TC05086

Appeal number: TC/2015/02012

SEED ENTERPRISE INVESTMENT SCHEME — application for authority to issue compliance certificate — form of application for enterprise investment scheme used by mistake — effect of ITA 2007 s 257DK — whether error capable of correction — no — appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

X-WIND POWER LIMITED **Appellant**

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: Judge Colin Bishopp

Sitting in public in London on 27 April 2016

Mr Iain Mackinnon, of I F Mackinnon and Company LLP, for the appellant

Ms Karen Powell, Presenting Officer, for the respondents

DECISION

1. The appellant, X-Wind Power Limited ("X-Wind"), is engaged in the design and manufacture of small and medium-sized wind turbine generators. It was incorporated in 2012, and on 25 September of that year it issued shares to its eight initial investors who had, together, injected £90,000 into the company. Further shares were issued in December 2013 and January 2014 in exchange for additional investments. It is common ground that the investors would be entitled, provided they satisfied the relevant conditions, to relief for proportions of their respective investments against their income tax liabilities in accordance with the enterprise investment scheme ("the EIS") or the seed enterprise investment scheme ("the SEIS").

2. The EIS is much the older of the two schemes, dating from 1994 (when it replaced an earlier form of relief); the SEIS was introduced by the Finance Act 2012 and was, therefore, very new when the first tranche of investment in X-Wind occurred. The relevant statutory provisions are now to be found in Parts 5 (EIS) and 5A (SEIS) of the Income Tax Act 2007 ("ITA"). The difference between the two schemes of particular significance for present purposes is that the rate of relief under the EIS is 30%, while the SEIS allows for relief at 50%. There are in each case upper limits on the amounts which may be relieved which are not material here. In broad terms, the SEIS is aimed at investors in start-up companies and the EIS at investors in small companies, not necessarily at start-up, and the rates of relief reflect the difference in investment risk between newly formed companies and those which, although relatively small, have some history behind them. In a typical case a new company might first attract investors by use of the SEIS, and then, when it has established itself, attract further investment by use of the EIS.

3. The procedural requirements of the two schemes are similar, and interlocking. The requirement which is important in this case is that before he may claim relief an investor must have obtained from the company a "compliance certificate" as evidence that he has made a qualifying investment: see ITA s 203 (EIS) and s 257EB (SEIS). A compliance certificate may be issued only with the authority of an officer of Revenue and Customs: ITA s 204(3) (EIS) and s 257EC(3) (SEIS). In order to secure such authority the company is required, by s 205 (EIS) or s 257ED (SEIS) to furnish a "compliance statement". What must be said in the compliance statement differs between the two schemes, reflecting differences of detail in the conditions which must be met; I shall return to this point later.

4. On about 22 March 2013 X-Wind sent a compliance statement to HMRC. The statement was made on a form, identified as EIS1, intended for the EIS. X-Wind's case is that this was a mistake; the intention was to submit a compliance statement for the SEIS, and relating to the September 2012 share issue, and neither the person who prepared the EIS1 nor the director of X-Wind who signed it realised that a different form should have been used. On 21 May 2013, on the strength of the compliance statement as submitted and some supplementary information he requested, an officer of Revenue and

Customs, Les Setterfield, authorised X-Wind to issue EIS compliance certificates to the eight original investors. Neither his request for additional information nor the grant of this authorisation led to discovery of the error.

5. There were no further material developments before X-Wind submitted a further compliance statement on 25 April 2014, this time using the SEIS form. HMRC refused to authorise the issue of SEIS compliance certificates because it is not permissible to do so if there has been an earlier EIS investment. X-Wind realised at this point that its earlier submission of the form EIS1 had been an error. It accepts that, had there been an earlier EIS investment, HMRC would be correct to refuse the authorisation of SEIS certificates because of the provisions of ITA s 257DK(1)(a) (which is set out below). Section 257DK reflects the typical sequence I have described, of SEIS relief at start-up and EIS relief at a later stage.

6. X-Wind attempted to persuade HMRC to accept an SEIS compliance statement in place of the EIS1 which had been submitted in March 2013, but to no avail. It then requested a formal review of the refusal, which led to a letter of 30 January 2015 by which the review officer upheld the decision to reject X-Wind's application to amend or replace the March 2013 submission. Although the review officer's conclusion is a matter of dispute, I think it right to record that in its form the review letter is a model of thoroughness and clarity.

