BlueCrest Capital: salaried member rules for LLPs

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We provide an update on the latest developments on the salaried member rules and what this means for limited liability partnerships and their members.

Key Points

What is the issue?

This article outlines two important updates concerning the salaried member rules. The first concerns the decision of the Court of Appeal in *BlueCrest*, which provides judicial guidance on how the significant influence test should be construed when determining Condition B. The second relates to HMRC's statement regarding its view on the application of the targeted anti-avoidance rule to capital contribution arrangements when determining Condition C.

What does it mean for me?

Limited liability partnerships and their tax advisers should be aware of these latest developments and would be well advised to revisit their salaried member analysis to consider the implications.

What can I take away?

HMRC's reversal of the new approach it had previously decided to take to applying the targeted anti-avoidance rule is welcome. It means that LLPs that make arrangements to comply with Condition C can obtain certainty on the status of their members. However, the Court of Appeal's construction of 'significant influence', which is narrower than previously understood even by HMRC, provides a higher bar for individuals to fail Condition B.

The salaried member rules are designed to counter the 'disguised employment' of individuals within limited liability partnerships (LLPs). Although the rules were enacted back in 2014, recent developments have called into question how certain parts of the legislation should be interpreted. Like the proverbial buses, after a long wait, 2025 has seen two important updates in this area arriving in quick succession.

The first concerns the decision of the Court of Appeal in *HMRC v BlueCrest Capital Management (UK) LLP* [2025] EWCA Civ 23, which was handed down in January 2025 and provides judicial guidance on how the significant influence test should be construed when determining Condition B.

The second relates to the conclusion in February 2025 of HMRC's review of its position on the application of the targeted anti-avoidance rule to capital contribution arrangements when determining Condition C, following its previous controversial change of approach and amended guidance published in February 2024.

A short summary of the rules

LLP members are normally treated in the same way for tax purposes as partners in a traditional partnership; i.e. as self-employed. However, under the salaried member rules, they can be treated as employees if all three of Conditions A, B and C are met. Broadly, these conditions focus on certain characteristics of partnership to distinguish those individual members whose relationship with the LLP and the other members is more akin to that of an employee than that of a true partner.

Condition A is met if it is reasonable to expect that at least 80% of the total amount payable by the LLP in respect of the member's performance during the relevant period of services for the LLP, in their capacity as a member, will be 'disguised salary'. An amount within the total amount payable is 'disguised salary' if it is:

- fixed;
- variable, but is varied without reference to the overall amount of the profits or losses of the LLP; or
- is not, in practice, affected by the overall amount of the LLP's profits or losses.

Condition B is met if the member does not have significant influence over the affairs of the partnership under the mutual rights and duties of the members of the LLP, and of the partnership and its members.

Condition C is met if the member's capital contribution to the LLP is less than 25% of their disguised salary (as defined for Condition A) in the tax year under review.

These conditions are underpinned by a targeted anti-avoidance rule which disregards arrangements with a main purpose of securing that one or more members are not deemed to be salaried members. If all three conditions are met by an individual member, they will be treated as an employee with PAYE and Class 1 NIC applicable to amounts paid to them. However, if any one of the conditions is not met, the individual will be treated as self-employed. This determination is only relevant for tax and NIC purposes and has no impact on the individual's status under employment or company law.

Condition B and BlueCrest

In brief, the facts of the case are that BlueCrest Capital Management (UK) LLP ('BlueCrest') is a UK LLP that forms part of the wider BlueCrest Group. It provides investment management services as sub-manager to hedge funds managed by a lead manager entity in the Group, as well as back-office services to other Group entities. The members can be categorised as:

- 'portfolio managers', who are responsible for managing an investment portfolio and/or are 'desk heads' responsible for overseeing a team of portfolio managers; and

- ‘non-portfolio members’ comprising all other members, including those providing back-office services.

In the periods concerned, there were approximately 80 members in total, with over half being portfolio managers.

The dispute concerns the application of Conditions A and B of the salaried member rules to both the portfolio managers and non-portfolio managers. Condition C was not in point as it was accepted that all of the members met this condition.

The Court of Appeal endorsed the findings of the First-Tier Tribunal and Upper Tribunal in respect of Condition A, agreeing with HMRC’s position that all members met this condition as their discretionary allocations were not variable by reference to the overall profits of the LLP but by their own performance. As this part of the judgment is largely unsurprising, this article focuses on the arguments around Condition B.

Both the First-tier Tribunal and Upper Tribunal had found that a substantial number of BlueCrest’s members failed Condition B, reasoning that the meaning of ‘significant influence over the affairs of the partnership’ was much broader than HMRC’s interpretation. They determined that significant influence was not restricted to managerial influence and could include financial influence; and also that significant influence could be over one or more aspects of the affairs of the LLP, rather than over its overall affairs.

On this basis, it had been held that those with the requisite significant influence included portfolio managers with capital allocations of at least $100 million who demonstrably made significant financial contributions to the business and were also carrying out operational and managerial activities, considered to be the sort of activities which a partner in a traditional partnership would have undertaken. This widening of the meaning of significant influence received a positive reaction from many LLPs.

The Court of Appeal’s judgment

In its judgment on 17 January 2025, the Court of Appeal allowed HMRC’s appeal. The decision restores the position to HMRC’s long-established view that significant influence must be over the affairs of the LLP as a whole and relates to decision

making at a strategic level. More remarkably, however, the Court of Appeal has applied a much narrower construction to the meaning of significant influence than is set out in HMRC's guidance.

