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WELCOME

Welcome to the Christmas 2023 edition of Tax Pulse. We are sure that you will all agree there is no better way to ring in the holiday season than by immersing oneself in a tax update. Hopefully you have all recently enjoyed an entertaining office Christmas party (tax deductible one hopes) and are looking forward to a few days off with family and friends.

In this edition of Tax Pulse we look at three recent decisions in the First Tier Tribunal on domicile in "Actions Speak Louder Than Words", where three taxpayers claim to a domicile outside the UK were soundly rebutted. Has the First Tier Tribunal gone off-piste in their decisions, only time will tell. We also include an educational piece on the complex area of insurance wrappers and our guest piece is by Andrew McCallum, partner of R&H Switzerland, providing an update on developments in the Swiss trust world. In our final festive piece we explore the origins of many of those wonderful Christmas traditions we all know and love.

We hope that you enjoy reading Tax Pulse and, as always, if you have any feedback or suggestions for future items, please do contact our editorial team. Finally, may we take the opportunity to wish all of you a wonderful Christmas and prosperous 2024.

The Partners

ACTIONS SPEAK LOUDER THAN WORDS - RECENT CASE LAW ON DOMICILE

Read this to learn about HMRC's and the First Tier Tax Tribunal's recent approach to domicile cases

The First Tier Tax tribunal (FTT) issued three notable judgments on domicile cases in 2023, significantly all in HMRC's favour. The cases are indicative of HMRC's and the tribunal's current approach to domicile cases. So, what can we learn from these cases?

Coller

Coller v HMRC (2023) is interesting because it addresses some important areas of domicile law. It is also interesting because it is a case where HMRC were able to prevail in a domicile case involving a living taxpayer.

The FTT hearing was an appeal against HMRC's conclusion that Jeremy Coller (Jeremy) was domiciled in England during the 2013/14 - 2015/16 tax years. Jeremy was born in England in 1958 and had been continually UK resident. His father (John) had come to the UK in 1938 at the age of 20, having fled Austria to escape Nazi persecution of Jews. John married Sylvia (who had arrived in London from Ireland) in 1954, but he died unexpectedly of a heart attack in 1968 when Jeremy was aged 10. Jeremy's claim to be domiciled in Austria therefore relied upon: 1) John retaining his Austrian domicile of origin until Jeremy's birth; 2) John not becoming UK domiciled before his death in 1968 (if he had, Jeremy would have acquired a domicile of dependency in the UK); 3) Sylvia not abandoning her Irish domicile of origin between John's death and Jeremy's 16th birthday in 1974; and 4) Jeremy himself not abandoning his Austrian domicile of origin and acquiring a UK domicile of choice during his majority. Even though the burden of proof rested with HMRC, they succeeded on all four issues.

An interesting aspect of the case was the scepticism with which the FTT considered personal witness statements and oral evidence by the taxpayer and others due to conscious or unconscious bias, unless stated contentions in such evidence were backed up by facts and actions. Another interesting aspect of the case was that neither John nor Jeremy had any intention to return to Austria, John's domicile of origin and Jeremy's claimed domicile of origin. The argument against either having acquired a UK domicile of choice relied upon not having a settled intention to remain in the UK permanently or indefinitely.

HMRC argued that rejection of a domicile of origin is highly relevant when considering whether a person has acquired a domicile of choice. In such a case where there are no links with the domicile of origin, it is extremely important to be able to demonstrate with hard fact a clear intention to leave the UK. Although Jeremy was able to demonstrate an intention to leave the UK and move to Israel, his decision to do so was taken recently and well after the period under consideration by the Tribunal.

Shah

In another case involving the domicile of a long-term UK resident (Shah (as Executor of the Estate of Anantrai Maneklal Shah (Deceased)) v HMRC 2023), the FTT came to a somewhat unsurprising conclusion, given the lack of substantial evidence presented by the appellant. They upheld HMRC's

assertion that the deceased had a domicile of choice in the UK at the time of his death.

The appellant argued that the deceased had every intention of returning to India, his presumed place of domicile, but had died before realising his ambition. However, the FTT considered that the deceased had no significant connections to India. There was no evidence to show he had made serious plans to retire there or efforts to obtain Indian citizenship; nor had he set up a bank account in India. Instead, the deceased pursued overseas citizen status which the judge considered as 'not a firm commitment to leaving and placed no obligation on him to go to India'.

