TC07716

Member of an LLP – NICs liability - payments made before Finance Act 2014 treated as self-employment income — section 863 ITTOIA – whether a member of an LLP could be an employee of the LLP - Section 4(4) Limited Liability Partnerships Act 2000

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05515

BETWEEN

PETER WILSON **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER

Sitting in public at Taylor House on 2 March 2020

Ms Rebecca Murray and Ms Marianne Tutin, counsel, instructed by Born & Co. for the Appellant

Ms Laura Prince, counsel, instructed by Haroon Khalid, litigator, of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Wilson appeals under Section 11 of the Social Security Contributions (Transfer of Functions etc.) Act 1999 ("the 1999 Act") against a decision made by HMRC under section 8 of the 1999 Act on 21 March 2018 that he was self-employed and therefore liable to pay National Insurance Contributions ("NICs") in respect of payments made to him resulting from his engagement with Haines Watts LLP ("Haines Watts") for the period 31 October 2012 to 31 March 2014. Mr Wilson maintains that he should be taxed as an employee of Haines Watts at the relevant time. (The relevant law does not include the changes made to the taxation of LLP partners made in section 74 Finance Act 2014 and the National Insurance Contributions Act 2014.)

2. HMRC have agreed to stand over the collection of income tax until the final determination of the current appeal.

BACKGROUND

3. In November 2011 Mr Wilson joined Haines Watts. On that day he signed an LLP agreement ("the LLP Agreement") and a deed of variation ("the Deed of Variation") and a side letter was written to him by three members of Haines Watts on behalf of the firm ("the Side Letter").

4. By the middle of 2012 Mr Wilson was in dispute with Haines Watts about a possible capital contribution and the amount of payments due to Mr Wilson. In January 2013 he started to query the basis of payments made to him by Haines Watts and whether they were correctly described as "profit share". He left Haines Watts on 31 March 2014 and remains in dispute about whether he or Haines Watts are liable to pay the tax due on payments made to him.

5. During 2014 there was an exchange of correspondence between HMRC and Mr Wilson and then his accountants, Born & Co, concerning his employment status. Mr Wilson maintained that it was Haines Watts' responsibility to pay the NICs and income tax in relation to payments made to him as he was an employee at the relevant times.

6. On 20 August 2015 HMRC wrote to Mr Perry, the Managing Member of Haines Watts, to ask about the terms of Mr Wilson's engagement with Haines Watts. Mr Perry replied in a letter dated 30 October 2015. A meeting was held between HMRC officers, Mr Perry and another Haines Watts member on 23 February 2017. In two letters dated 27 March 2017 from HMRC to Born & Co and Mr Perry, HMRC concluded that Mr Wilson was self-employed throughout his engagement with Haines Watts and was therefore responsible for paying his NICs and income tax.

7. On 12 June 2017 Born & Co wrote to HMRC to ask for the opinion in the letter of 27 March 2017 to be revisited. In a reply dated 27 September 2017 HMRC asked for further documentation to be provided. In letters dated 31 January 2018 to both Mr Perry and Born & Co HMRC confirmed the opinion that Mr Wilson was self-employed at the relevant times. Born & Co disputed HMRC's analysis in a letter dated 6 February 2018.

8. The decision which is appealed was issued in a notice of decision dated 21 March 2018. Born & Co requested an independent review in a letter dated 9 April 2018. The review upheld the notice of decision in a letter dated 30 July 2018.

PRELIMINARY ISSUE

9. The appeal was due to be heard by a panel consisting of a member and me. However, at the start of the hearing the member explained that he had previously been a partner of the Haines Watts partnership before its incorporation as an LLP. He had left the firm more than

20 years ago and did not know any of those involved with this case. Having regard to the overriding objective of dealing with a case fairly and justly the member stood down. I was satisfied that the overriding objective would be met by continuation of the hearing before me, sitting alone, and the parties made clear that they were content to proceed on this basis.

GROUNDS OF APPEAL

10. Mr Wilson maintains that having regard to the terms on which he joined Haines Watts, the controls applied to him in his work, and the provision of equipment and administrative support, if Haines Watts was a partnership he would be regarded as employed by the partnership. As a result of Section 4(4) of the Limited Partnerships Act 2000 (the LLPA") he could and should be regarded as an employee of Haines Watts and taxed as such.

BURDEN OF PROOF

11. In an appeal against an assessment for tax (including NICs), the burden is on the appellant to show that the sums charged to tax by the assessment are excessive. That was confirmed by Mustill LJ in *Brady (Inspector of Taxes)* v *Group Lotus Car Companies plc* [1987] STC 635, at 642, as follows:

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornthwaite & Sons Ltd* v *Kelly (Inspector of Taxes)* (1927) 11 TC 657."

12. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

EVIDENCE

13. The evidence consists of the agreed bundle of documentary evidence running to F721 as set out in the index, as well as: (i) the oral evidence of Mr Wilson; and (ii) the oral evidence of Mr Matthew Perry who appeared as witness for HMRC. Both of the witnesses were cross-examined.

14. For the reasons I explain later in this decision, I have reduced the weight given to the evidence of both Mr Wilson and Mr Perry in their Witness Statements and provided orally at the hearing in relation to their understanding of the deal pursuant to which Mr Wilson joined Haines Watts. For that reason I have given greater weight to other evidence, and in particular, the documents relating to that deal.

FINDINGS OF FACT

Background

15. Haines Watts is a limited liability partnership ("LLP") incorporated in England on 21 April 2011.

16. Mr Wilson qualified as a chartered accountant in Australia in 1975 and then completed a Master's degree in commerce, specialising in law and taxation law at the University of New South Wales in 1978/79. In 2006 he obtained a Masters in Taxation from the University of New South Wales. He completed a postgraduate law conversion course in the UK in July 1995 and in 1996 qualified as a chartered accountant in England. He was awarded a Doctorate in commercial law by Queen Mary College, University of London in 2017. (Despite his Doctorate he is referred to as Mr Wilson throughout the documents in this case and I therefore use the same title for him.) He became a fellow of the ICAEW in 2018. He currently researches and publishes papers regarding BRICS international tax law.

17. Mr Wilson has worked as a tax adviser for accounting firms as well as a mining and petroleum company. He was a partner of Arthur Young Australia, before relocating to Ernst &

Young New York to work in that firm's global tax desk cluster in 1991. He relocated to London in September 1993 and worked for Sumitomo Bank providing international taxation consulting advice. He then returned to Ernst & Young in New York in September 1995 as a partner, advising on US international tax law and Australian international tax law, and co-ordinated Ernst & Young's global oil and gas tax practice. He returned to London in 1996 and became a partner in Price Waterhouse focusing on cross-border international taxation law. After a brief period between 2000 and 2003 as an employee of a pensions administration group, Mr Wilson returned to Australia and, together with a Sydney-based chartered accountant, established a firm called Gateway Partners Pty Ltd ("GPP") to acquire and operate Sydney accounting firms. Shares were issued to international investors and in late 2008 the shareholders established a parallel company called Gateway Partners UK Limited ("GPUK") to acquire and operate London accounting firms.

18. Mr Wilson guaranteed debt finance provided to GPP and in 2010 and 2011 provided personal guarantees for facilities provided to GPUK.

19. In 2011 the non-executive shareholders in GPUK notified Mr Wilson that they wanted GPUK to be sold.

20. Discussions were held with another firm of accountants operating through an LLP about the purchase of GPUK. In those negotiations it was proposed that Mr Wilson would become a salaried (non-equity) member on a fixed salary together with a bonus entitlement and no management rights. Those negotiations were not successful. Shortly afterwards negotiations with Haines Watts started.

Negotiations with Haines Watts

21. By October 2011 GPUK was struggling to meet its liabilities. Mr Wilson prepared a file note on 20 October 2011 with his personal liability as a director in mind, describing GPUK's finances as being in a "parlous state". He described commercial negotiations regarding the amount to be paid by Haines Watts for the GPUK business and an agreement that Haines Watts would pay for GPUK over a period of five years, with an upfront payment and monthly balance for ongoing client work. Haines Watts would pay for what he described as "consulting work" at market value when he retired, or left Haines Watts, as it was considered to be the only fair way to value it, since not all of it would be for current GPUK clients.

22. Evidence from Mr Perry and Mr Wilson shows that it was agreed between Haines Watts and Mr Wilson that he would replace an outgoing tax practitioner. Haines Watts did not have a separate international tax department at the time and the deal was for Mr Wilson to develop such a department. Haines Watts would take over the relationships with old GPUK accounting clients and would provide all administrative assistance, staff, furniture, services etc. to allow Mr Wilson to concentrate on building the international tax business.

23. Mr Wilson's meeting notes show that in initial negotiations with Haines Watts, he asked for a package which had been offered by the previous possible buyer of GPUK, involving a payment to him of £15,000 per calendar month net of taxes (with Haines Watts paying the tax and NICs to HMRC directly), £5000 for car parking, other normal staff benefits and a bonus equal to 10% of Haines Watts' profits. The £15,000 per month equated to £180,000 per year and was estimated to reflect an amount before tax of approximately £320,000 per year.

24. However, Haines Watts were of the view that, as Mr Wilson would have no interest in the accounting and other services provided by the firm, it made no sense for him to have a financial interest in the firm as a whole. Haines Watts wanted to incentivise Mr Wilson to build up the tax practice and offered him what Mr Wilson described as a bonus of 25% of the fees from international tax invoices after deduction of Mr Wilson's pre-tax equivalent of

approximately £320,000 plus car costs, etc. He said in his meeting notes that Haines Watts took the view that the remaining 75% of the international tax invoices would compensate Haines Watts for the provision of administrative assistance, staff, furniture and services and resisted Mr Wilson's request for a 50/50 split. He then said that he agreed to the proposal of a 25% share in the profits of the international tax practice.

