

Upper Tribunal Determines That UK Company Was Entitled to Credit for US Federal Tax

3 July 2023

Report from our correspondent Richard Curtis, Tax Author

The United Kingdom (UK)'s Upper Tribunal has published its decision in the case of *GE Financial Investments V. The Commissioners For His Majesty's Revenue And Customs* [UT/2021/000165](#), deciding that a UK company was a US tax resident entitled to credit for US federal tax.

(a) Facts. GE Financial Investments (GEFI Ltd) is a UK resident company. It claimed a credit of roughly GBP 125 million in respect of US federal income tax paid on interest. GEFI Ltd claimed that it was entitled to that credit as a limited partner in a Delaware limited partnership. The company had previously amended its articles of association restricting the transfer of its ordinary dollar shares unless all the common stock in GE Financial Investments Inc (GEFI Inc), an affiliated company was transferred at the same time. As a result, the shares of GEFI Ltd were considered to be "stapled" to the stock of GEFI Inc. The consequence was that, for US federal income tax purposes, GEFI Ltd was treated as a domestic corporation and liable to US tax on worldwide income. The UK's tax authority, His Majesty's Revenue and Customs (HMRC) refused the claims. The company appealed to the First-tier Tax Tribunal, which refused the appeal so the company appealed to the Upper Tribunal.

(b) Issue. The main issue was whether GEFI Ltd was a resident of the United States (US) for the purposes of article 4 of the [United Kingdom - United States Income Tax Treaty](#). If so, it would be entitled to the relief claimed.

(c) Decision. Under Chapter 3 of Part 2 of the Corporation Tax Act (CTA) 2009 "a company which is incorporated in the United Kingdom is UK resident for the purposes of the Corporation Tax Acts". However, if a company is resident elsewhere under a double tax convention, section 18 of the CTA 2009 provides that it will not be regarded as UK resident. A foreign corporation can be treated as resident in the US under the "share stapling" rules, but there is an exception if less than 50% of the total voting power and less than 50% of the total value of its stock is held directly or indirectly by US persons. US residence may also apply if there has been a relevant "inversion" or if the company has elected to be treated as a domestic corporation.

The Upper Tribunal considered that article 4(1) of the OECD Model Tax Convention was drawn widely deliberately and signatory states had a wide discretion to determine tax residence with the tie-breaker provisions available to resolve issues. The share stapling rule was adopted by the US for anti-avoidance purposes and as it had been a feature of US federal income tax law for at least 17 years before the [United Kingdom - United States Income Tax Treaty](#) came into force, the UK should have been aware of those rules. The tribunal also considered the Canadian Supreme Court decisions in *Crown Forest Industries v. Canada* [1995] 2 SCR 802 and *Canada v. Alta Energy Luxembourg SARL* 2021 SCC 49.

The Upper Tribunal concluded that GEFI Ltd was resident in the US for the purposes of the [United Kingdom - United States Income Tax Treaty](#) and allowed its appeal against HMRC's assessments.

United Kingdom - Upper Tribunal Determines That UK Company Was Entitled to Credit for US Federal Tax (03 July 2023), News IBFD.

Exported / Printed on 9 Mar. 2024 by hkermadi@deloitte.lu.