



Appeal number: UT/2020/0043

INCOME TAX - CORPORATION TAX - Mixed Partnership Rules - Sections 805A-E Income Tax (Trading and Other Income) Act 2005 - s805C - increase in the profit share of an individual partner by so much of the amount of the corporate partner's profit share is attributable to the individual's power to the enjoy the corporate's profit share - appeal dismissed

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

NICHOLAS WALEWSKI

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

**TRIBUNAL: Mr Justice Marcus Smith
Judge Rupert Jones**

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 11 and 12 May 2021

**Mr Patrick Soares and Mr Imran Afzal, Counsel, Field Court Tax Chambers, for the Appellant
Ms Aparna Nathan QC, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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DECISION

A. INTRODUCTION

1.

This appeal concerns the interpretation and application of the "mixed partnership" rules contained in sections 850C to 850E of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). A mixed partnership arises where a partnership includes at least one individual partner and one non-individual partner, such as a limited company or other corporate entity.

2.

The partnership rules include section 850C. One effect of this provision is to enable the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to increase the profit share of an individual partner who has the power to enjoy the profit share of the corporate partner, if other conditions are satisfied. In these circumstances, HMRC is required to reallocate so much of the profit share of the corporate partner to the individual partner's power to enjoy to the extent this is just and

reasonable. The purpose of the rule is to prevent individual partners making arrangements which seek to accumulate profits in a corporate partner at a lower tax rate – for example, benefitting from the rate of corporation tax which is lower than the higher or additional rate of income tax.

3.

In this case, Mr Walewski (or the “Appellant”) and Walewski Limited (“W Ltd”) were both partners in two LLP partnerships: Alken Asset Management LLP (“AAM”) and Alken Finance LLP (“AF”). The Appellant was an individual partner and W Ltd was a non-individual or corporate partner. W Ltd was a UK company of which the Appellant was a sole director and employee. Partners of the LLPs in this case are also referred to as members.

4.

HMRC charged the Appellant to income tax for the 2014-15 tax year under section 850C ITTOIA on the basis that the Appellant’s profit share from AAM and AF should be increased by reference to the whole of the profit shares which had originally been allocated to W Ltd.

5.

The assessments were made by HMRC under section 850C ITTOIA by way of two closure notices, each dated 31 March 2017, in which the partnership statements of the LLPs were amended with the result that:

(1)

£18,088,195 of profits from AAM were reallocated to the Appellant giving rise to total profits chargeable to income tax in his hands of £18,103,962; and

(2)

£1,372,510 of profits from AF were reallocated to the Appellant giving rise to total profits chargeable to income tax in his hands of £1,434,315.

6.

The Appellant appealed the amendments in the closure notices to the First-tier Tribunal (“FTT”). He contended that the additional profits of the two partnerships, amounting to £19,460,705, should not be re-allocated to him because they were earned by W Ltd as a corporate partner and not by him in his capacity as an individual partner in AAM or AF. The majority of these profits were allocated to W Ltd from AAM. The remaining, much smaller amount (£1,372,510), was allocated to W Ltd from AF.

7.

The FTT dismissed the Appellant’s appeal in a decision released on 30 January 2020. An amended decision was released on 21 April 2020 (the “Decision”). The FTT found that the profit share from the partnerships was not earned by W Ltd but was allocated to W Ltd because of the Appellant’s ability to enjoy those profits via an offshore trust to which W Ltd paid its profits and of which the Appellant’s children were beneficiaries. It found that the whole of W Ltd’s profit share was attributable to the Appellant’s power to enjoy its profits and that it was just and reasonable to reallocate all of W Ltd’s profits to the Appellant.

8.

The Appellant sought to appeal the Decision to the Upper Tribunal on two grounds. On 21 April 2020, the FTT granted the Appellant permission to appeal on the first ground of appeal. On 22 May 2020 the Upper Tribunal granted the Appellant permission to appeal on the second ground.

9.