25. The meeting notes use both the terms "fees" and "profits" in describing the deal to divide the return from the international tax practice, but they are not legal documents. The final deal set out in the Deed of Variation referred to "profits" and I am satisfied that drafting reflected the parties' intentions as I explain below.

26. The meeting notes also show that the value of the GPUK international tax practice was accepted by Haines Watts to be around £300,000 and the value of the international tax practice to be contributed by Haines Watts was to be no less than £100,000, in each case based on estimates of annual chargeable time.

27. Those notes say that Mr Wilson understood that £400,000 of chargeable time per year was an objective under the deal (reflecting the contributions of both parties to the international tax practice), but there would be no financial detriment to him if that target was not met. This was not in fact reflected in the final documents and Mr Wilson recognised at the hearing that in the wording of the payment clause in those documents (addressed further below) he faced a reduction in the amount of £180,000 if the chargeable hours' target was not met.

28. In an email dated 7 October 2011 Mr Perry set out a proposed structure for the purchase of GPUK and engagement of Mr Wilson. It was recognised that Mr Wilson wished to focus on international tax work without the added burden of general practice management. The proposal for Mr Wilson was that he would receive "first charge drawings of £15,000 per month based on a minimum requirement of 1000 recoverable hours at £400 per hour"; car expenses of £5000 per annum and parking; private medical and critical illness cover. Mr Wilson's tax liability would be paid by Haines Watts. Specialist tax staff would be recruited to support the growth of international tax work and he would receive 25% of the profits from that work (after his first charge and the cost of his other benefits). That was stated to be a "more suitable and focused reward compared to sharing profits with 11 equity partners".

29. Mr Wilson was offered a compensation structure in which he would be employed through GPUK, but in an email from Mr Wilson to Mr Perry on 19 October 2011 he declined that suggestion as he said that he wanted his tax affairs to be "simple and self-evident". Mr Wilson stated that his very clear preference was "to be a partner in your LLP and be compensated as we have discussed as an individual partner in the LLP".

30. By 21 October 2011 Mr Wilson had received the LLP Agreement and Deed of Variation for comment. On that day Mr Wilson suggested in an email that a side letter should be prepared to deal with his desire to retire 10 years after joining Haines Watts rather than amend the Deed of Variation. On 23 October 2011 Mr Wilson emailed a draft side letter covering his position on retirement to Mr Perry.

The November Documents

31. On 1 November 2011 GPUK was sold to a limited company which licensed the use of GPUK's goodwill to Haines Watts.

32. On the same day the LLP Agreement, Deed of Variation and Side Letter were entered into:

> (1) Three "Client Members", three "Management Members" and Mr Wilson (who was also identified as a "Client Member" in schedule 1) entered into the LLP Agreement;

(2) Mr Wilson entered into the Deed of Variation with the three Management Members who had signed the LLP Agreement; and

(3) The same three Management Members wrote the Side Letter setting out further variation of the LLP Agreement.

33. Taken together the three documents are referred to by me as the "November Documents".

34. In the LLP Agreement "Members" are defined as meaning the Designated Members, the Client Members, the Management Members and the Managing Member or, as the context may require, any of them and such other or additional parties as are admitted as members of the LLP in accordance with the agreement.

35. A Client Member is defined as those listed as such in Schedule 1 to the LLP Agreement together with such additional Client Members who are appointed as such under the LLP Agreement. The list states three signatories to the LLP Agreement and Mr Wilson.

36. A Management Member is defined as those listed as such in Schedule 1 to the LLP Agreement together with such additional Management Members who are appointed as such under the LLP Agreement. Three other Members are listed as Management Members in Schedule 1 and the list included Mr Perry.

37. The Managing Member is defined as the person appointed as such and Schedule 1 states that Mr Perry was the Managing Member.

38. The LLP Agreement provides (in clause 3) that the Client Members shall devote the whole of their time and attention to client matters and the day-to-day management of the LLP business as requested by the Management Members and shall use their best endeavours to further the interests of the LLP Business and promote all aspects of the LLP Business.

39. The LLP Agreement provides that the Management Members are stated to be responsible, together with the Managing Member, for establishing the detailed local commercial strategy that the LLP shall follow.

40. The Deed of Variation varies the LLP Agreement. It introduces a new defined term of "Fixed Income Member" as any Member who executed the Deed of Variation and is defined in the Deed of Variation as a Fixed Income Member. Mr Wilson is defined as the Fixed Income Member for the Deed of Variation.

41. The Deed of Variation removed specific voting rights for Mr Wilson, but others under the LLP Agreement remained. It removed some rights under the LLP Agreement and left others. It substituted a right to request and be given financial information about the LLP for an absolute entitlement to receive financial information. It provided a specific basis of calculating payments to Mr Wilson and an indemnity from the other Client and Management Members to him. It did not alter the definition of Client Member or exclude Mr Wilson from that list.

42. Schedule 4 to the LLP agreement lists Members' "First Charges" and shares of profits after the First Charges. Mr Wilson is listed together with one other under the category of Client Member whose entitlements are stated to be determined "in accordance with deeds of variation". One other Client Member and the three Management Members had a fixed amount stated as their First Charges. Profits after deduction of the First Charges were only split between the three Management Members.

43. He was therefore not the only Member to have their position under the LLP Agreement determined through amendments in a deed of variation. The listing in Schedule 4 under the

heading "Client Members" emphasises the fact that Members continued to be Client Members even though two of them had their position determined via deeds of variation.

44. Despite these findings Mr Wilson contends that he was not a Client Member. He relies in part on the wording of an indemnity inserted into the LLP Agreement by the Deed of Variation.

45. That indemnity was poorly drafted. It stated that the "Client Members and Management Members … undertake jointly and severally with each Fixed Income Member to pay and discharge all liabilities and to perform all the obligations of the Partnership whensoever and howsoever arising and to indemnify each Fixed Income Member…".

46. On the face of it the wording of the additional indemnity results in Fixed Income Members indemnifying themselves by virtue of also being Client Members. As this leads to an absurdity the general rules of construction of such drafting would mean that in practice the indemnity would be applied so that Fixed Income Members could take the benefit of an indemnity from the other Client Members and Management Members. In addition, the LLP Agreement contains a clause specifying that if any provision of the LLP Agreement (and the indemnity was added to the LLP Agreement by the Deed of Variation) was found to be void or unenforceable in whole or part the remainder of the Agreement and the provisions would continue to be valid.

47. I find that the poor drafting of the Deed of Variation indemnity is insufficient basis to conclude that the intention was to exclude Fixed Income Members, and in particular, Mr Wilson, from being Client Members, given the ability to apply it sensibly and given the findings made about the definitions used in the LLP Agreement described in paragraphs 34-42 above.

48. Given the definitions used, the nature of the changes made by the Deed of Variation (described in detail below) and the listings in Schedules 1 and 4 of the LLP Agreement, the combined effect of the LLP Agreement and the Deed of Variation was to make Mr Wilson a Member, a Client Member (albeit with some amended rights, liabilities and obligations) and a Fixed Income Member.

49. I now address the effect of the November Documents in more detail.

Voting

50. The Deed of Variation removes Mr Wilson's entitlement to vote in relation to the following matters: admission of new Members, variation or amendment of the LLP Agreement; provisions dealing with the valuation of any created goodwill or write back of prior years amortisation in the books of Haines Watts on retirement or removal of a Member; changing the requirement that 21 days' written notice must be given for Members' meetings; variation of the First Charges (see below) and shares of the Haines Watts profits; deciding the monthly cash withdrawals which Members could receive on account of their First Charges and shares of the Haines Watts profits; removal of any Member or removal of a Managing Member from that office; payments made to outgoing Members outside the terms of the LLP Agreement; any decision to allow a suspended member a share of the Haines Watts profits while on suspension; any proposal to vary the LLP Agreement provisions which applied to permit a leaving Member to deal with specific clients in consideration of payment to the LLP; and permitting a Member to sell, charge or otherwise dispose of their interest in Haines Watts' undertaking and assets.

51. The LLP Agreement and Deed of Variation left Mr Wilson with a vote on: the appointment of Management Members, the appointment or removal of Designated Members; decisions altering the provisions dealing with bank signatories; applications for an overdraft or other borrowing from Haines Watts' bankers or any other financial institution; the location where the Haines Watts business would be carried on; investment in or lending to clients by

any Members; any Member or member of their family accepting appointments with clients; extending Members' sick leave and maternity leave; waiver of a reduction of a Client Member's entitlement to profit share on sick leave or maternity leave; suspending any Member; serving notice on a Member after specified periods of sick leave or maternity leave; determining the period in which a leaving member should cease performing his duties after having given notice of early retirement or resignation..

52. A meeting of the Members could be called by at least 25% in number of all the Members (which included Mr Wilson). He was entitled to be sent minutes of meetings of Members and to be sent 21 days' written notice of meetings (unless otherwise agreed by a vote from which he was excluded). If he attended a meeting of Members he was entitled to have one vote on the matters escribed above and could appoint a proxy or act as proxy. The quorum for meetings of Members was a majority of the Client Members including Mr Wilson and a majority of the Management Members.

