not for reasons connected with tax avoidance and the period of winding up is not unreasonably prolonged.

[10] ITTOIA s.863(1).

[11] ITTOIA s.863(2).

3. the return must, pursuant to section12AB TMA 1970 include a partnership statement showing the amount of income that has accrued to the partnership and each partner's share of that income;
4. where a partnership has submitted a return, section 12AC TMA 1970 empowers HMRC to enquire into it within the relevant time, provided they give notice to the partner who delivered the return;
5. any such enquiry is completed when, under section 28B TMA 1970, HMRC issue a closure notice to the person to whom the notice of enquiry was given;
6. alternatively, in certain circumstances, HMRC can make a discovery amendment in respect of the partnership return under section 30B TMA 1970; and
7. any conclusion or amendment made by closure notice under section 28B TMA 1970, and any amendment under section 30B TMA 1970, may, under section 31 TMA 1970, be appealed to the FTT.

The statutory provisions governing company tax returns and enquiries are found in Schedule 18 to the Finance Act 1998 (FA 1998). These generally mirror the self-assessment rules applicable to individuals and partners in TMA 1970.

As noted above, it has long been assumed that the partnership provisions in TMA 1970 apply to LLPs. By way of example, the Supreme Court in *HMRC v Tower MCashback LLP 1 and another* (*Tower MCashback LLP 1*)[12] took the view that an LLP should be "taxed as if it were an ordinary non-incorporated partnership" and that the "most important provisions of the self-assessment regime, as it applies to LLPs, are to be found in sections 12AA, 12AB, 12AC, 28B, 31 and 31A of TMA 1970".[13] There are, however, two potential problems with that assumption.

First, the deeming provision in section 863(2) ITTOIA, applies to references in "the Income Tax Acts". It is not immediately obvious that the TMA 1970 is one of those Acts:

1. The Tax Acts are defined in Schedule 1 to the Interpretation Act 1978 (IA 1978) as "the Income Tax Acts and the Corporation Tax Acts".
2. Schedule 1 IA 1978, defines the Income Tax Acts as "all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax".[14]
3. Section 118(1) TMA 1970 defines "the Taxes Acts" as "this Act [that is, the TMA 1970] and…the Tax Acts". In so doing, the TMA 1970 appears to draw a distinction between itself (on the one hand) and the Tax Acts (which, pursuant to IA 1978, include "the Income Tax Acts") (on the other). In other words, the definition of the Taxes Acts in section118 TMA 1970, read together with the definitions in IA 1978, appears to indicate that TMA 1970 is not one of the Income Tax Acts.

[12] *HMRC v Tower MCashback LLP 1 and another* [2011] UKSC 19; [2011] STC 1143.
[13] *Tower Mcashback LLP1*, above fn.12, [2011] UKSC 19 at [7]–[8]. The same assumption was made in cases such as *R. (on the application of Amrolia) v HMRC* [2020] EWCA Civ 488 at [8]; *R. (on the application of Cobalt Data Centre 2 LLP and Cobalt Data Centre 3 LLP) v HMRC* [2019] UKUT 342 (TCC); [2020] STC 23 at [121]; and *R. (on the application of Reid and Emblin) v HMRC* [2020] UKUT 61 (TCC); [2020] STC 622 at [31]–[37].
[14] TMA 1970 was enacted before IA 1978. However, IA 1978 Sch.2, para.4(1)(b) (and the lack of a date in the relevant paragraphs of IA 1978 Sch.1) has the effect that the definition of "the Tax Acts" in IA 1978 applies to TMA 1970.

If TMA 1970 is not one of the Income Tax Acts for the purposes of section 863(2) ITTOIA, then references to partnerships, firms and partners in TMA 1970 do not include references to LLPs and their members. In particular, the partnership provisions in TMA 1970 referred to above would not apply to LLPs at all.

