

The recent case of *Howden Joinery Group Plc v HMRC* TC03396 was mainly about a deduction for management expenses but had a much more interesting element concerning payments under a guarantee.

The First-tier Tribunal (FTT) confirmed the distinction between the expenses of management of the company and the expenses of management of the company's investment business. This is a very fine distinction and the tribunal concluded that the provision of a guarantee by a parent company to a subsidiary (for the benefit of both parties) was expenditure on an asset of the parent rather than on its investment business.

The guarantee question was mainly concerned with the character of a payment made under a guarantee. The company had guaranteed the rent of another company, so did the payments under the guarantee have the character of rent or did they have an independent character as guarantee payments?

Interestingly, the *Bank of Greece* case (*Westminster Bank Executor and Trustee Co v National Bank of Greece* [1971] 1 All ER 233) about withholding tax makes an appearance as it was also concerned with the issue of payments under a guarantee. In the Court of Appeal it was said:

"The guarantors unconditionally guaranteed the due payment of the principal and interest. When they pay under the guarantee, they pay the interest which the principal debtor should have paid. The indebtedness for interest is then discharged. So the payment is truly payment of interest."

On appeal to the House of Lords the question of the treatment of the guarantee payments did not arise because the point had been dropped but there was nothing said in the House of Lords to cast any doubt on the judgement of the Court of Appeal on this point. This reasoning was supported by the subsequent case of *Hawkins v Hawkins* [1972] 3 All ER 386 which held that the guarantor paid what he promised to pay, namely principal and interest, and that the difference in the source of the obligations did not affect the nature and quality of the thing paid.

Nevertheless, the tribunal concluded that the *Bank of Greece* case was not clear authority for the fact that the guarantee payments follow the character of the payments which they replaced and they came to the opposite conclusion.

This leaves us in some difficulty. We have a clear explanation of the position from the Court of Appeal followed by an equally clear judgement in the High Court – but an opposite conclusion from the FTT. As the FTT's judgements are not binding on anyone but the parties, it probably does not change anything, but it is far from satisfactory.

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