The first ground of appeal (“Ground 1”) is that, to the extent W Ltd’s profit share was attributable to the period of time when the Appellant was not a partner of AAM (which was between August and November 2014), the profits could not have been reallocated to him. It was submitted that the FTT erred in finding that section 850C ITTOIA could apply to such a time period.

10.

The second ground of appeal (“Ground 2”) is premised on the FTT’s findings at [170] to [172] of the Decision that the Appellant’s work for W Ltd, AAM and AF was fungible, he was playing only a single role for the benefit of all three entities, and there was “no commercial, physical or temporal separation of [the Appellant’s] activities”. The Appellant submits that the inevitable consequence of these findings is that the FTT erred in allocating all of W Ltd’s profits to the Appellant for the relevant period. There should have been an equal division of W Ltd’s profits (excluding the amounts which could not be reallocated in any case).

11.

We consider these grounds of appeal in turn below, in Sections D and E. Before we do so, however, it is necessary to set out the relevant statutory provisions (which we do in Section B) and explain how those provisions were applied by HMRC and found to apply by the FTT (which we do in Section C). In a number of respects, the Appellant accepted the approach of HMRC as considered by the FTT (or at least did not seek to appeal the FTT’s decision in these respects), but it is nevertheless necessary to understand the overall approach in order properly to understand Ground 1 and Ground 2.

B. THE RELEVANT STATUTORY PROVISIONS

12.

The profits or losses of an LLP that carries on a business with a view to profit are allocated between the partners according to their agreed partnership interests. Section 849 ITTOIA sets out the basic rule for calculating a partnership’s profit or losses: where, for any period in which a UK resident partner in the trading partnership is chargeable to income tax, the profits and losses of the trade are calculated as if the partnership were a UK resident individual.

13.

Section 850(1) ITTOIA provides that, 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. Section 850(2) defines “profit-sharing arrangements” as “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”.

14.

Section 850 is expressly made subject to “sections 850A to 850D”. For the purposes of this appeal, the critical section is section 850C, although the parties did make reference to a number of other provisions of ITTOIA. So far as is material, section 850C provides:

“(1) Subsections (4) and (5) apply if –

(a) for a period of account (“the relevant period of account”) –

(i) the calculation under section 849 in relation to an individual partner (“A”) (see subsection (6)) produces a profit for the firm, and

- (ii) A's share of that profit determined under section 850 or 850A ("A's profit share") is a profit or is neither a profit nor a loss,
 - (b) a non-individual partner ("B") (see subsection (6)) has a share of the profit for the firm mentioned in paragraph (a)(i) ("B's profit share") which is a profit (see subsection (7)), and
 - (c) condition X or Y is met.
- (2) Condition X is that...
- (3) Condition Y is that -
- (a) B's profit share exceeds the appropriate notional profit (see subsections (10) to (17)),
 - (b) A has the power to enjoy B's profit share ("A's power to enjoy") (see subsections (18) to (21)), and
 - (c) it is reasonable to suppose that -
- (i) the whole or any part of B's profit share is attributable to A's power to enjoy, and
 - (ii) both A's profit share and the relevant tax amount (see subsection 9) are lower than they would have been in the absence of A's power to enjoy.
- (4) A's profit share is increased by so much of the amount of B's profit share as, it is reasonable to suppose, is attributable to -
- (a) A's deferred profit, or
 - (b) A's power to enjoy,
- as determined on a just and reasonable basis.

But any increase by virtue of paragraph (b) is not to exceed the amount of the excess mentioned in subsection (3)(a) after deducting from that amount any increase by virtue of paragraph (a).