The second potential problem is that the deeming provision in section 863(1) ITTOIA only applies where the LLP carries on a trade, profession or business with a view to profit. Where the LLP does not carry on a trade, etc. with a view to profit, then: 1. the first deeming provision does not apply; and so 2. the second deeming provision (in section 863(2) ITTOIA) cannot apply because it only applies to LLPs that fall within the first deeming provision. It follows that where an LLP does not carry on a trade, etc. with a view to profit, then references in "the Income Tax Acts" to partnerships do not apply to such an LLP.

Therefore, even if TMA 1970 is one of the Income Tax Acts, difficulties may arise where it is uncertain whether the LLP in question meets the view to profit test. Suppose an LLP submits a return under the partnership provisions of TMA 1970 on the understanding that it was carrying on business with a view to profit during the relevant period of assessment. HMRC open and close enquiries into that return under the partnership provisions, and then successfully argue, on appeal, that the LLP has not been carrying on business with a view to profit. In those circumstances it would seem that the deeming provisions in section 863(2) ITTOIA do not apply to that LLP and so any references in TMA 1970 to partnerships, etc. do not apply to that LLP. Does that mean that the LLP and HMRC have used the wrong assessment procedure?

**Spring Salmon**

As regards the first of the two problems outlined above, the definition of the Tax Acts was discussed by Lady Smith in the Outer House of the Court of Session in *Spring Salmon & Seafood Ltd v Advocate General for Scotland* (*Spring Salmon*).[15]

That case concerned an application for judicial review of a decision by HMRC to open an enquiry under paragraph 24 of Schedule 18 FA 1998, into the corporation tax affairs of the petitioner. The petitioner argued (amongst other things) that the enquiry notice was invalid because it had not been given in writing. In support of that argument, the petitioner relied on section 832(1) of the Income and Corporation Taxes Act 1988 (ICTA 1988), which stated (at the relevant time): "In the Tax Acts…'notice' means notice in writing…." The Tax Acts were defined in section 831(2) ICTA 1988, for the purposes of that Act, as "…this Act and all other provisions of the Income Tax Acts and the Corporation Tax Acts".

In response, HMRC argued that section 832 ICTA 1988, did not apply to TMA 1970. In particular, section 118 TMA 1970 provided that it and the Tax Acts "were two separate entities". It was further argued that that approach was "demonstrated diagrammatically in the 'family tree' of tax legislation that is set out in the 43rd edition of Tolley's Yellow Tax Handbook, from which it is clear that the expression 'Tax Acts' does not include TMA".[16] Lady Smith agreed, concluding

[15] *Spring Salmon & Seafood Ltd v Advocate General for Scotland* [2004] STC 444 (Court of Session (Outer House)).
[16] *Spring Salmon*, above fn.15, [2004] STC 444 at [22].

that section 832(1) ICTA 1988 did not apply to TMA 1970: "It seems clear that TMA is separate and distinct from the group of statutes referred to as 'the Tax Acts' in that section."[17]

**Bartram**

Another case to consider the definition of "the Tax Acts" was *Bartram v HMRC* (*Bartram*).[18] The issue before the UT (Judge John Clark) was whether an appeal could be made to the Tribunal against a determination under section 28C TMA 1970 (a determination of tax where no return has been delivered). The taxpayer's primary submission was that section 197 of the Finance Act 1994 (FA 1994), which inserted section 28C into TMA 1970, somehow defined a determination as an assessment and that a right of appeal against a determination consequently existed under section 31(1)(d) TMA 1970, because the determination is "any assessment to tax which is not a self-assessment".

The UT rejected that argument. Further, the UT held that even if the taxpayer were correct, section 197(1) FA 1994 only applies for the purposes of "the Tax Acts" and "the Gains Tax Acts" and TMA 1970 was not included in the definition of those Acts. The UT reached that conclusion on the grounds that: 1. section 831(2) ICTA 1988 defined "the Tax Acts" as ICTA 1988, the Income Tax Acts and the Corporation Tax Acts, whereas ICTA 1988 refers to TMA 1970 elsewhere as "the Management Act" (which is not referred to in the definition of the Tax Acts); and 2. section 118(1) TMA 1970 indicates that TMA 1970 itself recognised that it did not form part of the Tax Acts. Consequently, the term "assessment" in section 31(1)(d) TMA 1970 did not include a "determination" made under section 28C TMA 1970, even if the taxpayer were right on his primary submission.

