Proskauer

UK Tax Round Up

August 2025

Welcome to the August edition of our UK Tax Round Up, in which we consider the First-tier Tribunal's decision that an attempt to alienate partnership income that was subject to a pre-existing security interest was ineffective.

Assignment of partnership profit rights ineffective as profits continue to be used for taxpayer's benefit

In *Craig William Burley v HMRC*, the First-tier Tribunal (FTT) considered whether an individual (Mr Burley) assigning his interest in the profits of two film partnerships to a limited liability partnership remained entitled to those profits under section 8 ITTOIA 2005. Section 8 provides that the person chargeable to income tax on the profits of a trade is the person who "receives or is entitled to" them. Dismissing Mr Burley's appeal, the FTT held that, despite the assignment, he remained the person entitled to the profits of the partnerships as those amounts continued to be applied towards the discharge of his personal liability to his lenders. Additionally, while immaterial to the decision, the FTT also stated that the assignment had not been validly effected under partnership law.

Mr Burley invested in two UK film partnerships, Bothwell Media I (BMI) and Bothwell Media II (BMII), in the early 2000s. Each partnership acquired film rights from a production company and leased them back in return for a revenue stream. Mr Burley financed his investment almost entirely through bank loans. While his liability to the bank was personal and unlimited, the banks held security over the partnerships' income, which was paid directly to the banks by the partnerships to satisfy the loan payments. As a result, he did not receive cash distributions in respect of his profit allocations. The loan terms were structured so that the films' minimum licence fees would cover both interest and capital repayments, with the loans repayable over fourteen years.

In the early years, the partnerships generated tax-deductible trading losses, which Mr Burley set off against his other income. Once the partnerships became profitable, however, the profits were allocated to him under the partnership agreements and were taxed in his hands even though all the cash went directly to the banks. This prompted him to take professional advice on how he might mitigate his tax liability. Following that advice, he sought to transfer his partnership income rights to a new limited liability partnership (LLP) in which both he and his personal service company, Craig Burley Ltd (CBL), were members. The plan was for the LLP to allocate profits to CBL, allowing them to be taxed at the lower corporation tax rate rather than Mr Burley's personal income tax rate.

In January 2011, shortly before the 2009/10 tax return filing deadline, a "Minute of Agreement" was executed which purported to assign all of Mr Burley's entitlement to partnership income to the LLP, retrospectively and with effect from the start of the 2009/10 tax year. Among its provisions, the Minute of Agreement recorded that:

- Mr Burley would hold four Florida properties for the benefit of the LLP, and the value of these properties would be equity capital of the LLP;
- Mr Burley would hold his partnership income rights for the LLP absolutely with effect from 6 April 2009; and
- CBL would become a member of the LLP and would bear any losses in respect of the Florida properties equivalent to any income allocated to it in the LLP from other sources.

In the LLP's accounts, Mr Burley's capital account was credited with £1.7 million for the value of the partnership income rights "contributed" by him to the LLP, but the liability to repay his bank loans was not recognised in the LLP and remained his personal liability. The income from the partnerships was shown as a credit in the LLP accounts with a matching debit to his capital account, reflecting the application of the income to pay the lenders.

HMRC did not agree with Mr Burley's position that it was CBL, and not him, that was liable for tax on the partnerships' income and issued him with five closure notices charging additional amounts of income tax. HMRC's case was, broadly, twofold. First, that the assignment by Mr Burley to the LLP was ineffective as a matter of general (non-tax) law. Secondly, as the profits of the partnerships continued to be used for his benefit, he was taxable on them even if the assignments had been legally effective, on the basis that he had "received or been entitled to" them.

The FTT first considered whether Mr Burley or CBL was subject to tax on the partnership profits. On this point, Mr Burley leaned heavily on section 850 ITTOIA, which provides that a partner's share of a partnership's trading profit is determined in accordance with its profit-sharing arrangements. He insisted that because profits had been allocated to CBL in the LLP's accounts, it was CBL that was chargeable on those profits. In that regard, he relied on the LLP's accounts, arguing this to be a golden rule endorsed by the Supreme Court in *NCL Investments Ltd* that accounts prepared in accordance with generally accepted accounting principles should be respected in determining the profits of a trade for tax purposes, absent a provision to the contrary.