- (5) ...
- (6) A partner in a firm is an "individual partner" if the partner is an individual and "non-individual partner" is to be read accordingly; but "non-individual partner" does not include the firm itself where it is treated as a partner under section 863I (allocation of profit to a firm).
- (7) B's profit share is to be determined by applying section 850 and, if relevant, section 850A in relation to B for the relevant period of account (whether or not B is chargeable to income tax) on the assumption that the calculation under section 849 in relation to B produces the profit for the firm mentioned in subsection (1)(a)(i).
- (8) ...
- (9) "The relevant tax amount" is the total amount of tax which, apart from this section, would be chargeable in respect of A and B's income as partners in the firm.
- (10) "The appropriate notional profit" is the sum of the appropriate notional return on capital and the appropriate notional consideration for services.
- (11) "The appropriate notional return on capital" is -

(a) the return which B would receive for the relevant period of account in respect of B's contribution to the firm were the return to be calculated on the basis mentioned in subsection (12), less

(b) any return actually received for the relevant period of account in respect of B's contribution to the firm which is not included in B's profit share.

(12) The return mentioned in subsection (11)(a) is to be calculated on the basis that it is a return which is –

(a) by reference to the time value of an amount of money equal to B's contribution to the firm, and

(b) at a rate which (in all the circumstances) is a commercial rate of interest.

(13) For the purposes of subsections (11) and (12) B's contribution to the firm is amount A determined under section 108 of ITA 2007 (meaning of "contribution to the LLP").

(14) That section is to be applied –

(a) reading references to the individual as references to B and references to the LLP as references to the firm, and

(b) with the omission of –

(i) subsections (5)(b) and (9), and

(ii) in subsection (6) the words from "but" to the end.

(15) "The appropriate notional consideration for services" is –

(a) the amount which B would receive in consideration for any services provided to the firm by B during the relevant period of account were the consideration to be calculated on the basis mentioned in subsection (16), less

(b) any amount actually received in consideration for any such services which is not included in B's profit share.

(16) The consideration mentioned in subsection 15(a) is to be calculated on the basis that B is not a partner in the firm and is acting at arm's length from the firm.

(17) Any services, the provision of which involves any partner in the firm in addition to B, are to be ignored for the purposes of subsection (15).

(18) A has the power to enjoy B's profit share if –

(a) A is connected with B by virtue of a provision of section 993 of ITA 2007 (meaning of "connected" persons) other than subsection (4) of that section,

(b) A is a party to arrangements the main purpose, or one of the main purposes, of which is to secure that an amount included in B's profit share –

(i) is charged to corporation tax rather than income tax, or

(ii) is otherwise subject to the provisions of the Corporation Tax Acts rather than the provisions of the Income Tax Acts, or

(c) any of the enjoyment conditions (see subsection (20)) is met in relation to B's profit share or any part of B's profit share.

(19) In subsection (18)(b) "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

(20) The enjoyment conditions are –

(a) B's profit share, or the part, is in fact so dealt with by any person as to be calculated at some time to enure for the benefit of A, whether in the form of income or not;

(b) the receipt or accrual of B's profit share, or the part, by or to B operates to increase the value to A of any assets held by, or for the benefit of, A;

(c) A receives or is entitled to receive at any time any benefit provided or to be provided (directly or indirectly) out of B's profit share or the part;

(d) A may become entitled to the beneficial enjoyment of B's profit share, or the part, if one or more powers are exercised or successively exercised by any person;

(e) A is able in any manner to control (directly or indirectly) the application of B's profit share or the part.

(21) In subsection (2) references to A include any person connected with A apart from B . "

C. APPLICATION TO THE PRESENT CASE

(1) Approach

15.

As we have noted, Ground 1 and Ground 2 can only be assessed in light of the overall statutory scheme – for the most part, set out in Section B above – and in light of the FTT's careful and detailed finding and consideration of the facts in its Decision.

16.

The FTT, in a hearing that lasted five days, heard witness evidence of six witnesses and considered voluminous documentary evidence. The Decision sets out detailed findings of fact and conclusions based on those findings. In this section, we set out the background facts (as found by the FTT) in Section C(2), before proceeding to set out (in Section C(3)) – in a slightly clearer form than the statute – the conditions that needed to be met in order for section 850C(4) ITTOIA to bite. Thereafter, we set out – very briefly – the FTT's conclusions as to the assessments and the application of section 850C(4). We do so briefly because the FTT's Decision is challenged only on the basis of Ground 1 and Ground 2, and these are the only matters before us. We consider the Decision more generally only in order to provide the context for the consideration of Grounds 1 and 2.