**MDL Property**

The first case to tackle head on the question of which assessment procedure is appropriate for LLPs was *MDL Property*.[19]

In that case, HMRC had issued a notice under section 12AA TMA 1970 requiring the appellant (the representative member of the LLP) to file a partnership return for the tax year 2011–12 by 31 January 2013.[20] On 12 February 2013, HMRC assessed the members of the LLP to penalties under paragraph 25 of Schedule 55 to the Finance Act 2009 (FA 2009) for failure to file the partnership return by the due date. Further penalties were then assessed for the continued failure to file.

On appeal, the FTT (Judge Richard Thomas) expressed surprise at HMRC's failure to address the question of why it was appropriate to issue an LLP with a section12AA TMA 1970 notice to file a partnership return in the first place. The FTT went on to question whether TMA 1970 was in fact part of the Income Tax Acts, referring to the definition of "the Taxes Act" in section 118 TMA 1970 and its apparent distinction between TMA 1970 and the Tax Acts (including,

[17] *Spring Salmon*, above fn.15, [2004] STC 444 at [23].
[18] *Bartram v HMRC* [2012] UKUT 184 (TCC); [2012] STC 2144.
[19] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC).
[20] If filed electronically; the earlier date of 31 October 2012 applied if the return was filed in paper form.

by virtue of IA 1978, the Income Tax Acts) and *Spring Salmon*.[21] The FTT concluded[22] that it was bound by Lady Smith's decision in *Spring Salmon* and that, accordingly, the deeming in section 863(2) ITTOIA did not apply to TMA 1970. As a result, the section 12AA TMA 1970 notice to deliver a return served on the members of the LLP was invalid; there could therefore be no failure to file a partnership return so the penalties fell away.

Nevertheless, Judge Thomas was not entirely comfortable with the conclusions in *Spring Salmon* and set out his own views on the definition of the Income Tax Acts in an appendix to the decision.[23] There he noted that, had it not been for *Spring Salmon*, he would have found that the reference to the Income Tax Acts in section 863(2) ITTOIA*does* include TMA 1970. This was on the grounds that: 1. the phrase "relating to income tax" in the definition of the Income Tax Acts in IA 1978 is extremely wide and there is no clear reason for distinguishing between substantive law (for example, in ITTOIA) and "adjectival law" in TMA 1970, the provisions of which relate to income tax; and 2. the definition in section 118 TMA 1970 applies exclusively for the purposes of TMA 1970 and should not be taken to affect ITTOIA.

**Inverclyde in the FTT**

Around a year and a half later,[24] the issue was raised again in a preliminary hearing before the FTT (Judge Ruthven Gemmell) in *Inverclyde* (FTT).[25]

In that case, the appellant LLPs had submitted returns under TMA 1970 partnership provisions. HMRC then issued enquiry notices and closure notices, also under TMA 1970 partnership provisions, and sought to amend the partnership returns on the basis that the LLPs were not, in fact, carrying on business with a view to profit.[26] It followed, HMRC said, that the deeming provision in section 863(1) ITTOIA did not apply and that the LLPs should be taxed as corporate entities. Whilst, strictly, this meant that the LLPs ought to have filed company tax returns, HMRC maintained that, having received a partnership return from the LLPs, they were perfectly entitled to open and close their enquiries under the partnership provisions as well.

The LLPs argued that, regardless of whether they met the view to profit test, HMRC should have assessed them using the corporation tax provisions in paragraph 24 of Schedule 18 FA 1998, and that if HMRC had wanted to challenge the returns of any of the LLPs' members they should have opened enquiries into those returns under section 9A TMA 1970.[27] This, argued the LLPs, solved the problem of determining which provisions an LLP should be assessed under where HMRC contend that the LLP is not carrying on a business, etc. with a view to profit (so that the first deeming, in section 863(1) ITTOIA, does not apply), because the corporation tax assessment provisions would apply to LLPs in all circumstances.