Consequently, the FTT ruled that the deceased had settled and intended to remain in England permanently.

This case highlights the need for taxpayers to support their stated intentions with evidence and, most importantly, by their actions.

Strachan

HMRC recently secured another domicile-related court victory, as the FTT dismissed a taxpayer's appeal regarding their domicile of choice (Ian Charles Strachan v HMRC 2023). The taxpayer was found to have an English domicile of origin but claimed to have acquired a domicile of choice in Massachusetts. The tribunal concluded that having a home in another place and having an intention to end one's days there was insufficient to establish that home as one's 'chief residence' and hence insufficient to establish a domicile of choice in another jurisdiction. Rather, to determine an individual's chief or permanent residence 'all relevant factors have to be considered'. The tribunal found on the facts that Mr Strachan had not established his chief residence in Massachusetts so his appeal failed.

Mr Strachan was unable to give evidence due to ill-health but had provided a lot of written material during the course of the HMRC enquiry which preceded the tribunal hearing; and his wife gave testimony at the hearing itself, along with some other colleagues and friends. However, similar to the approach taken by the FTT in Coller, Counsel for HMRC sought to qualify and undermine the evidence on the grounds of unconscious bias.

A second aspect of the case considered by the FTT was whether Mr Strachan had been careless for not taking professional advice on his domicile status before submitting his tax returns for the years concerned. While the FTT agreed with HMRC that Mr Strachan had been careless, they also concluded that the loss of tax had not been caused by such carelessness. This was because Mr Strachan had belatedly taken advice in 2018 and Counsel had supported the view that he was foreign domiciled. If, therefore, he had actually taken advice when preparing his tax returns for 2011/12 through to 2015/16, the years in question, it is likely that he would have included claims to be foreign domiciled anyway. The FTT therefore found that HMRC's assessments for 2011/12 and 2012/13 were therefore out of time.

Concluding comments

Collectively, these cases demonstrate HMRC's willingness to challenge the domicile of living long-term UK residents as well as deceased taxpayers; HMRC's success in doing so; the scepticism the Courts take to stated intentions not backed up by hard evidence and actions; and finally the need for taxpayers to take regular professional advice on their domicile position.

Please speak to your usual R&H contact if you wish to discuss any aspect of this note.

IT'S A WRAP! - THE TAXATION OF NON-QUALIFYING LIFE INSURANCE POLICIES

Read this if you want to learn more about the taxation of non-qualifying life insurance policies.

The rules surrounding the taxation of life insurance policies are complex. Therefore financial and tax advice should always be sought before taking any decisions. The purpose of this article is to highlight how 'non-qualifying' life insurance policies are taxed and how not to fall into one of the many tax traps.

What is a 'non-qualifying' policy?

A life insurance policy can be one of two things:

1. a policy which pays out a sum of money to a beneficiary when someone dies, which, for the purposes of this article, is referred to as a 'qualifying' life insurance policy, or

2. a policy which, while providing life insurance, is intended to act as an investment vehicle to provide a return on investment, as you would expect with an investment account with a broker, which for the purpose of this article is referred to as a 'non-qualifying' life insurance policy.

The manner in which 'qualifying' and 'non-qualifying' life insurance policies are taxed is starkly different. For example, for qualifying policies, there is no Income Tax charge when the policy matures or on death of the insured, unless the policy is cancelled within 10 years or has not run for at least three-quarters of the term.

For non-qualifying life insurance policies, there is an Income Tax charge when the policy terminates upon the death of the person whose life is insured, or when the policyholder partially or fully surrenders or sells the non-qualifying policy.

The manner in which qualifying and non-qualifying policies are funded also differs. For example, non-qualifying policies are usually funded by way of a single contribution, whereas qualifying policies tend to be funded by regular contributions.

Non-qualifying policies may also be referred to as 'life insurance wrappers', 'life insurance bonds' or 'investment bonds'.

Chargeable events for non-qualifying policies

A chargeable event for Income Tax purposes occurs:

1. when the policyholder fully withdraws capital from the policy, or when the policy matures; a partial withdrawal may also be a chargeable event, as explained below,

2. on termination of the policy when the last person dies whose life is insured under the policy, or

3. when the policyholder sells the policy to a third party for valuable consideration.