(2) The background facts

17.

The background facts were stated by the FTT at [7] to [16] of the Decision. They are set out below:

"7. Mr Walewski is a successful investment adviser in London. Having managed funds for other people, in 2005 he set up his own equity fund, the Alken Fund, a Luxembourg SICAV (an open-ended vehicle).

8. That fund was managed by AAM in the UK which was set up on 5 July 2005. Trade execution was carried out by AF which was set up on 19 November 2010. AAM was a member of AF until 5 December 2011.

9. For the relevant years, AAM's total profits were £19,040,069. AF's total profits were £3,165,813.

10. Mr Walewski was a partner in AM and AF and also set up a company, W Ltd, in June 2006 which was a partner of both AAM and AF. Mr Walewski was W Ltd's only director. Mr Walewski became an employee of W Ltd on 1 April 2007. W Ltd had no other employees or directors.

11. AAM was a partner in AF until 5 July 2011 and was its managing member. AF's only other member was Mr Walewski. W Ltd took over AM's partnership interest in AF on 5 July 2011.

12. AAM and AF had other employees as well as Mr Walewski and clients other than the Alken Fund, but that fund generated more than 80% of AAM's income for the 2014-15 tax year and Mr Walewski was the only member of AAM's management committee.

13. The "mixed partnership" rules are anti-avoidance rules which were introduced in April 2014 having effect for tax years starting from 6 April 2014. They apply to LLPs such as AAM and AF if the partnership includes both individual and non-individual members.

14. The shares in W Ltd are held by an offshore company Molinos Capital Limited in the British Virgin Islands. Shares in that company are held by a trust, the Kleber Trust, in which Mr Walewski's children are named beneficiaries.

15. During the relevant tax year 2014-15, Mr Walewski's role and involvement in AAM, AF and W Ltd changed:

(1) Mr Walewski retired as a partner from AAM on 31 July 2014.

(2) Mr Walewski's capital contribution to AAM was taken over by W Ltd effective from 1 August 2014, although no actual repayment was made to Mr Walewski until 24 November 2014.

(3) Mr Walewski became an employee of AAM for the two months from 1 August to 30 September 2014.

(4) Mr Walewski resigned as an employee of W Ltd at the end of September 2014. Mr Walewski remained as a director of W Ltd.

(5) On 29 November 2014 the business of AAM and AAF were incorporated and Mr Walewski became a director of both of those entities.

16. The profit allocations with which we are concerned were made on 24 March 2015 for AAM and 28 October 2015 for AF and represented profits for the 2014-15 tax year during which (i) W Ltd was a partner in AAM and AF (until their incorporation in November 2014) and (ii) Mr Walewski was also a partner, in AAM (from April 2014 until July 2014), and in AF (from April 2014 until November 2014)."

(3) A parsing of the relevant provisions

18.

The relevant provisions relied upon by the FTT to confirm HMRC's decision to increase the Appellant's profit share, and hence income tax liability, are set out in Section B above. The provisions

are complex, and it is appropriate to set out the various requirements that have to be met before setting out the FTT's approach.

(i) Section 850C(1)

19.

The relevant parts of section 850C – that is, subsections (4) and (5) – only apply if the three cumulative conditions in section 850C(1) are met. These are stated in sub-sub-paragraphs (a), (b) and (c) of section 850C(1). We shall refer to these three conditions as “Conditions (a), (b) and (c)”.

20.

As to these:

(1)

Condition (a). During the relevant period of account, from 6 April 2014, “A” (as the statute refers to persons like the Appellant) was calculated to receive a profit from the firms, AAM and AF, within the meaning of section 850C(1)(a).

(2)

Condition (b). In addition, “B” (as the statute refers to persons in the position of W Ltd) had a share of the profit from the firms (the LLPs), so that section 850C(1)(b) was satisfied.