53. The LLP Agreement provided for the Haines Watts accounts to be laid before a meeting of the Members, including Mr Wilson, for approval by, and to be distributed to, Members as required by the Companies Act.

54. The remaining voting rights which Mr Wilson was entitled to exercise were therefore significant and substantial.

55. A change to the nature of the business of Haines Watts required agreement in writing by the parties to the LLP Agreement including Mr Wilson.

56. Mr Wilson retained a right of veto (along with the other Members) on any decision to change the maximum number of Members from 20.

Other rights and obligations

57. As a Member Mr Wilson could sign cheques, promissory notes and other instructions to Haines Watt's bankers together with any other Member, although in practice he did not do so.

58. The LLP Agreement provisions dealing with the following matters applied to Mr Wilson:

(1) conflicts of interest;

(2) Members' holiday entitlements which were greater than that of employees at Haines Watts;

(3) restrictive covenants;

(4) the limitation on no more than two Members being permitted to retire early although the Side Letter gave him an absolute right to retire on 1 November 2021;

(5) the position of a Member who was in receipt of benefits under a permanent health insurance policy for more than six months under which the Members could remove that Member after a vote by giving notice in writing requiring him to retire on ill-health grounds;

(6) absence on sick leave for longer than the permitted periods under the LLP Agreement enabling the other Members to serve notice on that Member;

(7) dealing with the preparation of financial accounts for the LLP to the date of a Member leaving and the payment of interim payments calculated by reference to the estimate of the amount that would be due to the outgoing member once those accounts have been finalised,

(8) entitlement on leaving Haines Watts to receive a sum or sums representing a Member's proportion of contingent fees in respect of any work commenced while he was a Member;

(9) suspension of entitlement to profits;

(10) sick leave and entitlement to profits after specified periods of absence on sick leave;

(11) confidentiality provisions;

(12) the provision of life assurance policies to be in force for all of the Members and for the cost to be borne by Haines Watts;

(13) an indemnity from Haines Watts in respect of payments made or personal liabilities incurred by him in the performance by him of his duties as a Member in the ordinary and proper conduct of Haines Watts' business;

(14) the ability to charge and be refunded all out-of-pocket expenses properly incurred by him in connection with the LLP business (subject to any upper limits decided upon by the Members (including Mr Wilson));

(15) dispute resolution provisions;

(16) the irrevocable appointment of any Management Member or the Managing Member to be his attorney on ceasing to be a Member for specified purposes, such as approval of the annual accounts;

(17) to charge reasonable motor car running expenses, professional subscriptions and reasonable telephone expenses to the LLP. The Deed of Variation did not amend the clause in the LLP Agreement dealing with these amounts even though his payment clause made specific provision for car expenses;

(18) restrictions on him, and members of his family, investing in or lending to any client of Haines Watts or related Haines Watts' entities, or accepting any appointments in any capacity with a client of Haines Watts or other Haines Watts entities where the service required by the client was available through the usual service departments operated by Haines Watts or other Haines Watts entities.

59. The LLP Agreement states that at incorporation each of the Members acquired a share in the LLP in accordance with the amount or value of his contribution to the LLP. However, Mr Wilson was not a Member at the time of incorporation of the LLP.

60. Provisions in the LLP Agreement dealing with the following matters did not apply to Mr Wilson:

(1) The requirement to provide additional capital to Haines Watts following the decision that such was required by the Designated Member;

(2) Revaluation of Haines Watts premises and investments and allocation to Members' capital or current accounts on the death, retirement or removal of a Member or admission of a new Member;

(3) the scaling down of allocations of First Charges where the LLP profits were insufficient to pay all of the First Charges (see later);

(4) those provisions which dealt with the situation where, notwithstanding the undertaking of all Members not to sell or otherwise dispose of their interest in Haines Watts, such a sale or disposal took place with the unanimous agreement of all of the Members.

61. Mr Wilson was excluded from sharing in the beneficial interest of Haines Watts in any investment in any Haines Watts' company and from sharing in the repayment of professional indemnity funds retained to meet claims against Members.

62. Mr Wilson was bound by a list of mutual undertakings between the Members, including undertakings to employ himself for the greatest advantage of Haines Watts, to promptly disclose any circumstances or events which could give rise to a claim against Haines Watts; that neither he nor his personal representatives would sell, charge, or otherwise dispose of all or any part of his interest in Haines Watts or its assets; punctually to pay and discharge personal debts and obligations and to indemnify the other Members against such debts and obligations and any actions respect thereof; not without the prior approval of the Members to engage or dismiss any employee or trainee; and not without the prior consent of the Members to engage in activities such as lending any monies belonging to Haines Watts or borrowing any money from any client of Haines Watts.

Allocation of profit

63. In determining the allocation of profits, the LLP Agreement provided that the profits would be determined by reference to the LLP accounts for the relevant accounting year and then shared on the following basis:

> (1) there would be a non-cumulative first charge ("First Charge") on the profits for each of the Client and Management Members (except one other Client Member). Specific amounts were stated for the three Management Members and one of the other Client Members. Mr Wilson and one other Client Member were stated to have their First Charges calculated in accordance with deeds of variation;
>
> (2) the profits remaining after payment of the First Charges were allocated between the three Management Members.

64. Provisions dealing with the scaling down of the First Charge amounts where profits were insufficient to pay all of the First Charges did not apply to Mr Wilson.

65. Mr Wilson's profit share was set out in the Deed of Variation as follows:

> (1) "a first charge of £180,000 adjusted by
>
> (a) an amount equal to less than £400,000 of chargeable time annually by Mr Wilson;
>
> (b) car expenses of £5000 per annum and parking;
>
> (c) tax payable on the earnings of the firm as described in the LLP agreement shall be borne by Haines Watts London LLP;
>
> (d) 25% of the profits arising from International Tax work over and above the amounts included in (1), (a), (b) and (c)."

66. The drafting of this clause is not entirely clear, particularly about how the adjustment of the £180,000 was supposed to work if Mr Wilson's chargeable time was less than £400,000. However, for the purposes of this decision the relevant findings are that Mr Wilson was entitled to an amount of £180,000 out of the total profits of Haines Watts, which was to be reduced by some amount if his chargeable time was less than £400,000, plus 25 % of the profits from the international tax practice.

67. Mr Wilson's entitlement was therefore not to a salary as it would be if he was an employee. The Fixed Charge was only payable out of the profits of Haines Watts. If there were insufficient profits to pay all the First Charges, the result of the Deed of Variation was that Mr Wilson's was not scaled back. So, for example if the profits were £190,000 he

remained entitled to £180,000 (plus the other elements of his profit share calculated under the Deed of Variation). In that sense his First Charge was first before the other First Charges.

68. However, if Haines Watts had made a loss overall Mr Wilson was not entitled to any payment under his First Charge. That is the result of the combination of the LLP Agreement profit sharing provisions and the Deed of Variation amendments to that Agreement. Mr Wilson's notes of meetings state that he understood that he would have no financial interest in Haines Watts as a whole. His entitlement did not increase if the profits of Haines Watts increased overall, but he could lose entitlement if the firm made a loss overall. He therefore did have an interest in the firm not becoming loss-making. I am not satisfied that the meeting notes of one party to the negotiations regarding his understanding that he would have no financial interest in the firm are sufficient to override the terms of the November Documents themselves.

69. The LLP Agreement provision dealing with the sharing of net losses amongst the Members did not apply to Mr Wilson, but that does not alter the conclusion about how his First Charge was calculated by reference to the Haines Watts' profits.

70. Any cash withdrawals decided by the Members (including Mr Wilson) to be taken in addition to monthly cash withdrawals, or withdrawals in respect of taxation, were stated to be on account of a Member's share of LLP profits. Payments for insurance policies taken out on behalf of the Members were deducted from Members' shares of profits.

71. In the event of winding-up no Member was obliged to contribute in any way to the assets of the LLP. This was consistent with Haines Watts being an LLP.

72. Any surplus of assets on a winding-up would be payable by the liquidator to the Members in the same proportions in which they shared the LLP profits (after deduction of First Charges). Therefore on liquidation Mr Wilson was entitled to his First Charge amount, but no further share in the surplus assets.

The Side Letter

73. By virtue of the Side Letter, Mr Wilson's membership of the LLP was set to expire no later than 1 November 2021.

74. On 1 November 2021 or on ceasing to be a Member of the partnership on any date before 1 November 2021 the Side Letter provided that Haines Watts would purchase Mr Wilson's 25% net profits interest in Haines Watt's international tax practice for an amount calculated by reference to the average net profit of the international tax practice in the 24 months immediately preceding Mr Wilson's departure, less the annual compensation for an individual to carry on that practice. In the event of Mr Wilson's death the amount payable was increased.

75. The existence of provisions for calculating a purchase price for his interest in Haines Watts is consistent with membership of the LLP rather than employment by the LLP.

Other relevant findings

76. The following findings are made as a result of the evidence overall, including Witness Statements and oral evidence of the witnesses.

77. Mr Wilson's appointment as a member of the LLP was not registered with Companies House until 31 October 2012. It stated his date of appointment was 31 October 2012 despite the LLP Agreement and Deed of Variation having been signed on 1 November 2011. However, the relevant period for the purposes of this decision starts on 31 October 2012 by which time he was registered as a member.

78. Mr Wilson did not have a written contract of employment or statement of employment particulars for his engagement with Haines Watts.

79. Employees of Haines Watts are remunerated by a salary and a bonus system of up to 10% based on personal performance and/or business introduced. Mr Wilson had a separate profit share calculation as described above.