[21] *Spring Salmon*, above fn.15, [2004] STC 444.
[22] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC) at [47] by reference to *National Exhibition Centre Ltd v HMRC* [2015] UKUT 23 (TCC) at [30]–[34].
[23] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC) at [107]–[128].
[24] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC) was released in December 2017; *Inverclyde (FTT)*, above fn.2, [2019] UKFTT 408 (TC) was released in June 2019.
[25] *Inverclyde* (FTT), above fn.2, [2019] UKFTT 408 (TC).
[26] The substantive appeal concerned a dispute between the LLPs and HMRC regarding the quantification of the LLPs' claims for Business Property Renovation Allowance under CAA 2001 Pt 3A.
[27] *Inverclyde* (FTT), above fn.2, [2019] UKFTT 408 (TC) at [21].

Ultimately, the LLPs succeeded with that argument on the basis that the deeming provision in section 863(2) ITTOIA applies only to the "Income Tax Acts" and TMA 1970 is not one of those Acts. Like the Tribunal in *MDL Property*, the FTT in *Inverclyde* (FTT) relied on Lady Smith's conclusions in *Spring Salmon*, albeit that the FTT in *Inverclyde* (FTT) did not reach a view about whether or not it was bound by decisions of the Outer House of the Court of Session, but simply concluded that it agreed with Lady Smith's judgment and considered it to be good law. The FTT did, however, conclude that it was bound by the UT's decision in *Bartram*, relying on Judge John Clark's statements to the effect that the definition of the Taxes Acts in section 118 TMA 1970 clearly indicated that TMA 1970 itself was not one of the Taxes Acts.

It seems that the FTT was particularly persuaded by the notion that the LLPs' interpretation made the statutory framework workable in circumstances where it might not always be clear whether a given LLP meets the view to profit test (and so falls within the scope of the section 863 ITTOIA deeming). The judge concluded that HMRC should always conduct enquiries into LLPs using the company provisions in FA 1998 and that HMRC would have to issue separate enquiries under section 9A TMA 1970 to individual members.[28]

It seems to be a common misconception that this case hinged on whether the LLPs were carrying on business with a view to profit. In fact, as noted above, the FTT found that their conclusion applied *regardless* of the entities' activities; the central point was whether the TMA 1970 was one of the Income Tax Acts.

**Section 104 of the Finance Act 2020**

The Budget 2020 announced the introduction of clause 101 of the Finance Bill 2020 (FB 2020) (now section 104 FA 2020) as a provision that would clarify that "HMRC can continue to amend LLP members' tax returns where the LLP operates without a view to profit".[29] HMRC's policy paper states that the measure "preserves…the status quo for the vast majority of [LLP] customers that operate with a view to profit who will not experience any change at all".[30] The measure came into force from the date of Royal Assent to FB 2020 and will apply both prospectively and retrospectively. The description below is based on the version of the Bill presented to the House of Lords which became FA 2020.

Section 104 FA 2020 introduces a new section 12ABZAA into TMA 1970. That section applies where: 1. a person delivers a "purported partnership return"[31] on the basis that the activities of the LLP are treated, under section 863 ITTOIA or s.1273 CTA 2009, as carried on in partnership by its members; but (ii) the LLP does not actually carry on business with a view to profit in the relevant period. Where the section applies, for the purposes of sections 12AC and 28B TMA 1970 (enquiries into partnership returns) and Part 4 FA 2014 (follower notices and accelerated payment notices), and "any enactment relating to, or applying for the purposes of"[32] those enactments, the return is to be treated as a partnership return and the terms "partnership" and "partners" are to include LLPs that fall within section 12ABZAA and such LLPs' members.

[28] *Inverclyde* (FTT), above fn.2, [2019] UKFTT 408 (TC) at [125]; see also [130].
[29] HM Treasury, *Budget* 2020, above fn.4, para.2.262.
[30] HMRC, Policy paper, above fn.4, under "Background to the measure".
[31] FA 2020 s.104(1) inserting TMA 1970 s.12ABZAA(1)(a).
[32] FA 2020 s.104(1) inserting TMA 1970 s.12ABZAA(3)(b).