(3)

Condition (c). Condition X or Y must also be met. In this case condition Y was relied upon by HMRC. It will be necessary to consider condition Y in greater detail. Condition X is immaterial for present purposes.

(ii) Condition Y

21.

The nature of condition Y is specified in section 850C(3). The subsection provides four requirements which must be satisfied in order for HMRC to increase the Appellant's profit share. These requirements are as follow:

(1)

The first requirement (“Y(1)”). B's profit share – that is, the profit share of W Ltd – must exceed the “appropriate notional profit”: section 850C(3)(a).

(2)

The second requirement (“Y(2)”). A – that is, the Appellant – must have the power to enjoy B's (W Ltd's) profit share: section 850C(3)(b).

(3)

The third requirement (“Y(3)”). It is reasonable to suppose that the whole or any part of B's profit share is attributable to A's power to enjoy: section 850C(3)(c)(i).

(4)

The fourth requirement (“Y(4)”). Both A's profit share and the relevant tax amount (being, essentially, the tax that would be paid otherwise than by virtue of section 850C) are lower than they would have been in the absence of A's power to enjoy: section 850(3)(c)(ii).

(iii) Section 850C(4)

22.

Assuming that conditions (a), (b) and (c) are met, sections 850C(4) and (5) apply. Section 850C(5) is not material for the present appeal, and is not considered further.

23.

Section 850C(4) provides for the amount by which an individual partner's profit share is to be increased in the event that profit is attributable to the individual partner's power to enjoy that profit. In that situation, the profit that is to be reallocated to the individual partner is so much of B's profit share as is attributable to the power to enjoy as determined on a "just and reasonable basis".

24.

It is to be noted that the subsection is expressed in mandatory terms – "A's profit share is increased by so much of the amount of B's profit share..." – but subject always to a determination on a "just and reasonable" basis.

(4) The FTT's consideration and the grounds of appeal

25.

As we have described, and for the reasons given in the Decision, the FTT dismissed the Appellant's appeal against the closure notices, and found the adjustments pursuant to section 850C(4) to be proper. More specifically:

(1)

Conditions (a) and (b) were not in issue before the FTT, and are not relevant for the purposes of this appeal. It was common ground that those conditions were met.

(2)

As to condition (c), this turned on whether the various requirements of condition Y were met. These requirements – as described – are in essence fourfold, comprising Y(1), Y(2), Y(3) and Y(4). The FTT found those requirements to be met.

(3)

Accordingly, the FTT proceeded to a consideration of section 850C(4) and found that the adjustments made to the profit shares of the Appellant and W Ltd by HMRC in the closure notices to be just and reasonable.

26.

As we have noted, most of these requirements were either not challenged before the FTT or – having been dealt with by the FTT – are not the subject of this appeal. The specific portions of the Decision that are under attack in this appeal are Grounds 1 and 2, to which we now turn.

D. GROUND 1

27.

The Appellant contended that, to the extent that W Ltd's profit share was attributable to the period of time when the Appellant himself was not a partner of AAM, the profits of W Ltd earned during that period could not be reallocated to him as a matter of statutory construction. Essentially, the contention was that, on a proper analysis of section 850C, the power to reallocate profit share to the Appellant could only arise in respect of a time period during which he (and W Ltd) were both partners of AAM.

28.

Paragraph 11 of the Appellant's written submissions put the point thus:

"Under Ground 1 the Appellant contends that to the extent W Ltd's profit share was attributable to the period of time when the Appellant was not a partner of AAM, the profits cannot have been reallocated to him. Section 850C envisages cases where individual partners divert their share of profits arising from an LLP to a partner that is a company, and this is relevant because an individual cannot divert that which he does not have to divert in the first place. In other words, to the extent that W Ltd's profit share relates to the period when the Appellant was not a member of AAM, the profits were those of the then member (i.e. excluding the Appellant) and thus they could not have been diverted by the Appellant to W Ltd. The FTT should either have held (a) that the legislation simply did not apply to such profits, or alternatively (b) that such profits could not be reallocated pursuant to section 850C(4)."