80. Mr Wilson received monthly payments of £15,000. On one occasion the amount paid was described as "drawings". He was not issued any payslips and PAYE was not applied.

81. Mr Wilson was described as a "partner" to clients of Haines Watts.

82. All Members of Haines Watts have the authority to sign as "Haines Watts" for the purposes of an engagement letter. Mr Wilson was provided with the firm's email signature to use in such circumstances and in line with other Members was required to use the firm's standard engagement letter and letterhead.

83. Mr Wilson had to obtain approval for his vacation dates from a Management Member, but the evidence does not show that he was the only Member required to do so.

84. Office equipment and secretarial/administrative assistance was provided by Haines Watts for employees and Members.

85. Mr Wilson conducted interviews for hiring staff in the international tax practice, but the remainder of the hiring process, such as the preparation of employment contracts, would be dealt with by Haines Watts' human resources team. The evidence does not show that this was any different to the process used by other Members.

86. Annual budgets were agreed by Mr Wilson with Management Members for the international tax practice in line with the arrangements for other departmental heads to agree budgets.

87. Mr Wilson was allocated a desk adjacent to other Members of the LLP.

88. In line with all employees and Members, Mr Wilson was required to use the Haines Watts' approved font and letter style.

89. Contact with some clients by Mr Wilson was subject to another member's approval. On some occasions another Member would direct that a particular fee structure should be applied to work carried out by Mr Wilson for a client. There were times when he was asked to provide tax advice to the clients of other Members or asked not to provide advice to such clients.

90. In 2012 Mr Perry and another of the Management Members asked Mr Wilson to contribute capital to Haines Watts. He refused to do so.

91. I find that these matters do not "hollow out Mr Wilson's membership as he claims. They do not negate the previous findings about his rights and obligations as a Member of Haines Watts. The fact that there were different categories of Members with different rights and exercising different levels of management control is consistent with the legislative framework for LLPs described later.

Mr Wilson's departure from Haines Watts

92. Mr Wilson tendered his resignation in writing on 12 December 2013. An email of 12 February 2014 shows that Haines Watts were in dispute with Mr Wilson over his profit share and exit arrangements.

93. Mr Wilson was served with a notice of removal by Haines Watts on 21 March 2014. The notice stated that the Members had decided in accordance with the LLP Agreement to issue Mr Wilson with a notice of removal. The removal provisions in the LLP Agreement state a

maximum period of notice, but no minimum. Mr Wilson was required to resign on 31 March 2014 and to cease to be a Member of Haines Watts on that date. He was required to serve the period between 21 March 2014 and 31 March 2014 as "gardening leave" under the terms of the LLP Agreement.

94. In a letter dated 31 March 2014 Mr Wilson said that he considered that the terms of the LLP Agreement did not apply to him, although he was prepared to adhere to the post termination restrictions set out in the LLP Agreement. He set out proposals for arrangements regarding clients whom he would take with him on leaving Haines Watts.

Self-assessment by Mr Wilson

95. On 21 January 2013 Mr Wilson emailed Mr Perry saying that he did not understand about the profit share. He stated that he was a "fixed income partner (really an employee treated as a partner to avoid NICs etc.)" and that he saw the bonus as just that and not a profit share as he was not an equity partner in Haines Watts.

96. On 31 January 2013 Mr Wilson wrote another email saying that he could not understand the profit share calculation for his tax return and stated that he saw himself as "a non-equity partner on a fixed income with a bonus entitlement equal to 25% of the profit". He agreed to proceed to use the figures given to him for his tax return but said that the actual situation would need to be worked out for the next tax year.

97. In his self-assessment tax returns for the tax years 2011/12 and 2012/13 Mr Wilson recorded the income he received from Haines Watts as profit from a partnership.

98. In his 2011/12 return he recorded employment income from an unrelated employment in that year, self-employment profit unrelated to his Haines Watts payments and net partnership income from Haines Watts of just over £90,000. In the white box he noted that "my partnership share of profits has been reduced by £9562 and this is reflected in the return. This represents the cost that I incurred personally for my capacity of a partner." Mr Wilson knew at the time of submitting that tax return that he would not have been able to claim the deduction of £9562 as an employee.

99. In his 2012/13 return he declared partnership profit, but noted that he was in dispute with Haines Watts about his profit share and "the amount inserted into the return was subject to change". A letter to HMRC dated 27 April 2014 also explained that he was in dispute with Haines Watts in 2013 about the calculation of the profit share and, more particularly, the amount of revenue and costs taken into account.

100. In his 2013/14 return he declared employment income from Haines Watts and provided a white space disclosure stating that he believed that he was an employee of Haines Watts in that tax year even though he was a Fixed Income Member. In the same white space it is stated that Mr Wilson also believes he was an employee of Haines Watts for tax purposes in the 2011/12 and 2012/13 years even though he was a Fixed Income Member of Haines Watts for those years as well and comments that he incorrectly lodged self-assessment tax returns for both of those years as he was not self-employed.

101. Haines Watts paid the income tax and NICs due on Mr Wilson's payments as a self-employed earner/member of an LLP to HMRC for the tax year 2011/12 as well as payments on account for 2012/13.

102. Mr Wilson is in dispute with Haines Watts about who has the liability to pay the tax due on payments made to him.

MR WILSON'S CASE

103. Ms Murray submitted that the period under consideration was that set out in the decision under appeal, i.e. 31 October 2012 to 31 March 2014 and not the longer period starting on 1 November 2011 referred to at times by HMRC in correspondence and now claimed to be under appeal by HMRC. She submitted that, as the earlier period from 1 November 2011 until 30 October 2012 was not before me, arguments about the nature or extent of Mr Wilson's membership of Haines Watts pre and post 31 October 2012 were not relevant.

104. In her skeleton argument Ms Murray submits that Mr Wilson should have been treated as an "employed earner" as defined by section 2(1)(a) of the Social Security Contributions and Benefits Act 1992 ("SSCBA") because he was gainfully employed under a contract of service with Haines Watts. While Mr Wilson accepts that he was a member of Haines Watts, it is submitted that he was also employed by Haines Watts and his income comprised earnings from that employment rather than a share of the profits of Haines Watts' trade or profession.

105. Ms Murray relies on: the lack of capital contribution by Mr Wilson and his lack of entitlement to receive financial information to which other members of the LLP were entitled; the fact that his First Charge would not be reduced if there were insufficient profits to pay out all of the First Charges; the indemnity given to him by other Members; the existence of obligations applying to other members which did not apply to Mr Wilson; the fact that the value of Haines Watts' leases and investments were not taken into account for Fixed Income Members; the limitations on his voting rights; and his lack of entitlement to participate in the management of Haines Watts or in any business decisions, or to be given notice in relation to a proposed meeting of the Members.

106. Ms Murray also relies on Mr Wilson only being entitled to take leave with the prior approval of the Managing Member. She submits that Mr Wilson had provided examples of control by Haines Watts over client engagements. Equipment required by him was provided by Haines Watts and he was provided with secretarial and other administrative assistance as well as professional assistance on tax work, but he was not entitled to hire or fire any member of staff.

107. Ms Murray submits that as a result the arrangements overall should be treated as giving rise to a contract of employment and the pay received by Mr Wilson from Haines Watts should be taxed as employment income.

108. Ms Murray submits that section 4(4) of the Limited Liability Partnerships Act 2000 ("LLPA") does not preclude a member of an English LLP from also being an employee of an LLP - *Tiffin v Lester Aldridge LLP* [2012] 1 WLR 1887 In particular, she submits that the statements made by the Court of Appeal in that case were part of the ratio decidendi of the case and are therefore binding on me.

109. Ms Murray submits that the statements made by Lady Hale in *Clyde & Co v Bates van Winkelhof* [2014] 1 WLR 2047 (which it is recognised lead to the conclusion that in the case of an English LLP a person cannot be both a partner and an employee) and on which HMRC rely, are obiter dicta. Obiter dicta of the Supreme Court do not overrule the ratio decidendi of the Court of Appeal, as acknowledged by Warren J in *Reinhard v Ondra LLP* [2015] EWHC 26. Ms Murray submits that although Warren J returned to the point in *Reinhard v Ondra LLP (No 2)* [2015] EWHC 1869 and concluded that what Lady Hale had said was necessary to her decision and not obiter, Warren J's statements on that matter were themselves obiter.

110. Ms Murray submits that the test for the admissibility of Hansard as set out in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3 is met in this case and the Parliamentary debate addressing section 4(4) LLPA supports the conclusion that the *Tiffin* construction is correct.

111. Moving on to apply the *Tiffin* approach, Ms Murray submits that while the primary source material is the LLP Agreement this will not necessarily represent the totality of what is looked at. She relies on the case of *Stekel v Ellice* [1973] 1 WLR 191 to conclude it is necessary to look at the terms of the relationship to ascertain whether or not it creates a true partnership. She refers to the decision of Megarry J in that case that the fact that a person is not entitled to share the profits of the partnership will be an indicator, particular where the person is entitled to receive a fixed sum regardless of whether or not the partnership makes a profit.

112. Ms Murray also relies on the case of *Cobbetts LLP v Hodge* 92009) 153 (17) SJLB 29 as authority to say that a partner who is remunerated even when the partnership makes a loss is more likely to be regarded as an employee.