Where a gain arises or is deemed to arise on the occasion of a chargeable event, it is referred to as a 'chargeable event gain', and is subject to Income Tax, rather than Capital Gains Tax, at the individual's marginal rate of tax, i.e. as their 'top slice' of income once all other income has been considered in their Income Tax calculation for the tax year in which the chargeable event gain has arisen.

In terms of partial withdrawals, sales or assignments, the policyholder is able to withdraw capital worth up to 5% of the initial investment each year, without realising an immediate chargeable event gain. This allowance is known as the '5% tax deferred allowance' and it can be accumulated and carried forward if it is not utilised in the year in which it is deemed to have accrued.

A common pitfall is to make capital withdrawals early on in the life of the policy which exceed any accrued and/or accumulated 5% tax deferred allowance, which, as a result, may realise disproportionate chargeable event gains in a year for which no relief may be available to lessen the Income Tax charge (albeit since 2017 it is possible to request HMRC discretion if the gain is wholly disproportionate).

The assignment of a non-qualifying life insurance policy for nil consideration, i.e. by way of a gift, is not a chargeable event for Income Tax purposes. There are, however, likely to be Inheritance Tax implications of gifting the policy, details of which are outside the scope of this article.

Calculation of Income Tax charge

Full encashment/maturity of policy

The chargeable event gain on encashment or maturity of a policy is calculated by deducting:

1. the amount of the premium(s) paid, and

2. the amount of gains realised in a tax year before the policy matures or was fully surrendered

against:

3. what the policy pays out on maturity or when encashed, plus

4. any chargeable event gains deferred by the 5% tax deferred allowance.

If a chargeable event gain has been realised, the two main reliefs that are available to reduce a chargeable event gain are:

a. Time-apportioned reductions for periods of non-UK residence, and

b. Top-slicing Relief.

For example, let us assume an individual purchases a non-qualifying policy from a non-UK provider paying an initial premium of £1,000,000 on 1 May 2019 and a further two premiums totalling £200,000 a year later. The policyholder withdraws all capital from the policy on 5 April 2024, i.e. during the 2023/24 tax year. During the 4 years to 5 April 2023, the policyholder made withdrawals of £50,000 in each year, within the 5% tax deferred allowance. The chargeable event gain realised on withdrawal of all capital is £450,000 (see Figure 1).

	£
Proceeds	1,450,000
Withdrawals	200,000
	1,650,000
less: cost	(1,200,000)
Chargeable event gain	450,000

Figure 1

As the chargeable event gain will be subject tco Income Tax as savings income rather than Capital Gains Tax, the chargeable event gain is considered the policyholder's top slice of income in the year the policy is encashed. Figure 2 below shows how the Income Tax liability of £140,384 has been calculated.

INCOME TAX COMPUTATION

	Non-savings	Life policy (SI)	
Chargeable event gain		450,000	
Other income (savings income)	-		
Net income	-	450,000	
less: PA	-	-	*NB1*
Taxable income	-	450,000	

Band	Amount	Rate	Tax	
Savings Rate Band	5,000	0%	-	
PSA	-	0%	-	*NB1*
Basic rate band	32,700	20%	6,540	
Higher rate band	112,300	40%	44,920	
Additional rate band	300,000	45%	135,000	
	450,000		186,460	
	less: top slicing relief (W1)		(46,076)	
		Tax liability	140,384	
	less: tax credit on policy gain @ 20%		-	*NB2*
		Tax due	140,384	

Figure 2

NB1. Due to having income in excess £125,140 and being an additional rate taxpayer, the individual's personal allowance is tapered to nil and he does not have an entitlement to a personal savings allowance of £1,000 or £500, as a higher rate taxpayer, respectively.

NB2. As the policy has not been issued by a UK provider, there is not an automatic 20% tax credit to further reduce the individual's tax liability.

Top-slicing relief

Top-slicing Relief is a useful relief to reduce the amount of tax on a chargeable event gain. An individual is entitled to Top-slicing Relief if the inclusion of the chargeable event gain in the individual's Income Tax computation results in them being subject to a higher rate of Income Tax than they may have been had the gain been spread over the period of the policy. In Figure 2, Top-slicing Relief of £46,076 is available to reduce the Income Tax on the gain from £186,460 to £140,384. The calculation of Top-slicing Relief can be complex. Figure 3 outlines how it applies in this example.