29.

The difficulty with this contention is that it assumes a direct correlation between a person's status as partner and the allocation to that person of the profits in the partnership. In short, the underlying assumption is that there is a direct relationship between the time spent by a person as a partner and the profit share accruing to that partner.

30.

There is, we consider, no such correlation. Indeed, that was demonstrated by the various different measures that Mr Soares, on behalf of the Appellant, articulated as to how the profits of AAM might be split as between the Appellant and W Ltd based purely on their time of service as partners during the relevant accounting period.

31.

We consider that there is no necessary correlation between profit share and time served, and that – absent very clear wording in the statute – the proposition advanced by Mr Soares is an untenable one. Indeed, it would open the way to a clear ability to divert partnership profits and undermine the purpose of section 850C by appropriately timing the entry and exit of partners.

32.

We accordingly reject Ground 1. It represents both a misunderstanding and misinterpretation of section 850C, is contrary to the clear language of the provision, not supported by any authority and inconsistent with the statutory scheme under section 850C. More specifically:

(1)

The construction contended for would involve doing violence to the clear language of section 850C and/or inserting further words. On its face, section 850C does not have the meaning for which the Appellant contends.

(2)

Section 850C applies "for a period of account" (see subsection (1)(a)). Absent any words of limitation, it applies if the various conditions are met at any point in the period of account. As a matter of construction, there is no requirement that A be a partner for more than a moment of time within the relevant period of account for the purposes of section 850C, so long as A receives a share of some profit (see subsection (1)(a)(ii)).

(3)

This is consistent with the scheme of the legislation: section 850(1) (allocating a firm's share of profits (or losses) between partners) is subject to section 850C. Section 850A applies for a "period of account". It is therefore consistent for section 850C to apply for that same period of account, in this case from 6 April 2014 until the dissolution of the partnership on 29 November 2014.

(4)

This approach is also consistent with the scheme of section 850C itself, which is concerned with the inappropriate diversion of profit shares. The intended purpose of the section is to reallocate profits of a partnership to an individual partner where the requirements of the section are met, and to impose additional requirements not present in the statutory wording and not necessary for its operation is not permissible.

33.

Mr Soares also submitted that the FTT erred at [213] to [216] of the Decision in not exercising its discretion to reduce the reallocation of the profit share in respect of the four months that the Appellant was not a partner in AAM. He submitted that the FTT might have apportioned this on a time basis – reducing the reallocation by 50% because he was a partner for four months and a non-partner for four months. Alternatively, he suggested that the reallocation should be apportioned according to the proportion of turnover generated by AAM in the period while the Appellant was a partner.

34.

We are satisfied that this aspect of Ground 1 is no more than a challenge to the FTT's findings and a submission that the FTT erred in determining it just and reasonable to increase the Appellant's profit to the full extent of W Ltd's profits. This, as it seems to us, is an impermissible attempt to argue primary points of discretion, and absent a contention that the FTT erred as a matter of law, the FTT's Decision must stand. Having rejected the error of law contended for by the Appellant – namely that the FTT had misconstrued section 850C in the manner we have described – we consider that the Appellant has not articulated, in Ground 1, any further basis for contending that the FTT had erred as a matter of law.

E. GROUND 2

35.

The basis upon which Ground 2 was articulated rested upon the FTT's "overall conclusion" at [170] to [172] of the Decision that the Appellant's services to AAM, AF and W Ltd were "fungible".

36.

It is appropriate to set out the relevant paragraphs of the Decision:

"170. Our overall conclusion, based on these findings of fact, is that Mr Walewski's work for W Ltd, AAM and AF was fungible; it is not possible on the basis of any evidence which we saw, to separate his role into discrete components; his work for one was his work for each and all of those entities. Mr Tsatsaris described Mr Walewski's roles for the three entities as "very interlinked", we think they were more than interlinked, we think Mr Walewski was essentially playing only a single role, but for the benefit of all three entities.