The amendment is to be treated as "always having been in force".[33] However, there is a carve out for cases where: 1. before 11 March 2020, a court or tribunal determined, in proceedings to which an LLP was party, that the purported partnership return was not a return under section 12AA TMA 1970[34]; and 2. at the beginning of 11 March 2020, the order of the court or tribunal giving effect to that determination had not been set aside or overturned on appeal.[35]

In addition, amendments are made to Part 1 of Schedule 14 to the Finance (No.2) Act 2017 (F(No.2)A 2017) (digital reporting and record keeping for income tax, etc.), extending the new section 12ABZAA TMA 1970 so that it applies to returns purportedly made under Schedule A1 TMA 1970. Those amendments take effect from the date of the commencement of Schedule 14 F(No.2)A 2017.[36]

Although there is no reference to it in the Budget 2020,[37] the Treasury impact note,[38] or the Explanatory Notes to FB 2020,[39] it is widely believed that this provision is being enacted in response to the FTT's decisions in *Inverclyde* (FTT) and *MDL Property*.[40] However, section 104 FA 2020 does not address one of the main issues raised in those cases, namely whether the reference in section 863(2) ITTOIA to "the Income Tax Acts" includes TMA 1970. In addition, it appears that section 104 FA 2020 fails to address the situation where HMRC issue a notice to deliver a return under section 12AA TMA 1970 on the understanding that the LLP was carrying on a trade, etc. with a view to profit during the assessment period when, in fact, it was not (the issue in *MDL Property*[41]): section 12ABZAA TMA 1970 will only apply where a "purported partnership return" has been delivered, and so it does not rule out the possibility of challenging a notice to submit a partnership return on the basis that the LLP is not trading, etc. with a view to profit. Fortunately, the UT's decision in *Inverclyde* (UT), released on 27 May 2020,[42] appears to provide some guidance on those issues.

**Inverclyde in the UT**

The UT (Lord Tyre and Judge Raghavan) confirmed that the central issue on appeal was the proper interpretation of section 863(2) ITTOIA and, in particular, whether the phrase "the Income Tax Acts" is capable of including provisions in TMA 1970 concerned with income tax. The UT went on to answer that question in the affirmative. In particular, the UT held as follows:

[33] FA 2020 s.104(2).
[34] FA 2020 s.104(3)(a).
[35] FA 2020 s.104(3)(b).
[36] No date has yet been appointed for the commencement of F(No.2)A 2017 Sch.14 and so the amendments made to that schedule by FA 2020 s.104 have yet to come into effect: see F(No.2)A 2017 s.61(6).
[37] HM Treasury, *Budget 2020*, above fn.4.
[38] HM Treasury, *Impact on households: distributional analysis to accompany Budget 2020* (March 2020).
[39] HM Treasury, *Finance Bill Explanatory Notes* (19 March 2020).
[40] *Inverclyde* (FTT), above fn.2, [2019] UKFTT 408 (TC); *MDL Property*, above fn.1, [2017] UKFTT 894 (TC). See, for example, Chartered Institute of Taxation (CIOT), *Representation to the Finance Bill 2020 Public Bill Committee* (2020), available at: *https://www.tax.org.uk/sites/default/files/FB2020%20CIOT%20PBC%20Submission%20Clauses%20100-101%20Tax%20Administration%20FINAL.pdf* [Accessed 23 October 2020], para.4.1 where the CIOT refers to *Inverclyde* (FTT).
[41] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC).
[42] *Inverclyde* (UT), above fn.6, [2020] UKUT 161 (TCC).