(W1) Top slicing relief

Tax on policy gain	186,460	
less: notional 20% tax credit	(90,000)	*NB3*
Extra tax on policy gain	96,460	
less: relieved liability x policy years	(50,384)	
Top slicing relief	46,076	

Chargeable event gain	450,000
Number of complete years the policy has been held	4
Annual equivalent of policy gain	112,500
less: reduced personal allowance	(6,320)
Adjusted annual equivalent of policy gain	106,180

Extra tax on annual equivalent:

Band	Amount	Rate	Tax	
Savings Rate Band	5,000	0%	-	
PSA	500	0%	-	
Basic rate band	32,200	20%	6,440	
Higher rate band	68,480.05	40%	27,392	*NB3*
	106,180		33,832	
		less: notional 20% tax credit	(21,236)	
		Relieved liability	12,596	
		Relieved liability x policy years	50,384	

Figure 3

NB3. For the purposes of calculating Top-slicing Relief, an individual is entitled to a 20% tax credit regardless of whether the policy has been issued by a UK or non-UK provider.

Relief for periods of non-UK residence

Further relief is also available for any period in the duration of the policy where the individual is not considered to be resident in the UK for tax purposes under the UK Statutory Residence Test. Chargeable event gains realised by non-UK residents are not subject to Income Tax, but individuals should be wary of falling foul of anti-avoidance provisions to prevent individuals from becoming temporarily non-resident to realise substantial chargeable event gains and returning back to the UK in a short period of time.

Partial encashment / withdrawal of policy

Where a policy is partially encashed, the chargeable event gain is calculated by deducting the amount of any accumulated 5% tax deferred allowance against the partial capital withdrawn and no deduction is made for the initial premium invested. Therefore, where you have an investment bond comprised of a cluster of various distinct policies, it is generally recommended to fully encash individual policies held within the bond rather than partially withdrawing funds from several different policies so as to avoid realising substantial chargeable event gain(s).

Personal Portfolio Bonds

Non-qualifying policies that fall within the definition of a Personal Portfolio Bond ('PPB') can have significant adverse UK tax implications for the policyholder and so it is important that the policyholder does not direct the investment adviser on the management of the underlying assets of the policy. This is usually achieved by ensuring that the investments in the bond are collective investment schemes which are each managed at the level of the fund. The taxation of PPBs is outside the scope of this article.

In conclusion…

Non-qualifying policies of life insurance are often used as a form of investment wrapper, enabling capital growth to accrue without triggering tax on a gain until there is a realisation event, and permitting partial withdrawals up to 5% of the initial premium annually without triggering a chargeable event. The quid pro quo is that when gains are realised, they are subject to Income Tax rates rather than to CGT. Planning to mitigate Income Tax by using Top-slicing Relief can be intricate but might pay dividends. This area of tax is complex and advice is essential.

SWISS TRUSTEE LICENCING UPDATE AND THE DRAFT SWISS TRUST LAW

Introduction

Skiing, watches and, of course, chocolates: there are some of the things that makes Switzerland so attractive.

Many families are also attracted to Switzerland when organizing their financial affairs, given its political and economic stability, its longstanding and large private banking sector, and its easy and regular travel connections to Europe and beyond.

This often translates into families choosing Swiss trustees when their family affairs involve a trust.

This short article shall highlight recent legal and regulatory developments in Switzerland in relation to trusts, focusing on the introduction of Swiss trustee licencing and a project to introduce a possible Swiss trust law.

Swiss trustee licencing update

The Federal Act on Financial Institutions (FinIA) and related Ordinance on Financial Institutions (FinIO) came into force on 1 January 2020, with transitional provisions running from that date until 31 December 2022. This law introduced the requirement for professional Swiss trustees to obtain a licence from FINMA, the Swiss Financial Market Supervisory Authority, in order to be permitted to act as trustees.