113. Ms Murray identifies particular factors which she submits indicate that Mr Wilson was not carrying on a business in common with the other Members: he was not sharing risk and reward with them; he had no liability for losses; he was paid a fixed sum even if the business suffered losses provided that he worked a minimum number of hours; he was entitled to use equipment and be reimbursed expenses regardless of whether the business made a profit; he was excluded from management; he had no control of the clients he was able to introduce into the business, the hours he works, the place he worked, the resources he used; he was not liable to pay for any of the overheads out of the income he was entitled to receive.

114. Ms Murray relies on the cases of *Hall v Lorimer* [1993] EWCA Civ 25 and *Market Investigations Ltd v Minister of Social Security* (1969) 2 QB 173 to describe the correct approach to assessing the question of whether Mr Wilson was an employee.

115. Ms Murray submits that even though Mr Wilson was a member of Haines Watts and therefore deemed under section 863 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") to be carrying on the profession of the LLP in partnership with the other members, he would not be chargeable to income tax under the provisions relating to taxation of partnership income starting at section 847 ITTOIA because no profits were allocated to him. Instead, he received earnings from his employment which were chargeable to income tax under ITEPA 2003. At the hearing when I sought clarification of this argument Ms Murray submitted that it was analogous to a "source" of income question: Mr Wilson was maintaining that the "source" of his income was an employment relationship and not the partnership. She was not submitting that the profit share calculation in ITTOIA produced a figure of zero for Mr Wilson.

HMRC'S CASE

116. Ms Prince submitted that the period to be considered was 1 November 2011 to 31 March 2014 despite the shorter period being stated in the Notice of Decision. She submitted that there was no factual difference in the earlier period from 1 November 2011 to 30 October 2012, save that Mr Wilson's membership of Haines Watts was not registered until 31 October 2012. The appellant had only raised any argument distinguishing the periods as a result of that registration at the hearing. She submitted that while the failure to register within the requisite time is a summary offence under section 9(6) LLP, it does not invalidate the membership of the person in question.

117. HMRC maintains that as Mr Wilson was a member of Haines Watts he was therefore liable for NICs on payments made to him by Haines Watts as a "self-employed earner" as defined by section 2(1)(b) SSCBA.

118. Ms Prince submits that the email correspondence between Mr Wilson and Haines Watts show that he intended to become a member of Haines Watts and not an employee. She submitted that this was not a situation of a power imbalance, but a negotiation between sophisticated parties. Mr Wilson has a PhD in tax law and had stated in his Witness Statement

that he had a quite detailed understanding of employment status issues. There should therefore be little doubt that he would have understood concepts such as employment status and the tax implications of differing status.

119. Ms Prince submitted that while the Deed of Variation removes Mr Wilson's voting rights in respect of certain matters, they remain for other matters as identified in her outline submissions. She submitted that Mr Wilson had gone to considerable lengths to argue that the LLP Agreement should not be applied according to its terms.

120. Ms Prince refers to section 863 ITTOIA and submits that as a result partners in a limited liability partnership are to be taxed as if they were partners in a standard partnership. She refers to the fact that this is the basis upon which Mr Prince completed his tax returns for the tax years 2011/12 and 2012/13.

121. In relation to the appellant's analysis of section 4(4) LLPA, Ms Prince submitted that this was not an appropriate case for reference to Hansard. The legislation is not ambiguous, obscure, or leading to an absurdity. Ms Prince relied on the case of *Clyde & Co* in which she submits the Supreme Court held that Rimer LJ's analysis in *Tiffin* was wrong.

122. Ms Prince submitted that Lady Hale's comments in *Clyde & Co* regarding section 4(4) LLPA form part of the ratio of her decision because the first step in Lady Hale's analysis in that case is to consider whether the section precluded someone from being an employee and an LLP member. If she had found that a person could be both, she would not have needed to go on to consider whether or not the term "employed" in Section 4(4) covered "workers". It is therefore an integral part of her analysis. Ms Prince recognises that the statements in *Reinhard (No 2)* regarding Lady Hale's decision in *Clyde & Co* are obiter, but submits that they are very persuasive. In addition, she submitted that the decision in *Clyde and Co* was also applied by the High Court in *Altus v Baker Tilly* [2015] EWHC 12 (Ch).

123. As a result, once it is established that Mr Wilson was a member of Haines Watts in England there is no scope in English law for using Section 4(4) LLPA to argue that if Haines Watts were a partnership rather than an LLP, Mr Wilson would, on the facts be an employee.

124. Ms Prince submits that even if the appellant's interpretation and application of section 4(4) LLPA was adopted, Mr Wilson would be a partner and not an employee. She referred to the *Stekel* case and submitted that the entitlements which Mr Wilson had under the November Documents were sufficient to make him a partner.

125. Ms Prince submits that in any event, section 4(4) LLPA concerns the employment status of LLP members. It does not set out the rules regarding the taxation of monies received by the members of LLPs. Those rules are set out in section 863 ITTOIA. Therefore even if the appellant's interpretation of section 4(4) LLPA was adopted and Mr Wilson was found to have been an employee of, as well as a member of, Haines Watts, he must still be taxed as if he were a partner in a standard partnership. She submitted that the November Documents and Mr Wilson's own declarations in his tax returns for 2011/12 and 2012/13 lead to the conclusion that payments made to him by Haines Watts were payments of a "profit share" for the purposes of applying section 850 ITTOIA.

126. Ms Murray initially submitted that this was a new argument that section 863 "deems" Mr Wilson's income to be partnership profit even if he is treated as an employee and is not prevented from being so by section 4(4) LLPA. As such Ms Prince needed to apply for permission to rely upon it. Both representatives made specific submissions on this point. Ms Prince referred to HMRC's statement of case and the reference to the application of section 863 and also submitted that both counsel had raised section 863 in their skeleton arguments. It

was therefore not a new argument. Ms Murray accepted that HMRC were not running a new argument that section 863 deems employment income to be partnership income.

127. In Ms Prince's skeleton argument, she submitted that Mr Wilson appeared to be putting forward an alternative argument in his Witness Statement, that he was never a member of Haines Watts and HMRC submitted this argument should not be admitted as no application had been made to amend Mr Wilson's grounds of appeal. However, at the hearing it was confirmed that this argument was not being run by the appellant.

128. Ms Prince also addressed a distinction which Mr Wilson appeared to draw in his Witness Statement between his status from 1 November 2011 to 30 October 2012 prior to registration of his membership of Haines Watts at Companies House and from 31 October 2012 to 31 March 2014 after that registration. She submits that no distinction should be drawn. He was a member of Haines Watts in both periods.

DISCUSSION - THE PERIOD UNDER APPEAL

129. The Notice of Decision states that the decision on 21 March 2018 was that Mr Wilson was self-employed in respect of his engagement with Haines Watts for the period from 31 October 2012 to 31 March 2014. However, Ms Prince submits that he should be treated as self-employed and taxed accordingly during the period from 1 November 2011 to 31 March 2014, picking up on the date on which Mr Wilson joined Haines Watts and references at various times in HMRC's letters to that longer period.

130. HMRC has not been consistent about the dates under consideration in its correspondence. Even in HMRC's review letter of 30 July 2018 various dates were stated for the period in question. However, the correspondence does not determine the jurisdiction of this tribunal.

131. The jurisdiction of this tribunal is limited to those powers granted to it by statute. Although the Notice of Decision does not make reference to any statutory authority for the decision, the parties have both proceeded on the basis that it is a decision made under section 8 of the 1999 Act. The appeal right is therefore provided by section 11 of the 1999 Act. Section 11 provides:

> **Appeals against decisions of Board**
>
> (1) This section applies to any decision of an officer of the Board under section 8 of this Act or under regulations made by virtue of section 10(1)(b) or (c) of this Act (whether as originally made or as varied under regulations made by virtue of section 10(1)(a) of this Act).
>
> (2) In the case of a decision to which this section applies—
>
> (a) if it relates to a person's entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay, statutory adoption pay, statutory shared parental pay or statutory parental bereavement pay, the employee and employer concerned shall each have a right to appeal to the tribunal, and
>
> (b) in any other case, the person in respect of whom the decision is made and such other person as may be prescribed shall have a right to appeal to the tribunal.

132. The right of appeal is therefore limited to a decision made under section 8 of the 1999 Act. HMRC has not identified any other decision in addition to the Notice of Decision which is a decision made under section 8 of the 1999 Act.

133. In compliance with Regulation 3 of the Social Security Contributions (Decisions and Appeals) Regulations 1999, the Notice of Decision states the period for which it has effect; namely 31 October 2012 to 31 March 2014.

134. Regulation 7 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 ("the 1999 Regs") states that Sections 49A-49I of the Taxes Management Act 1970 ("TMA") apply to appeals under the 1999 Act.

135. Under Section 49A TMA the appellant first notifies HMRC that he requires HMRC to review "the matter in question" which is defined by Section 49I as the matter to which an appeal relates. After the review is concluded the appellant may notify the tribunal and under Section 49G TMA if that happens "the tribunal is to determine the matter in question".

136. In this case the matter in question was whether Mr Wilson was self-employed in respect of his engagement with Haines Watts LLP for the period from 31 October 2012 to 31 March 2014.

137. I recognise that Regulation 10 of the 1999 Regulations provides:

> If, on an appeal … under Part II of the Transfer Act that is notified to the tribunal, it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

138. Although Regulation 10 does not include any limitation in its own terms to the variations which the tribunal is entitled to make, HMRC have not raised any argument before me that I should exercise power under that Regulation to vary the period for which the Notice of Decision takes effect.

139. HMRC had power to vary the decision and, in particular, the period to which it related, at any time before the appeal is determined under regulation 5 of the 1999 Regs, but have not done so.