171. Mr Walewski was described as "wearing a number of hats", again, in our view this does not do justice to the truly fungible nature of his activities for these entities, all of whose decisions and strategies began and ended with Mr Walewski, as the only director and employee of W Ltd, as a

member of AAM and only member of its management committee and as an employee and member of AF.

172. There was no commercial, physical or temporal separation of Mr Walewski's activities. A more accurate description of Mr Walewski would be to say that he wore one hat in many places. The entity on whose behalf he wore that hat was essentially irrelevant."

37.

On behalf of the Appellant it was submitted that, given that the FTT found the Appellant was playing a single role for the benefit of all three entities, it had accepted that the Appellant was providing half of his time or half of his services through W Ltd to the partnerships and their clients. W Ltd had, therefore, earned that half of its profit share from the partnerships as a corporate partner. The increase in the Appellant's profit share should take account of the time and services the Appellant provided through W Ltd to the partnerships and their clients.

38.

We confess that we have some difficulty in seeing the error of law alleged by the Appellant in Ground 2. It is trite that the terms of a decision or judgment should not be read as if a statute, and – particularly where an appeal is confined to points of law – an appellate court must be particularly careful when considering the manner in which the court below has expressed itself. Here, quite clearly, the FTT was holding that the manner in which Mr Walewski provided his services was utterly fluid and essentially unknowable. The fact is that W Ltd was nothing more than a corporate alter ego to Mr Walewski and it seems to us that the conclusion reached by the FTT is entirely consistent with that finding.

39.

In short, we are satisfied that Ground 2 is nothing more than a challenge either to the factual findings of the FTT as to whether the statutory requirements were satisfied or to its determination as to what was "just and reasonable" on the facts it had found. Neither, as it seems to us, can amount to an error of law, whether as articulated in Ground 2 or otherwise.

40.

The FTT properly and carefully followed each stage in the series of statutory requirements imposed by section 850C and, where in dispute, made findings that these statutory requirements were satisfied. Its findings on each requirement, including on the extent of W Ltd's excess profits, were rational and available to it to make on the evidence it received. We are satisfied that the findings were neither perverse nor irrational. There is no sustainable challenge that can be made to any of the factual findings or inferences that could be drawn from them.

41.

Likewise it cannot be said that the FTT's determination as to what was "just and reasonable" for the purposes of section 850C(4) was "plainly wrong". While this is not an exercise of judicial discretion but a judicial determination, we should not interfere with it unless we are satisfied that the high hurdle expounded in *Piglowska v. Piglowski*, [1999] 1WLR 1360 is met.

42.

In this case, the FTT came to three key conclusions when determining that section 850C(3) was satisfied and when considering the application of section 850C(4):

(1)

Each of W Ltd, AAM and AF were creatures of the Appellant who controlled them: Decision at [198].

(2)

None of the profits allocated to W Ltd can be said to have been earned by that entity through the Appellant's activities or services provided as an employee (Decision at [200] and [202]). In other words, all of its profits were excess profits.

(3)

All of W Ltd's profits were attributable to the Appellant's power to enjoy (Decision at [205]).

43.

Each of the three key conclusions, and the factual findings supporting them, were rational and available to the FTT on the evidence it received, and we see no basis for challenging the FTT's conclusions in this regard. Accordingly, we reject Ground 2.

F. DISPOSITION

44.

For the reasons we have given, Grounds 1 and 2 both fail and this appeal must be dismissed. HMRC did file a respondent's notice, but given the nature of our conclusions in relation to Grounds 1 and 2 it is unnecessary to consider this further.

Handwritten signature of Mr Justice Marcus Smith, consisting of a stylized 'M' followed by a horizontal line and the name 'Rupert Jones' in cursive.

MR JUSTICE MARCUS SMITH JUDGE RUPERT JONES

UPPER TRIBUNAL JUDGES

RELEASE DATE: 15 June 2021