Such licencing brings Switzerland into line with most other competing trust jurisdictions, and provides

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families with the additional comfort that their trustee is subject to federal supervision, in addition to the anti-money laundering rules and laws that have been in force for decades.
One immediate consequence of the new rules is a reduction in the number of trustees operating from Switzerland, which is seen within the industry as being a positive development. At 31 December 2022, of the 387 trustees who had previously (in 2020) announced that they may need a FINMA licence, only 165 (less than half) actually made the licence application itself. Several reasons have been identified for this reduction, including:

- Trustees who no longer provide Swiss trustee services upon the commencement of Swiss trustee licencing (e.g. through retirement, liquidation of the trust company, merging with another trust company, cessation of trustee activity within Switzerland etc);
- Entities not subject to authorization due to exception or exemption (private trust companies or dedicated trust companies); and
- Small trustees who are below the legally defined threshold of "professional activity" (there are thresholds, such as revenue based thresholds, below which a FINMA licence is not required).

At the time of writing this article, FINMA are still in the process of formally approving all the trust companies who made an application to be licenced, with only 71 trust companies having been formally issued their licence so far. Most of the large trust companies are still awaiting their formal approval. Whilst FINMA have not communicated when they expect the initial licencing phase to be complete, it is very possible that the process will only be complete in late 2024.

The Introduction of a Possible Swiss Trust law

Currently, Switzerland does not have its own substantive trust law and instead recognises trusts under the terms of the Hague Convention on the Law Applicable to Trusts and on their Recognition (the 2007 Hague Trust Convention). Thus, if you have Swiss trustees, the governing law of the trust will certainly be a foreign law, e.g. Jersey/Cayman/Guernsey law. This long established practice has permitted the development of an extensive and flourishing trust industry in Switzerland.

Given that Switzerland does not have its own substantive trust law, in 2023 the Swiss Federal Council published a draft bill aimed at introducing one into Swiss law. This was a response to the Swiss Federal Council recognising that trusts play an important role in the Swiss wealth management arena, and in particular it wanted to provide Swiss clients with an alternative to turning to foreign laws when drafting trust deeds.

Therefore, in January 2023 the draft Swiss trust law text was published for public consultation. As part of the same consultation process, the Swiss Federal Council also (unfortunately) issued a proposal to codify a Swiss tax law concerning trusts. Whilst the draft trust law itself drew limited (and largely positive) consultation responses, the tax proposals were strongly criticised by the entire economic spectrum.

The Federal Council, recognizing the strength of dissatisfaction of the responses related to the tax proposals, has since recommended to Parliament that the entire project be withdrawn (i.e. withdraw both the Swiss trust law and the codification of tax laws concerning trusts). Until the proposal has completed all of the necessary stages of that Parliamentary journey, there remains a small chance that Parliament shall resurrect the Swiss trust law project separately, but this is considered to be very unlikely.

Thus, the Swiss trust law project was collateral damage to the deeply unpopular tax proposals.

The shelving of the Swiss trust law project is certainly not a bad thing. Switzerland thus continues with the popular trust solution that has existed for many years, i.e. Swiss trustees continue to manage trusts that are governed by foreign law (and thus benefit from all the case law and statute derived from

that foreign law). Furthermore, the existing tax guidelines, which are popular and have stood the test of time, also remain in force with no changes having been made. In short, no change is probably the best solution in this instance.

Andrew McCallum is Senior Partner at Rawlinson & Hunter Switzerland, is Chair of STEP in Switzerland and Liechtenstein and is also Chair of the STEP Worldwide Professional Standards Committee. Furthermore, he is Treasurer of STEP Geneva and the Swiss Association of Trust Companies, and is Acting Chair of the Audit and Risk Commission of the International Federation of Red Cross and Red Crescent Societies.

R&H CHRISTMAS CELEBRATIONS - WHERE THE DICKENS DID THESE CHRISTMAS TRADITIONS ORIGINATE?

Read this if you want to hear about the R&H Christmas celebration, and learn more about where some of our cherished Christmas traditions originate from

When it comes to celebrating, we at Rawlinson & Hunter like to think we know how to throw a good party. We had a better reason than usual this year to cut loose and party hard, celebrating, as we were, the Firm's 90th birthday. This year's Christmas party for partners, staff and their better halves was hosted amidst the lavish Art Nouveau grandeur of the Waldorf in Aldwych. Those attending were encouraged to dress in 1920's finery, which photographic evidence indicates to have met with mixed success in terms of period authenticity! A great time was nevertheless had by all, with the tax staff in particular able to lay aside for a few hours their preoccupation with the coming trials of the 31 January filing deadline and enjoy turkey with all its trimmings in the shade of the wonderfully decorated Christmas trees.