140. Regulation 5 of the 1999 Regs states:

> (1) An officer of the Board may vary a decision under section 8 of the Transfer Act or Article 7 of the Transfer Order if he has reason to believe that it was incorrect at the time that it was made.
>
> (2) Notice of a variation of a decision must be given to the same persons and in the same manner as notice of the decision was given.
>
> (3) A variation of a decision may state that it has effect for any period in respect of which the decision could have had effect, if the reason for the variation had been known to the person making the decision at the time that it was made.
>
> (4) A decision which is under appeal may be varied at any time before the tribunal determines the appeal.

141. Given that there is this power to vary the decision which has not been exercised by HMRC, I am fortified in my view that it is not for me to do so by virtue of Regulation 10 of the 1999 Regs. In this case the appellant has indicated that there may be matters relied on to distinguish his position pre - 31 October 2012 and after that date which were not raised in the grounds of appeal because the decision appealed only related to the later period. Given HMRC's power to vary the decision, that would have been the correct process to use to extend the period under consideration.

142. I therefore conclude that the period which is before me is 31 October 2012 to 31 March 2014.

APPLICATION OF NICS TO MR WILSON AS A SELF-EMPLOYED EARNER

The Law

143. The SSCBA draws a distinction for NICs between "employed earners" and "self-employed earners".

144. The general charging provision for Class 4 NICS is provided by Section 15 SSCBA in accordance with which Class 4 NICS are payable on profits which are "immediately derived from the carrying on or exercise of one or more trades, professions or vocations". In the case of LLPs, Section 13 of the LLPA inserted a new sub-section into Section 15 of the SSCBA stating:

> (3A) Where income tax is (or would be) charged on a member of a limited liability partnership in respect of profits or gains arising from the carrying on of a trade or profession by the limited liability partnership, Class 4 contributions shall be payable by him if they would be payable were the trade or profession carried on in partnership by the members.

145. The application of Class 4 NICs therefore depends on the income tax treatment of the payments as well as the general requirement for the payment to have derived from the carrying on of a trade or profession in partnership by the members.

146. If Mr Wilson is found to be a member of an LLP and to be taxable on the payments made to him by Haines Watts as such a member, Part 9 of ITTOIA sets out the specific taxing provisions which apply to partnerships ("the Partnership Code"). The application of income tax to LLP members is set out in Section 863 ITTOIA:

> (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.

147. This places LLP members within the Partnership Code provisions and means that the LLP is "transparent" for tax purposes. While the LLP still needs to submit a partnership tax return, the profits or losses shown in that partnership tax return would not lead to any tax liability (or tax relief) for the LLP itself. Instead, the taxable profit or loss shown on that partnership tax return would be allocated to the individuals who are members of the partnership, in accordance with the allocation provisions of the Partnership Code, who would each include their share of the profit or loss on their own tax returns.

148. Section 850 ITTOIA provides that:

> (1) For any period of account a partner's share of a profit or loss of a trade carried on by a firm is determined for income tax purposes in accordance with the firm's profit-sharing arrangements during that period.
>
> This is subject to sections 850A to 850D and section 12ABZB of TMA 1970 (partnership return is conclusive).

> (2) In this section and sections 850A and 850B "profit-sharing arrangements" means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade.

149. Ms Murray submits that Mr Wilson is not chargeable under the Partnership Code because the payments made to him were not allocation of profits under a profit-sharing arrangement, but payments made to him as an employee. Despite being a member of the LLP, payments received from Haines Watts LLP should not be taxed by reference to that membership but by reference to what Mr Wilson maintains is his true relationship with Haines Watts LLP, an employee relationship.

Discussion

Assessment of the evidence

Weight given to the Witness Statements and oral evidence

150. For the following reasons I have reduced the weight given to the evidence in Mr Wilson and Mr Perry's Witness Statements and their oral evidence about the deal agreed for Mr Wilson to join Haines Watts.

151. Mr Wilson has spent many years advising clients and I must assume in doing so that he has read legal documents. He is highly qualified and has spent most of his career advising about the application of tax law, which by its nature often requires forensic analysis of words used in legislation and otherwise. Yet in much of his evidence he has sought to claim that he barely read the November Documents and to offer constructions of those documents which do not fit with the words used, as I now explain.

152. I find it barely credible, even in the context of pressure to sell GPUK that Mr Wilson described, that he would not have worked through the November Documents in some detail. He was clearly qualified to suggest drafting or other changes if he considered that the documents did not reflect the deal being done with Haines Watts. This conclusion is supported by the evidence in an email dated 21 October 2011 from Mr Wilson to Mr Perry in which he specifically comments on how particular work and clients would be handled if he left Haines Watts and asks that the fixed retirement age in the LLP Agreement is altered in his case by side letter to a date of 10 years after joining Haines Watts. On 23 October 2011 Mr Wilson followed this up with an email attaching a side letter dealing with his retirement and what he described as "the purchase price for his interest in the international tax practice when he retired".

153. Mr Wilson claimed at the hearing that he had no rights or benefits of any substance under the LLP Agreement as a result of the Deed of Variation and that he signed the LLP Agreement "for some reason", but it had no relevance to him as a result of the Deed of Variation. He says in his Witness Statement that his registration as a member of the LLP at Companies House was membership in name only, that no genuine membership existed and it was a hollow label. Ms Prince put to Mr Wilson in cross-examination the fact that, working through the detailed provisions of the Deed of Variation and the LLP Agreement, Mr Wilson is left with significant voting rights, including on appointing a new Managing Member, the nature of the business of Haines Watts, the appointment or removal of a Designated Member, relocation of premises and suspension of a Member. These are significant and substantial matters. His contention that the provisions do not apply to him because he was not in fact a Client Member does not withstand scrutiny of the November Documents.

154. The Deed of Variation is specific about which sub-clauses in the LLP Agreement do not apply to Mr Wilson and which voting rights in sub-clauses do not apply to him. I find no basis to conclude that other provisions do not apply to him as he claims. For example, in Mr Wilson's Witness Statement he states that the Client Member responsibilities clause, requiring Client Members to devote the whole of their time to client matters and the day-to-day management of

the LLP business as requested by the Management Members, did not apply to him as he was not obliged to attend to the day-to-day management of the LLP. He refers to the Deed of Variation as achieving this result, but it did not.

155. Mr Wilson recognised at the hearing that recital B in the LLP Agreement meant that everyone who signed that agreement was a member of the LLP. Ms Murray confirmed that it was not being argued that Mr Wilson was not a member of the LLP. Yet Mr Wilson seeks in his Witness Statement to say that the provisions set out in clause 9.1 of the LLP Agreement for admission of new members were not complied with because he had not signed a document referred to as the "participation agreement". This was explored in cross-examination by Ms Prince who put to him that the term "Participation Agreement" was a defined term in the LLP Agreement, meaning a participation agreement agreed from time to time with Haines Watts Ltd. She put to him that the provisions of clause 9.1 did not require him to sign or be bound by the Participation Agreement, but by the LLP Agreement.

156. The words in clause 9.1 are:

> Persons shall only be admitted as Members at that time and after approval of Haines Watts Ltd in accordance with the provisions of the "Participation Agreement" and then only if such persons agree to be bound by this agreement and sign an agreement as a deed to that effect, whereupon the expression "the members" shall be deemed to include them.

157. I find that there is little doubt that the reference to persons agreeing to be bound by "this" agreement is reference to persons being bound by the LLP Agreement. The reference to the Participation Agreement is simply in the context of explaining the approval of Haines Watts Ltd in accordance with that agreement. The clause does not impose any requirement for a new member to sign or agree to be bound by the Participation Agreement. I find little basis for Mr Wilson to be arguing otherwise.

158. At times Mr Wilson's clause by clause analysis of the LLP Agreement and Deed of Variation in his Witness Statement strays further into territory of seeking to ignore the obvious meaning of the words. For example, he claims that the provision stating that the business of the LLP shall, unless and until the parties otherwise agree in writing, be confined to that of accountants, was not relevant to him but there is no explanation of how that conclusion was reached.

159. He then goes on to say that in any event he concluded that providing international tax advice was not "confined to accountants" because solicitors also provide international tax advice and therefore the clause did not apply to his work in international tax. Mr Wilson's comments convey a clear misreading of the LLP Agreement clause. Many accountants provide tax advice as part of their business and the fact that people other than accountants also provide tax advice does not alter the fact that the business of Haines Watts was that of accountants. The clause was not saying that the business of Haines Watts was confined to areas which could only be undertaken by accountants as Mr Wilson suggests.

160. Much of Mr Wilson's evidence about the effect of the November Documents bore little relationship to the wording of the documents themselves. I find Mr Wilson's attempts at suggesting alternative interpretations of the November Documents to be illustrations of seeking to distance himself from the effect of the November Documents and to attempt to bolster his case that he was not in substance a Member of Haines Watts. As a result I have reduced the weight given to Mr Wilson's evidence in his Witness Statement and orally at the hearing about his understanding of the deal he did with Haines Watts.

161. Mr Wilson seeks to claim that the compensation described in the Deed of Variation as "Profit Share" is not a profit share. In cross-examination he claimed that he was more interested

at the time of agreeing this, on focusing on the £180,000 and not the words, but this is someone who has acted for many years as a tax adviser at a high level and who must therefore be acutely aware of the importance of words used in documents. Of course, a label cannot override the substance of provisions, but the provision is titled "Profit Share". When the provisions in the Deed of Variation are placed into the relevant paragraphs of the LLP Agreement, as the Deed of Variation requires, it is clear that Mr Wilson's entitlement is to an allocation of the profits, as I have explained earlier.

