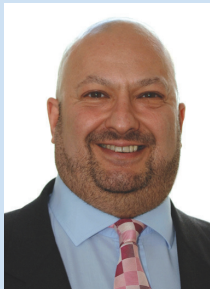


**Issues raised by *Swift v HMRC***  
**Pete Miller, Partner, Powrie Appleby**



The decision in *Swift* ([2010] UK FTT00399, see *Tax Journal* dated 19 April 2010 p 17) raises some interesting questions.

**Are the Memec tests still valid?**

The six tests of whether an entity is transparent or opaque, derived from *Memec plc v CIR* (71 TC 77), were considered and the LLC in *Swift* satisfied four of these: legal existence, carries on business, responsible for its debts and beneficially owns its assets. But the LLC was found not to have

issued share capital, and its profits were found to belong to the members as they arose. This last point was the major ratio for the decision, which suggests that the other *Memec* tests are irrelevant. Once the profits of the LLC were found to belong to the LLC's members, the members were directly taxable on those profits.

**Is the LLC a company?** This was not answered in the decision. The general definition is at CTA 2010 s 1121(1): 'any body corporate ... but not a partnership'. A Delaware LLC is a body corporate, as it is incorporated under the Delaware LLC Act. The Tribunal judges did not find that it was a partnership: all they said was that the members' interests looked more like partnership capital than share capital. In the narrower context of group relationships, a company merely has to be 'formed under the law of a country or territory

outside the United Kingdom' (for example, TCGA 1992 s 170(9)(b)). Once again, a Delaware LLC clearly satisfies this test. So I believe the *Swift* decision suggests that an entity can be both a company and transparent for UK tax purposes.

**Does the LLC have issued share capital?** Regardless of whether the LLC had share capital, the expert witnesses considered that nothing was 'issued'. The meaning of 'issue' was considered in *National Westminster Bank v CIR* (67 TC 1), and I interpret this decision to mean that share capital is 'issued' when all the required legal processes have been completed. I assume that all legal protocols had been followed by the LLC and its members in *Swift*, so if the LLC had share capital, I suggest that it had been issued. Revenue & Customs Brief 87/09 details HMRC's views about issued share capital. The problem with the decision is that a company that does not have issued share capital is a group breaker, as all UK corporation tax definitions of groups require a holding of the share capital of a company. From this perspective, the better result would have been a finding that the LLC is transparent and not a company, as the LLC would then be ignored in determining group relationships.

Much of the decision in *Swift* derived from the Delaware LLC Act, rather than from the LLC's specific operating agreement, which is why these matters are of general concern. And other US states also have LLC Acts which are similar to that of Delaware. Overall, therefore, this case raises some very interesting questions; we await the results of the appeal with some trepidation.

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