[2016] UKFTT 0466 (TC)

TC05219

Appeal number: TC/2015/05709

INCOME TAX – seed enterprise investment scheme – effect of s257DK of ITA 2007 – whether earlier application for enterprise investment scheme can be withdrawn – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GDR FOOD TECHNOLOGY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Having determined the appeal without a hearing following a direction under Rule 29 of the Tribunal Rules by reference to written submissions on behalf of the parties

Karen Charmley, of WDM Chartered Accountants, for the Appellant

Matthew Mason, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. In this appeal GDR Food Technology Ltd (the "Company") appeals, under s257EE of the Income Taxes Act 2007 ("ITA 2007"), against HMRC's refusal to authorise the issue of a compliance certificate under the seed enterprise investment scheme ("SEIS") in respect of shares that the Company issued on 15 August 2013. HMRC considered that the Company had previously made a compliance statement under the enterprise investment scheme ("EIS") in respect of those shares. Therefore, in HMRC's view, an EIS investment had previously been made in the Company with the result that s257DK of ITA 2007 meant that relief under the SEIS could not be claimed. The Company argues that it made an innocent mistake when it claimed the benefit of the EIS and it had always intended to claim the benefit of the SEIS and, in those circumstances, HMRC should permit it to amend its claim accordingly and, having done so, authorise the issue of a compliance certificate under the SEIS.

2. On 1 April 2016, both parties having consented to this, Judge John Brooks made a direction to the effect that this appeal should be determined without an oral hearing. Therefore, I have decided this appeal without hearing live evidence or oral submissions and indeed neither party submitted witness statements. However, both parties submitted skeleton arguments and, at the direction of the Tribunal, supplemented those with submissions on the Tribunal's decision in *X-Wind Power Limited v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 0317 (TC) which raised issues very similar to those arising in this appeal. HMRC also prepared a bundle of relevant documents.

Facts

3. The facts did not appear to be disputed in any material respect. I have made the findings at [4] to [12] below.

4. The Company was incorporated on 4 June 2013. Its business consists of developing and producing gluten-free and allergen-free bread. Its issued share capital consists of 142,857 ordinary shares of £1 each. One share was issued on incorporation on 4 June 2013.

5. On 15 August 2013, the Company issued 42,856 shares of £1 each to two investors. The Company has completed various forms under both the SEIS and EIS schemes that describe those shares (together with the single share issued on 4 June 2013) as issued for £42,857 and I have therefore concluded that they were issued for cash consideration.

6. On 30 September 2014, WDM Chartered Accountants ("WDM"), acting on behalf of the Company, submitted a duly completed Form EIS1 to HMRC. That Form EIS1 was a compliance statement (for the purposes of the EIS) within the meaning of s205 of ITA 2007 and related to the 42,857 shares issued as described at [4] and [5]. The Form was signed by Bill Blacoe, a director of the Company. WDM concluded their covering letter enclosing the Form EIS1 with the sentence:

> We look forward to receiving your agreement that these shares qualify for EIS relief.

7. Having received the Form EIS1, HMRC requested further information. On 29 October 2014, WDM sent this information and answered some questions that HMRC had asked. They also concluded this letter by stating that they looked forward to receiving agreement that the shares qualified for EIS relief.

8. On 1 December 2014, WDM chased HMRC for a response on their application stating that they were "writing to enquire if you have reached an agreement that these shares qualify for EIS relief". HMRC had, in fact, misplaced the Form EIS1 that WDM submitted on 30 September 2014 and Jacqueline White of HMRC called WDM to request a further copy. On 10 December 2014, WDM emailed a copy of the Form EIS1 to HMRC. They concluded this letter with a statement that they looked forward to receiving agreement that the shares qualified for EIS relief.

9. On 17 December 2014, in accordance with s204(3) of ITA 2007, HMRC authorised the Company to issue compliance certificates under the EIS in relation to the shares that the Company had issued on 15 August 2013.

10. On 21 January 2015,WDM wrote to HMRC stating that they wished to withdraw their application under the EIS on the grounds that:

> … the wrong form was completed and signed by my client. It was purely a simple error and form Seed Enterprise Investment Compliance Statement should have been completed.

With their letter, WDM enclosed an SEIS Compliance Statement (Form SEIS1).

11. HMRC refused to authorise the issue of compliance certificates under the SEIS regime and that decision was upheld on review. It is that decision against which the Company appeals.