162. Unfortunately Mr Perry's evidence in cross-examination about his understanding of the profit share provisions was also remarkably opaque, at times confused and at times bearing little relationship to the words in the profit share provisions. For example, Mr Perry referred to adjustment under the Deed of Variation profit share provision by reference to £400,000 of profit, when in fact the provision does not adjust by reference to profit but by reference to chargeable time. He described Haines Watts having a tax liability on £400,000 of chargeable time without any recognition of the tax being calculated on profit. Given his position as a partner in an accounting firm I have little doubt that he would understand the difference between profit and chargeable time. At another point he was unable to explain why the phrase "first charge" was used. When asked why Haines Watts was paying Mr Wilson's income tax his answer was "Well it didn't, or it did. Maybe it did. I don't know."

163. For these reasons I also reduce the weight given to Mr Perry's evidence about the understanding of the deal and the intentions of the parties.

164. This means that neither Mr Wilson nor Mr Perry has provided reliable evidence regarding the understanding of the deal struck between Haines Watts and Mr Wilson about his pay and I have therefore given greater weight to the November Documents themselves.

Mr Wilson's self-assessment history

165. Mr Wilson states in his Witness Statement that prior to working with Haines Watts he had been employed by four different businesses in Australia, and in London by three different businesses, and had been a partner in various firms. He said therefore he had a very broad exposure to different working arrangements and fact patterns which equipped him reasonably well to determine when an arrangement constituted employment and when it was not. In addition, in cross-examination he confirmed that he had some understanding of the difference between employment and self-employment and between memberships and partnerships. While he later sought to distance himself from having specialist employment tax law knowledge, I have little doubt that with his background and experience he would have been aware of the core tax implications of being an employee or being self-employed. In his tax return for 2011/12 he included not only the partnership profit from Haines Watts, but also amounts of employment income and self-employed income and I have little doubt that he understood the nature of each. He confirmed that he understood that the deduction claimed against the partnership profit would not have been deductible from employment income.

166. Mr Wilson submitted tax returns in 2011/12 and 2012/13 on the basis of receiving income/profit from his interest in a partnership. I find that his action in doing so undermines his claim that he considered himself to be an employee. He is a highly qualified tax adviser and his claim that he had insufficient time between receiving the figures from Haines Watts on 21 January and filing his return on 31 January to deal with the issue is inconsistent with his background and with the fact that he took no action to correct his 2011/12 tax return until he submitted his 2013/14 return. His white space comments in his 2012/13 tax return simply stated that he was in dispute about his profit share and the amount inserted into his tax return was subject to change. There was no suggestion at that time that its nature would change.

167. Haines Watts paid the income tax and NICs due on Mr Wilson's payments as a self-employed earner/member of an LLP to HMRC for the tax year 2011/12 as well as payments on account for 2012/13. The fact that, as a practical matter, Haines Watts made those tax payments has no bearing on the question of whether the underlying payments are taxable as self-employed earnings as a member of an LLP or not.

168. Before moving on to decide the application of the Taxes Acts to Mr Wilson, I address the structure of Haines Watts in the context of the law regulating LLPs set out in the LLPA, as that is relevant to the assessment of his position as a member of Haines Watts.

Assessing the Haines Watts LLP Agreement in the context of the LLPA

169. The ability to form limited liability partnerships is provided by the LLPA. Section 1(2) of the LLP states that limited liability partnerships are bodies corporate. Section 4 states:

> "(1) On the incorporation of a limited liability partnership its members are the persons who subscribed their names to the incorporation document (other than any who have died or been dissolved).
>
> (2) Any other person may become a member of a limited liability partnership by and in accordance with an agreement with the existing members."

170. It was confirmed at the hearing that Mr Wilson accepts that he was a member of Haines Watts LLP, although there he has disputed the nature of his membership.

171. Section 6 of the LLPA provides that:

> (1) Every member of a limited liability partnership is the agent of the limited liability partnership.
>
> (2) But a limited liability partnership is not bound by anything done by a member in dealing with a person if—
>
> (a) the member in fact has no authority to act for the limited liability partnership by doing that thing, and
>
> (b) the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership.

172. It is therefore clearly envisaged that different levels of authority can be granted to members within an LLP. The broad scope of section 1(2) taken together with section 6 of the LLPA enables LLPs to regulate the terms of membership.

173. Section 5 LLPA provides that the members of an LLP may regulate their mutual rights and duties by agreement:

> Relationship of members etc.
>
> (1) Except as far as otherwise provided by this Act or any other enactment, the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members, shall be governed—
>
> (a) by agreement between the members, or between the limited liability partnership and its members, or
>
> (b) in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c).

174. The LLP Agreement distinguishes between Client Members, Management Members and Managing Members. There is one Managing Member – Mr Perry. He and two other Members are Management Members. The four Client Members, including Mr Wilson, are not

Management Members. There is also the category of Fixed Income Member introduced by the Deed of Variation.

175. The LLP Agreement draws a clear distinction between the three different categories of Member. The Managing Member is answerable to the Members for the effective day-to-day management of the LLP Business consistent with the policies, strategy and professional standards established with the Management Members. The Management Members, in turn, are responsible with the Managing Member for establishing the detailed local commercial strategy that Haines Watts LLP shall follow. The Client Members are required to devote the whole of their time and attention to client matters and the day-to-day management of the LLP Business as requested by the Management Members.

176. In other words, the firm, in line with many professional services firms, appoints some members to take on a more active managerial role.

177. Regulations set out the position on insolvency and winding-up, pursuant to section 14 of the LLPA. In the UK apart from Scotland, those regulations are the Limited Liability Partnerships Regulations 2001, SI 2001/1090. In essence, the LLP is treated as if it was a company and members are treated as if they are directors.

178. There is no requirement in the LLPA or regulations made thereunder for members of LLP to be required to contribute capital to the LLP.

179. I now move on to consider the appellant's arguments about his tax treatment.

Application of the tax rules to Mr Wilson

180. Mr Wilson accepts that he was a member of Haines Watts (at least for the period under consideration in this appeal). He has argued that his membership was "hollowed out" and of no real substance, but having regard to my findings in this case and for the reasons I set out later I do not accept that to be the case.

181. As a member of an LLP for the period 31 October 2012 to 31 March 2014 I have decided that:

(1) Mr Wilson was taxable on payments made to him by Haines Watts under the Partnerships Code by virtue of Section 863 ITTOIA;

(2) If, despite the wording of Section 863, there was scope in the tax rules for Mr Wilson to be taxed as an employee, the words of Section 4(4) LLPA do not enable a person to be treated as an employee for tax purposes when a member of an English LLP;

(3) Even if Section 4(4) LLPA means that a person could be an employee and a member of an English LLP, the payments made to Mr Wilson were as a member of Haines Watts as if a partner and not as an employee.

Tax treatment set out in Section 863 ITTOIA

182. The Partnership Code sets out the tax treatment for partnerships including LLPs. In particular, Section 863 provides that *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) and *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* (italics added).

183. LLP members are therefore treated as partners for all the activities of the LLP. The LLP provisions do not contemplate that the treatment is subject to the application of other provisions in the Taxes Acts and the provisions of Section 863 override consideration of whether a person is in fact employed.

184. Indeed, the fact that the Partnerships Code, and in particular the LLP tax provisions, were determinative of the tax treatment of LLP members gave rise to reliance on them in situations where the members were far less able than Mr Wilson to show that they were in any real sense "partners" and in turn to the anti-avoidance provisions introduced in 2014.

185. The Partnerships Code provides a set of rules for calculating a person's tax liability that is quite separate from the more usual expectation that a person will be taxed on amounts they receive. It involves firstly the profits and losses of the partnership being calculated under section 849 ITTOIA and then the profits and losses being allocated in accordance with the profit-sharing arrangements under section 850 ITTOIA. Those allocated profits and losses may be adjusted in various circumstances. Those circumstances include situations where there is a loss-making period, but one or more partners is allocated a profit and profit-making periods where one or more partners is allocated a loss. The Partnerships Code therefore clearly envisages situations where a partner is allocated "profit" even though the firm overall makes a loss.

186. The conclusion that the LLP provisions in the Partnerships Code determine the treatment of members in an LLP is supported by the decision in *Altus* where Judge Keyser QC at paragraph 163 of his decision relied in part on the position that "Partners in firms and members of limited liability partnerships are regarded as self-employed for tax purposes" to exclude consideration of the structure being addressed in that case as possibly giving rise to deemed employment via the application of IR35.

187. On this basis alone Mr Wilson's appeal must be dismissed.

188. However, the parties have engaged in detailed arguments predicated on the basis that this is not the complete answer and I have therefore also addressed whether the application of the cases relied on by the appellant would lead to a different conclusion.

Ability to be an employee of and member of an LLP

189. In order for Mr Wilson's appeal to succeed he needs to be able to show that he could be an employee of the LLP for tax purposes despite being a member of the LLP, and that the payments made to him were in relation to employment by Haines Watts and not in relation to his membership of Haines Watts. I underline "for tax purposes" as that is key. Although there is considerable overlap in status as an employee for employment law purposes and for tax purposes, they are not unified. In particular, as cases such as *Pimlico Plumbers* v *Smith* [2018] UKSC 29 show, a person can be treated as an employee for employment law and not for tax law.