It had been common ground between HMRC and BlueCrest that, as well as the rights and duties of the members under the LLP agreement, it was appropriate to take into account actual (de facto) influence. However, the Court of Appeal ruled that this is incorrect and that both the First-tier Tribunal and Upper Tribunal had erred in law in accepting this wider construction.

Under the Court of Appeal's interpretation:

- to qualify, the influence required 'must derive from, and have its source in, the mutual rights and duties of the members of the LLP ... as conferred by the statutory and contractual framework which governs the LLP';
- 'the concepts of "rights" and "duties" connote legal enforceability'; and
- 'influence ... which lacks any identifiable contractual and/or statutory source in the specified rights and duties is excluded ... although it may remain highly material in deciding whether the influence that does qualify ... is significant'.

Summarising, the influence must be grounded in the legally binding constitutional framework of the LLP and de facto influence does not qualify. However, de facto influence exerted by others may be material as to the judgment of whether the member in question's influence is 'significant'.

Based on this construction, it will undoubtedly be more difficult for LLP members to fail Condition B, particularly those who are members of larger LLPs where it is typical for the constitutional framework of the LLP to restrict the authority to make strategic decisions on behalf of the LLP to an executive made up of a small number of the members.

It is not the end of the matter yet, however. The Court of Appeal has remitted the case back to the First-tier Tribunal 'for reconsideration in the light of the correct construction of the Condition'.

Looking forwards

A deeper dive by the First-tier Tribunal into whether members have significant influence under the mutual rights and duties provided by BlueCrest's LLP Agreement

should provide more colour to the Court of Appeal's version of the test. Meanwhile, BlueCrest has applied to the Supreme Court for permission to appeal the Court of Appeal's decision, meaning that it cannot be considered final until the outcome is known.

Beyond the legal proceedings, at the time of writing, HMRC's Partnership Manual (at PM256200) continues to state:

'In looking at whether or not an individual member has significant influence, it is important not only to look at the written agreement, but also to look at how the LLP operates in practice.'

Many LLPs and their advisers, as well as HMRC officers, will have applied the more generous approach per the HMRC guidance when considering the Condition B test and there will be keen interest in how HMRC will respond.

Questions that come to mind include the following.

- Will HMRC amend its manual to align with the Court of Appeal's narrower interpretation of significant influence?
- If so, will it seek to apply this interpretation 'retrospectively'? Or, perhaps to avert judicial review challenges, will it allow LLPs to revisit their analyses on a go-forward basis only?
- Given that it seems that HMRC had intended that de facto influence should be taken into account when Condition B was designed, will HMRC instead look to change the legislation to match its original policy intention?

Whilst uncertainty remains, particularly for LLPs that rely on their members failing Condition B to preserve self-employed status, it would be sensible to review the constitutional documents of the LLP – principally being the LLP Agreement but including any Deeds of Accession, etc. – to assess whether these accurately reflect how influence over the affairs of the LLP is exercised in practice.

The operation of an LLP can evolve over time and may be run by members differently to how the existing LLP Agreement portrays; for example, with non-founder members taking greater responsibility over decision-making. Problems caused by such discrepancies often only arise in the event of a dispute, either with HMRC or between the members, but it would be advisable to proactively update any LLP Agreements to ensure that these align with the true position.

Condition C and the targeted anti-avoidance rule

Since the introduction of the salaried member rules, Condition C has been considered to provide a ‘safe harbour’, enabling LLPs and their members to understand how much of their own money that a member needs to contribute as capital to the LLP to fall outside the rules.

For many LLPs, capital contributed by members provides a valuable source of funds, so linking this to compliance with Condition C is not generally seen as unhelpful. Consequently, many LLPs and their members have relied on capital contribution arrangements which ensure that Condition C is failed to provide certainty over the members’ status.

This position was thrown into doubt when, in February 2024, HMRC published updated guidance in its Partnership Manual (at PM259200 and PM259310). This suggested that HMRC would, controversially, seek to apply the targeted anti-avoidance rule to arrangements under which members increase their contributions as their remuneration changes in order to prevent Condition C being met, therefore disregarding the contributions made when testing Condition C. HMRC compliance teams also began to follow this revised approach, triggering a huge amount of uncertainty and the risk of additional employment taxes being assessed.

Following representations made by the CIOT, amongst others, HMRC confirmed on 7 February 2025 that it will in effect reverse the changes it made in February 2024. In line with the original guidance, HMRC now accepts that when determining whether or not Condition C is met, capital contribution arrangements which result in a genuine contribution made by the individual to the LLP, intended to be enduring and giving rise to real risk, will not trigger the targeted anti-avoidance rule. HMRC has also helpfully consulted on revised guidance to provide additional clarification but, at the time of writing, this has not yet been published.

Although many LLPs and their members have been subjected to a significant amount of unnecessary disruption whilst HMRC reconsidered its approach, this is nevertheless a welcome development for those firms that have relied on compliance with Condition C to ensure that their members fall outside the salaried members rules. It would be advisable, however, for LLPs to check the accuracy of their Condition C calculations and to ensure that there is a robust monitoring process in

place.

Final thoughts

With much recent activity and uncertainty around the application of the salaried member rules, LLPs would be well advised to revisit their analysis and consider the implications of the latest developments. Additionally, LLPs may wish to review their LLP Agreement and, if necessary, make changes to ensure alignment with how the LLP operates in practice.

It is important for LLPs to be prepared for both a potential HMRC enquiry, with experience suggesting that HMRC is focusing on this area, and for any due diligence exercise that might be anticipated if a commercial transaction involving the LLP is contemplated, as questions around the salaried member position adopted will invariably arise. Taking action now will provide additional assurance and/or the opportunity to build a more robust position.

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