12. For reasons that I will come to, I do not consider that the circumstances in which the Company submitted a Form EIS1 (rather than a Form SEIS1) on 30 September 2014 are relevant to this appeal. However, the Company, in its submissions, has relied strongly on its argument that this happened by mistake and I have, therefore made the findings on this issue. I have seen an email dated 24 May 2013 from Lindsays, the Company's solicitors, that considers the Company's proposed share structure in the light of the requirements of SEIS relief. Bill Blacoe, who signed the Form EIS1, was copied on that email. Lindsays have also signed a written statement confirming that, at the request of the Company, the shareholdings were structured so as to qualify for SEIS relief. In addition, the investors who subscribed for the shares issued on 15 August 2013 have signed statements confirming that they made their statements on the basis that SEIS relief would be available. I have accepted those statements and have concluded that, at all material times, the Company, Lindsays and its investors intended that the share issue would benefit from SEIS relief. However, given that WDM repeatedly referred to "EIS relief" in their letters to HMRC, I have concluded that this intention was either imperfectly communicated to, or imperfectly understood by, WDM. In addition, since WDM used forms relating to the EIS (and not the SEIS)

and in their cover letters referred specifically to the EIS, HMRC could not have been aware of the Company's mistake until 21 January 2015 at the earliest.

The law

13. I gratefully adopt the analysis of the legislation in this areas set out in the decision of Judge Bishopp, the Chamber President, in *X-Wind Power*. As that decision makes clear, in order for investors to be eligible for SEIS relief, among many other requirements, the general requirement set out in s257DK must be met. That section provides as follows:

> **257DK No previous other risk capital scheme investments**
>
> (1) The requirement of this section is that—
>
> (a) no EIS investment or VCT investment is or has been made in the issuing company on or before the day on which the relevant shares are issued, and
>
> (b) no EIS investment or VCT investment has been made on or before that day in a company which at the time the relevant shares are issued is a qualifying subsidiary of the issuing company.
>
> (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…

Discussion

14. I respectfully agree with Judge Bishopp's decision in *X-Wind Power*. The combination of the issue of shares on 15 August 2013 (for which money was subscribed) and the company making a compliance statement for the purposes of the EIS means that there was an EIS investment that was regarded as made on 15 August 2013. Therefore, on the day on which the "relevant shares" were issued (being the shares in respect of which SEIS relief is sought), an EIS investment was made in the Company. The requirement of s257DK ITA 2007 was not met and, accordingly, the investors were not entitled to SEIS relief and HMRC were correct not to authorise the issue of a compliance certificate for SEIS purposes.

15. The Company has argued that HMRC were not entitled to approve the issue of a compliance certificate for EIS purposes by reference to the copy of the Form EIS1 (that the Company emailed after HMRC lost the original form). I do not accept that submission. However, in any event, s257DK makes it clear that the "EIS investment" is regarded as complete when the Company provides a compliance statement under s205 of ITA 2007. The section does not invite any consideration of whether or not HMRC subsequently authorise the issue of a compliance certificate. Therefore, even if I had accepted the Company's submission, it could not have altered my conclusion.

16. The Company has also submitted that there should be some mechanism in place to correct an error when the wrong form has been submitted to HMRC. I feel sympathy for the Company and investors that a small mistake has led to significant financial consequences. However, Parliament has legislated in the clear terms set out above and has not made any provision to relieve taxpayers who inadvertently submit the wrong form. I agree with Judge Bishopp in *X-Wind Power* that the legislation does not ask why a compliance statement under s205 ITA 2007 has been made; it simply asks whether it is has been made.

17. The Company also argues that, since it discovered its mistake just over a month after HMRC authorised the issue of the EIS compliance certificates, the decision in *X-Wind Power* can be distinguished. However, since I do not consider that the Company's reasons for making a compliance statement under the EIS are relevant, it follows that the length of time it took to discover its mistake is not relevant either.

18. The Company has not, in its written submissions, referred to the decision of the Upper Tribunal in *Joost Lobler v HMRC* [2015] UKUT 0152 (TCC). In that case, the Upper Tribunal decided that the tax implications of an election made under the terms of a financial contract between the taxpayer and a third party should be determined on the basis that the equitable remedy of rectification was available following a unilateral mistake by the taxpayer. Since no submissions were made in relation to that decision, I will not consider it in any great detail. However, it seems to me that the Company cannot rely on this decision in support of a claim that its compliance statement in relation to the EIS should be "rectified" and treated as a compliance statement relating to the SEIS. That is because the decision in *Lobler* was dealing with questions of contract law whereas, in this appeal, there was no contract between the Company and HMRC; rather the relevant issue involves the construction of the relevant statutory provisions and their application to the Company's communications with HMRC. Given that Parliament has legislated in the terms set out above, I do not consider that there is any room to apply concepts of mistake and rectification (which, in any event belong in the realms of contract law) to alter the plain effect of the statutory provisions concerned.

19. For all of those reasons, the appeal is dismissed. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 30 JUNE 2016