7. ITA s 257EE provides for a right of appeal to this tribunal, which X-Wind has exercised, against a refusal to authorise the issue of an SEIS compliance certificate. The appeal encompasses both the refusal to allow the replacement of the first application, and the refusal to authorise the issue of SEIS compliance certificates following the submission of the April 2014 compliance statement.

8. HMRC's position, as it was put by Karen Powell, the presenting officer who appeared before me, is that there is no provision in the legislation for the rectification of an error, whether in the use of the wrong form or in the identification of the scheme in respect of which authorisation was sought. Once EIS authorisation was granted, as it had been, on submission of the first compliance statement there was no means by which HMRC could later lawfully agree to retrospective withdrawal of the original application and its replacement by another. Similarly, the legislation made it perfectly clear that once an EIS compliance statement had been submitted the company was precluded from any use of the SEIS. It was irrelevant that the use of form EIS1 was attributable to an honest mistake (which HMRC did not concede was the case) or to a change of mind. It was also irrelevant that, had the first compliance statement been on the correct form, the second application for SEIS authorisation would have been successful.

9. X-Wind was represented before me by Iain Mackinnon, whose firm had been engaged for the purpose of securing the necessary investments. Mr Mackinnon has himself invested, and is a non-executive director of X-Wind, with the specific role of protecting investors' interests. X-Wind's case, as he explained it, was that it had been made clear to potential investors from the

start that SEIS relief should be available to them because X-Wind satisfied the relevant conditions. The use of the wrong form was attributable to a simple mistake; the SEIS scheme was novel at the time and his personal assistant, who completed the form on his instructions and had it signed by the managing director before submission, had made an innocent error in using the EIS form. Although Mr Mackinnon had also seen it before submission he too had not realised that a different, SEIS-specific, form should have been used. There was, Mr Mackinnon said, no doubt that X-Wind intended to apply for SEIS authorisation, and it was plainly unfair that authorisation should be refused, and the investors denied the relief to which they were properly entitled, because of what was no more than a clerical error. He added two further arguments, to which I shall come later.

10. Although, for reasons to which I shall come, it makes no difference to the outcome of this appeal, the first question I should address is whether the EIS form was used, as Mr MacKinnon says, because of an innocent mistake or, instead, it was used intentionally and the truth of the matter is that the appellant has had a change of mind. As I have already said, Ms Powell did not concede that the wrong form was submitted because of a simple mistake. I was a little surprised to find that this was a matter in issue since the author of the review letter included in it the remark that "Mr Mackinnon asserts that a mistake was made within his firm and I see no reason to doubt that assertion". Although I think that the more natural reading of this phrase is that the writer was willing to accept that the wrong form had been submitted because of an innocent error, I recognise that the sentence is not unequivocal and that both the statement of case and Ms Powell's skeleton argument make it clear that innocent mistake is not conceded. I therefore allowed HMRC to advance the argument, in case it should be significant, that X-Wind must establish that there was a simple mistake rather than a change of mind. For that reason Mr Mackinnon gave oral evidence about the submission of the EIS1 form; the topic was also touched on in a witness statement he had supplied in advance.

11. Mr Mackinnon pointed me to the copies within the hearing bundle of documents addressed to the prospective investors, in which it was made clear that SEIS relief should be available to those whose personal circumstances met the relevant conditions, and to an email in which he asked his personal assistant to obtain and complete the appropriate SEIS form. He accepted that she had made a mistake in identifying the form, that he had not detected the mistake himself, and that it had not been detected by the director who signed it before it was sent to HMRC. He agreed too that more than a year had gone by before the error was discovered, and that the discovery was made only because of the queries HMRC raised in correspondence about the later requests for authorisation. He denied that there had been any change of mind.

12. I have no hesitation in accepting Mr Mackinnon's evidence. I am entirely satisfied that it was always intended that an application for SEIS authorisation should be made—it makes no sense not to have applied for the more generous SEIS relief when it was available and its availability was known—and that the use of the wrong form was wholly attributable an inadvertent and innocent mistake. I reject the proposition that there was a change of mind.