The Palm Court at The Waldorf

There are so many traditions which we follow at Christmas as a matter of habit. It is simply what you do at this time of year, and Christmas just wouldn't be the same without these traditions. But those with an enquiring mind and time on their hands over the Christmas break may well ponder why exactly we do some of these things. If you are one such individual, read on…

The celebration of Christmas had been in decline since the 17th century, partly because under the influence of the Puritans, the Church of England was purged of many of the old practices and traditions with pagan origins. It was also the case that during the industrial revolution, workers just did not have the time off work enjoyed by employees now, and few had the time to celebrate Christmas. It was in the first half of the 19th century that Christmas enjoyed a revival, possibly even a reinvention.

The Christmas tree – Prince Albert, the Queen's consort, was of course German, and Christmas in Germany had not been affected by puritanical purges and retained much of its old tradition. One such tradition was the Christmas tree, and Albert erected one at Windsor Castle. This practice took root, and a tree, or something resembling one, is a feature of many households' domestic celebrations. The tree erected in Trafalgar Square is an annual gift from Norway for Britain's support in WW II, and

has itself now been a tradition since 1947. It is difficult to imagine that such a gesture of goodwill could cause controversy, but that is exactly what happened in 2021 when the tree was mocked for the sparseness of its lower branches, prompting Westminster Council to wonder whether the branches were 'social distancing'. Norway retaliated by sending an even worse tree in 2022! The 2023 edition looks to be more densely foliaged (slightly).

Christmas turkey – Turkey started to feature in Christmas dinners in the 16th century, although it was costly and did not therefore initially enjoy the prevalence which it has today. It was a surge in English turkey rearing, particularly in Norfolk where the ground was suitable, which contributed to the popularity of the bird as Christmas fare. In 1851, turkey featured in the Christmas dinner of those trend-setters Queen Victoria, Prince Albert and the royal family. Over the next century, the goose and the turkey fought for dominance, with the turkey winning out (if one can view mass rearing for slaughter as 'winning') in the 1950's. Since then, turkey has been standard fare at Christmas, with all the trimmings.

Christmas pudding – the pudding receives an honourable mention in Dickens's 1843 masterpiece, 'A Christmas Carol'.

'In half a minute Mrs Cratchit entered – flushed but smiling proudly – with the pudding, like a speckled cannon ball, so hard and firm, blazing in half of half-a-quarter of ignited brandy, and bedight with Christmas holly stuck into the top. Oh, a wonderful pudding!'

Just reading this is enough to make one salivate. But the origins of the pudding are much earlier, medieval even, although the 'figgy pudding' which was eaten then was more like a broth. It went through a process of evolution through a porridge phase before the more solid sphere or semi-sphere which we would recognise today became a standard dessert on the Victorian Christmas dining table.

Christmas cards – there was an early isolated instance of King James I receiving a Christmas card in 1611, but the first run of printed cards was made in 1843 for Sir Henry Cole, subsequently the first director of the V&A, who had a card designed by the artist John Callcott Horsley and printed 1,000 of them. As new printing processes and techniques made mass production of cards easier and less expensive, sending Christmas cards gained traction and became a popular practice by 1890.

Kissing under the mistletoe – mistletoe was regarded by the Celtic druids as a sacred plant, but how it made the transition to a Christmas decoration from a sacred herb is somewhat obscure. Kissing under the mistletoe seems to have become a practice amongst domestic servants in the 18th century, when men were allowed to snatch a kiss (this genuinely does sound appalling now) from any woman caught standing beneath the mistletoe, with refusal regarded as bringing bad luck. The practice swiftly spread from the servants downstairs to their employers upstairs.

It will be seen, therefore, that many of our Christmas traditions were either invented or imported relatively recently by our Victorian ancestors, rather than being handed down across multiple generations. Perhaps the greatest image conjured up by Dickens in 'A Christmas Carol', the one which has had the most enduring effect on us today, is his portrayal of Christmas as a time when families gather

together by the fireside, sharing emotional warmth and a festive slap-up dinner. If this is how you will be spending Christmas, you may care to propose a toast and raise a glass to Charles Dickens's powers of imagination and Prince Albert's determination to have a good time!

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