1. Section 1 IA 1978[43] states "that every section of an Act takes effect as a substantive enactment without introductory words". This section, read together with *The Wakefield and District Light Railways Co v The Wakefield Corp*,[44] indicates that the concept of an enactment is not limited to whole Acts, parts or even sections of an Act. Instead, any provision, regardless of length, which achieves a distinctive objective, may be "an enactment".
2. It follows that the definition of the Income Tax Acts in IA 1978, which refers to "all enactments relating to income tax", should be read as referring not only to whole Acts relating to income tax, but also to any section of an Act relating to income tax, for example, the income tax provisions of TMA 1970.
3. The definition of the Tax Acts in section 118(1) TMA 1970 does not indicate a distinction between TMA 1970 and the Taxes Acts. As the reference to "the Tax Acts" in section 118(1) TMA 1970 includes sections of TMA 1970 relating to income tax, any overlap with the scope of the reference to "this Act" is of no practical significance. Further, TMA 1970 contains provisions capable of applying to other taxes (for example, capital gains tax), so the reference to "this Act" is not otiose.

This provides an answer to the question considered by the FTT in both *Inverclyde* (FTT)[45] and *MDL Property*[46] about the scope of the phrase "Income Tax Acts" in section 863(2) ITTOIA and confirms that references in TMA 1970 to partnerships and partners include references to LLPs and their members (provided that the LLP meets the view to profit test).

The UT went on to consider the practical implications of that conclusion and how section 863(1) ITTOIA operates in light of it. In doing so, the UT explored the following scenarios:

1. Where an LLP is carrying on trade, etc. with a view to profit, section 863(1) and (2) ITTOIA apply. The LLP is treated as transparent and returns should be submitted under section 12AA TMA 1970, with enquiries opened under section 12AC TMA 1970 and closed under section 28B TMA 1970.
2. Where an LLP is not carrying on a trade, etc. with a view to profit, section 863(1) and (2) ITTOIA do not apply to it. The LLP is not treated as transparent and is liable to corporation tax on its profits. TMA 1970 does not apply to the LLP and the process for the submission of company tax returns, enquiries and closure notices in Schedule 18 FA 1998 should be followed.
3. Where an LLP submits a partnership return on the basis that section 863 ITTOIA applies to it, but it is subsequently found (during an enquiry or on appeal) that it is not carrying on a trade, etc. with a view to profit, that finding does not retrospectively invalidate the notice to submit a return, the submission of the return, or the opening or closing of the enquiry under the partnership provisions. The UT

[43] And its predecessor the Interpretation Act 1889 s.8.
[44] *The Wakefield and District Light Railways Co v The Wakefield Corp* [1906] 2 KB 140. In that case, Ridley J stated that "[t]he word 'enactment' does not mean the same thing as 'Act'. 'Act' means the whole Act, whereas a section or part in an Act may be an enactment" (at 145–146).
[45] *Inverclyde* (FTT), above fn.2, [2019] UKFTT 408 (TC).
[46] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC).

relied on the broad scope of section 12AC(4) TMA 1970, which extends the enquiry to "anything contained in the return", which, in the UT's view, is capable of encompassing a conclusion that the wrong return has been submitted. If the conclusion is reached that the LLP is not carrying on a trade, etc. with a view to profit, then the officer may begin what s/he regards as the correct process by issuing a notice under paragraph 3 of Schedule 18 FA 1998 requiring the delivery of a company tax return. Going forward, this type of scenario should be covered by the new section 12ABZAA TMA 1970 (introduced by section 104(1) FA 2020).

4. When a notice requiring a return to be submitted is due to be issued, but it is unclear whether or not the LLP was carrying on business with a view to profit during the relevant period, it is reasonable for the officer requiring the submission of a return to proceed on the basis that the LLP falls within section 863(1) ITTOIA. This provides an answer to the question in *MDL Property*,[47] which section 104 FA 2020 does not appear to address.

**Conclusion**

Section 104 FA 2020 does provide some clarity in situations where an LLP has submitted a partnership return on the mistaken basis that it is carrying on a trade, profession or business with a view to profit during the relevant assessment period. The UT's decision in *Inverclyde* (UT)[48] provides answers to some of the issues not addressed by that section. ☙

**Emma Pearce***

[47] *MDL Property*, above fn.1, [2017] UKFTT 894 (TC).
[48] *Inverclyde* (UT), above fn.6, [2020] UKUT 161 (TCC).

☙ keywords to be inserted by the indexer

* Pump Court Tax Chambers.