190. As Judge Keyser QC stated in *Altus* at paragraph 163, in addressing the argument that a member of an LLP could be an employee for tax purposes, "context is everything" when considering the authorities relied on in this case. The cases relied on by Mr Wilson address the question of whether a member of an LLP can be an employee for employment law purposes, for which there was no need to consider the specific regime set out for tax purposes in the Partnership Code – a point Judge Keyser alludes to in paragraph 163. Out of the cases relied on by the parties, it is only the *Altus* case which addresses the possibility of being an employee and a member of an LLP in the context of considering the application of the tax rules. That is an important distinguishing feature when working through the authorities before me and to which I return later.

191. The first issue is whether Mr Wilson can rely on the authorities and the application of Section 4(4) LLPA to maintain that it is possible to be a member of an LLP and an employee of the LLP, despite the accepted principle in English law that a partner in a partnership cannot be an employee of the partnership.

192. Section 4(4) states:

> "a member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership."

193. Ms Murray submits that *Tiffin* is authority for him being able to do so, whereas Ms Prince submits that *Tiffin* was overruled by Lady Hale in *Clyde & Co.* Ms Murray in turn submits that Lady Hale's statements were obiter dicta and cannot therefore overturn the ratio of Rimer LJ in *Tiffin.* HMRC rely on the decision of Warren J in *Reinhard (No2)* as authority that Lady Hale's statements were part of the ratio of her decision and the application of *Clyde & Co* in *Altus*, whereas Ms Murray submits that Warren J's statements in *Reinhard (No2)* were themselves obiter.

194. In *Tiffin* Rimer LJ grappled with the problem that a partner in a partnership cannot be an employee of the partnership because it is not possible for an individual to be an employee of himself. He concluded that the authors of section 4(4) were apparently unaware of this because the answer must, in every case, produce the same answer that the member could not be an employee of the LLP. He then sets out a two-part test:

> "… It requires an assumption that the business of the limited liability partnership has been carried on in partnership by two or more of its members as partners; and upon that assumption, an enquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that enquiry is that he *would* have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the limited liability partnership. If the answer is that he would *not* have been a partner, there must then be a further enquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the limited liability partnership."

195. However, he noted that the approach he set out did not work in the situation where there were only two members in the limited liability partnership.

196. Lady Hale in *Clyde & Co* addressed Rimer LJ's decision and concluded that the drafting of section 4(4) reflected the fact that there is doubt about whether partners in a Scottish partnership can also be employed by the partnership. On that basis, in an English law LLP the position remains that a person cannot be an employee and a member.

197. The two counsels in this case have set out detailed arguments as to whether Lady Hale's statements are obiter dicta. I respectfully agree with the decision of Judge Keyser QC in *Altus* that in *Clyde & Co* the Supreme Court did not have to address the point. It was a decision about whether a person was a limb (b) worker (in contrast to *Tiffin* where the question was whether the person was an employee under a contract of employment). Employment law has the category of "worker" which encompasses not only those who work under a contract of employment but also those, generally referred to as "limb (b)" workers: "who work under any other contract…whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual" (Section 230(3) Employment Rights Act 1996). Lady Hale concluded that section 4(4) would not operate to exclude a person from being a "worker" and as a result she did not need to reach a conclusion about whether a member could be an employee. Her statements regarding the application of section 4(4) to employees were therefore strictly obiter.

198. However, whilst recognising the rules of precedence, it is clear that obiter dicta of the Supreme Court have considerable persuasive authority for this tribunal. As Megarry J stated in *Brunner v Greenslade* [1971] Ch:

> "A mere passing remark or a statement or assumption on a matter that has not been argued is one thing, a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio. Such judicial dicta, standing in authority somewhere between a ratio decidendi and an obiter dictum, seem to me to have a weight nearer to the former than the latter."

199. That is particularly the case where on the one hand there is an explanation provided by the Supreme Court which does not have caveats, and on the other hand there is an alternative approach offered by Rimer LJ in the Court of Appeal which does not, as he recognised, work for all LLPs.

200. In addition, in the decision of the Court of Appeal in *R v Barton and Booth* [2020] EWCA Crim 575 decided after the hearing of this case, Lord Burnett CJ stated the principle as follows (at para. 104):

> "Where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly obiter. To that limited extent the ordinary rules of precedent... have been modified."

201. The conclusion that I should apply Lady Hale's approach is supported by Judge Keyser QC's analysis in *Altus* at paragraph 161 of his judgement where he states that a member of a limited liability partnership cannot be employed by the limited liability partnership. Judge Keyser QC relies on several factors to reach this conclusion, including his view that it would take a decision of the Supreme Court to alter what has long been understood to be the law. Most importantly, when identifying the approach to adopt, Judge Keyser QC was considering whether the member could be an employee for tax purposes, in contrast to Rimer LJ who was considering whether a person could be both an employee and a member in the context of employment law.

202. I am not persuaded that *Pepper* v *Hart* principles should be applied in this case to enable consideration of Hansard. Higher courts have resisted doing so and Lady Hale has provided an explanation of Section 4(4) which means that, whether or not her statements are applied as precedent, any previously perceived absurdity in the construction of Section 4(4) LLPA has been removed.

203. This analysis of the authorities therefore also leads to the conclusion that Mr Wilson's appeal must be dismissed.

Payments made to Mr Wilson as a member in any event

204. Yet even if I were to apply Rimer LJ's approach set out in *Tiffin*, notwithstanding my conclusions about the authorities, it would not lead to the conclusion that Mr Wilson had received payments as an employee of Haines Watts LLP for the following reasons.

205. I recognise that a label put on a relationship by the parties may not determine the true agreement between them and any written agreement is usually only part of the material to be used to determine the real nature of the relationship. In *Autoclenz v Belcher* [2011] ICR 157, the Supreme Court confirmed that the written deed may only be a part of the true agreement, particularly where the relative bargaining power of parties is taken into account. However, in this case I am satisfied that there was not any significant inequality in bargaining power

between Mr Wilson and Haines Watts as shown by the meeting notes and emails at the time of the negotiations.

206. In *Tiffin* itself Rimer LJ decided that the member of the LLP was not in fact an employee of the firm. In that case the member was required to contribute capital and had a prospect of sharing in the surplus assets on a winding up. Mr Wilson does not share those attributes. However, those were not the only factors that were taken into account in reaching the conclusion that the appellant in *Tiffin* was not an employee. Rimer LJ also took into account the fact that the appellant in that case had a voice in the management of the affairs of the LLP and, in addition to a fixed guaranteed entitlement, also had a true interest in and share of the firm's profits.

207. For the reasons I have explained above I have concluded that Mr Wilson had a voice in the management of the affairs of the LLP and an interest in and share of profits. I have found that his interest was not just limited to an interest in the profits of the Haines Watts' international tax practice. Mr Wilson was only entitled to a payment under the profit share clause in the Deed of Variation if Haines Watts made a profit for an accounting year and I do not accept Ms Murray's submissions to the contrary given the wording of the November Documents.

208. Rimer LJ relied on the case of *Stekel* in reaching his conclusion and the importance of identifying the parties' intentions, to determine whether a partnership was created. Again in *Stekel* it was made clear that the label used to describe a relationship is not determinative, but its true substance. In *Stekel* the partner made no contribution to the capital of the firm, had no entitlement to any share of its profits (receiving only a fixed salary with a possible bonus) or requirement to share in its losses and was not given any express voice in the management of its operations, but the intention of creating a partnership was sufficient for the relationship to be considered a partnership.

209. I refer to the evidence in the emails, meeting notes and the November Documents and conclude that in this case the parties clearly intended to make Mr Wilson a member of the LLP and, in the sense described by Rimer LJ, a partner.

210. I do not accept Mr Wilson's contention that his membership was hollowed out and in some way ineffective. I have explained how variation in the rights of different members fits into the LLP legislation. Mr Wilson was in fact left with significant rights and obligations as a Member under the November Documents as identified in the findings of fact, including to decide with the other Members what the nature of the Haines Watts business should be and a veto over the maximum number of Members changing. He was bound by a list of mutual undertakings and his inability to hire and fire employees without the consent of other Members which he has relied on in his evidence was in line with the position of the other Members under the LLP Agreement. His entitlement to be paid only applied where Haines Watts made a profit; he was not entitled to an 'above the line' salary.

211. Mr Wilson has set out a table of examples which he states show how Haines Watts exercised control over him on client matters. The table reflects little more than commonly encountered practices in professional firms. Other partners may have developed client relationships which they were keen to manage directly and that management may have included the types of interaction Mr Wilson has described, such as requiring contact with the client to be subject to another member's approval or directing that a particular fee structure should be applied. These practices and other administrative requirements, such as requiring Mr Wilson to use firm letterhead and email signatures which Mr Wilson has relied on in claiming he was in fact an employee, do not undermine the position of Mr Wilson as a Member under the November Documents.

212. As a result, I conclude that even if I were to apply the *Tiffin* approach, the payments made to Mr Wilson by Haines Watts were payments made to him as a member of an LLP and "as if" a partner in a partnership and not as an employee.

CONCLUSION

213. For all these reasons the appeal is dismissed and the decision made by HMRC under on 21 March 2018 that Mr Wilson was self-employed and therefore liable to pay National Insurance Contributions ("NICs") in respect of payments made to him resulting from his engagement with Haines Watts LLP ("Haines Watts") for the period 31 October 2012 to 31 March 2014 is CONFIRMED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

214. 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.

TRACEY BOWLER

TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2020