In addressing this argument, the FTT stressed that, while section 850 is a computational provision which determines how much profit a partner is allocated, it does not impose the tax charge on the partner. That is done by section 8 ITTOIA, which requires a separate enquiry into who, on a realistic view of the facts, receives or is entitled to the profits. The FTT noted that, in the case of a straightforward commercial partnership, those questions would normally arrive at the same answer. In this case, however, the FTT disagreed with Mr Burley's reliance on the LLP's accounts, observing that the so-called "golden rule" would only apply to the computation of profits and not to the question of who was entitled to them. The latter is a legal question requiring a realistic appraisal of the commercial reality or substance of the arrangements in light of the words of the statute purposively construed.

In assessing section 8 ITTOIA, the FTT drew heavily on the Court of Appeal's (CA's) decision in *Good v HMRC*, where Mr Good had argued that he was no longer entitled to certain film distribution receipts because they had been assigned to his lender under a security arrangement. In deciding on the meaning of the phrase "receiving or entitled to" in section 611 ITTOIA 2005 (a provision materially identical to section 8), the CA held that, even though the payments flowed directly to the lender, Mr Good derived a direct and personal benefit from them because each payment reduced his outstanding debt. He therefore remained "entitled to" the income for tax purposes. The CA stressed that entitlement under ITTOIA is not displaced simply because cash never passes to the taxpayer; what matters is whether the income benefits the taxpayer in a real and practical sense.

The FTT considered that analysis to apply squarely to Mr Burley's situation. Much like Mr Good, and notwithstanding his claim to have assigned his right to receive the income, he still benefited from the income which was applied to discharge his personal liability under his bank loans. His attempt to distinguish *Good* on the basis that he had executed a separate equitable assignment was rejected, since the commercial effect was identical. In both cases, the taxpayer remained the true beneficiary of the income by virtue of its use to satisfy personal obligations.

The FTT further stated that the effect of the borrowing and security documents was that Mr Burley's share of partnership income was diverted to his lenders before the purported assignment to the LLP and until his obligations had been fully discharged. While the LLP's accounts credited him with a capital contribution which the LLP then wrote off as the underlying partnership income was used to discharge his personal obligations, the LLP never really received any benefit from the interest transferred to it. The FTT noted that this outcome was not accidental: the contractual arrangements ensured that the profits would be used in this manner, and Mr Burley remained personally liable under the loans, with his liability reduced by the application of the partnership profits. On that basis, the FTT held that the partnerships' profits were still being used for Mr Burley's exclusive benefit and so it was he who was entitled to them for the purposes of section 8 ITTOIA.

Secondly, while recognising this to be immaterial to the outcome of the appeal given the decision on the first question, the FTT also considered the partnership (non-tax) law question of whether the Minute of Agreement effected an assignment of Mr Burley's partnership income. It held that, due to the lack of notice to the partnerships, it could not be a legal assignment under section 136 Property Act 1925, and could only take effect in equity. Ruling that the Minute operated, if at all, as an assignment of future partnership profits (a "future" chose in action), the Minute could take effect only as an agreement to assign, which would have had to have been supported by consideration from the LLP—a requirement the FTT doubted was met. While it was argued that Mr Burley was credited in the LLP accounts with £1.7 million, the FTT questioned whether this created any additional membership rights for him. Further, CBL's assumption of losses of Mr Burley's Florida properties was not clearly consideration from the LLP. Difficulties also arose because the LLP was not a party to the Minute, and the assignment would necessarily have been subject to the prior security interests in the partnerships' income, leaving little value to be assigned. Lastly, the wording of the assignment was not clear as to whether gross or net income from the partnerships was assigned. If the Minute was trying to assign more than the net amounts (after payment to the lenders), it could not confer a right to the LLP in priority to the lenders. For all these reasons, the FTT was not satisfied that the Minute was effective in assigning to the LLP the rights that Mr Burley claimed it did.

This is an interesting case, both in the general application of the *Ramsay* principle requiring a realistic view of the facts to the provision in question and also as the latest case considering the concepts of receipt and entitlement in the context of tax cases and how a cautious approach should be applied to attempts to alienate taxable income. It also shows the importance of clear and comprehensive drafting of documents when specific tax consequences are sought.

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