13. Unfortunately that conclusion does not seem to me to assist X-Wind. ITA s 257AA is in these terms:

> "An individual ('the investor') is eligible for SEIS relief in respect of an amount subscribed by the investor on the investor's own behalf for an issue of shares in a company ('the issuing company') if—
>
> (a) the shares ('the relevant shares') are issued to the investor,
>
> (b) the investor is a qualifying investor in relation to the relevant shares (see Chapter 2),
>
> (c) the general requirements (including requirements as to the purpose of the issue of shares and the use of money raised) are met in respect of the relevant shares (see Chapter 3), and
>
> (d) the issuing company is a qualifying company in relation to the relevant shares (see Chapter 4)."

14. The only requirement relevant here is that imposed by sub-s (d), that X-Wind should be a qualifying company. The meaning of that term is provided by s 257D which, so far as material to this appeal, is as follows:

> "The issuing company is a qualifying company in relation to the relevant shares if the requirements of this Chapter are met as to—
>
> …
>
> (j) no previous other risk capital scheme investments (see section 257DK) …."

15. Section 257DK, so far as material, is in these terms:

> "(1) The requirement of this section is that
>
> (a) no EIS investment … is or has been made in the issuing company on or before the day on which the relevant shares are issued, …
>
> (2) An 'EIS investment' is made in the company if the company—
>
> (a) issues shares (money having been subscribed for them), and
>
> (b) (at any time) provides a compliance statement under section 205 in respect of the shares;
>
> and the EIS investment is regarded as made when the shares are issued."

16. The difficulty for X-Wind is that this section makes it clear that it is the combination of two events, the issue of shares in return for a subscription of money and the provision of a compliance statement under s 205, which amounts to the making of an EIS investment, and there can be no doubt, even on its own case, that both of those events have occurred here. Shares were issued in September 2012 in exchange for cash subscriptions; and a s 205 compliance statement (that is, form EIS1) was provided in March 2013. It is clear from the manner in which s 257DK is worded that what matters is what was done, and not what was intended. As HMRC, in my judgment correctly, say, that is the end of the matter: there is no provision in the legislation for the withdrawal, setting aside, replacement or revocation of a s 205 compliance statement. I accept, as I have said, that the submission of the wrong form was

attributable to an innocent error but I am compelled to agree with HMRC that there is nothing they or this tribunal can do to assist X-Wind out of its difficulty. HMRC were obliged to refuse X-Wind's request that it be allowed to replace the form EIS1, and were likewise obliged to reject the April 2014 SEIS compliance statement.

17. I should add for completeness that Mr Mackinnon made the point in his written submissions that it should have been obvious to HMRC that a mistake had been made in the form EIS1 submitted in March 2013 because the entries on it suggested that the conditions for EIS were not met—the answer given to one question was appropriate to an application within the SEIS, but not one within the EIS, because of one of the differences of detail between the two schemes to which I have referred—and HMRC should have rejected it. Mr Setterfield gave oral evidence about the procedure he and his colleagues follow when compliance statements are submitted. I accept from that evidence that he was entitled to reach the conclusion, from what was before him, that there was nothing untoward about the application; as I understand it Mr Mackinnon too accepted following that explanation that the argument could not succeed. The most which can be said, with the benefit of hindsight, is that Mr Setterfield might have asked some more questions but I agree with him that, faced as he was with an EIS compliance statement and a covering letter which referred to the EIS and not the SEIS, there was nothing to put him on notice that an SEIS application was intended.

18. Mr Mackinnon also argued that X-Wind should be able to take advantage of the provisions of s 42(9) of the Taxes Management Act 1970, which provides that:

> "Where a claim has been made (whether by being included in a return under section 8, 8A, 4 or 12AA of this Act or otherwise) and the claimant subsequently discovers that an error or mistake has been made in the claim, the claimant may make a supplementary claim within the time allowed for making the original claim."

19. In my judgment this argument is misconceived. A compliance statement does not amount to a "claim"; it is instead what must be provided, in essence various items of information, before a company can be authorised to issue the compliance certificates which will later support the investors' claims for relief. I do not see how the scope of the provision can be extended in the manner Mr Mackinnon's argument requires.

20. I come finally to Mr Mackinnon's argument, with which I have some sympathy, that it is unfair that an adverse result of some magnitude should follow from a simple clerical error. It is not, however, within this tribunal's power to allow an appeal on the ground that the underlying decision, or its consequences, is or are perceived to be unfair: see *Revenue and Customs Commissioners v Hok Ltd* [2012] UKUT 363 (TCC), [2013] STC 225.

21. For the reasons I have given I must, and do, dismiss the appeal.

22. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

COLIN BISHOPP
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2016