



TC06152

Appeal number: TC/2016/05073

INCOME TAX – Seed Enterprise Investment Scheme – Part 5A ITA 2007 - compliance statement completed using form for Enterprise Investment Scheme by mistake – whether compliance statement valid

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

INNOVATE COMMISSIONING SERVICES LIMITED Appellant

-and-

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

TRIBUNAL: Judge Peter Kempster

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

DECISION

1. By a notice of appeal filed on 21 September 2016 (“the Notice of Appeal”) the Appellant appeals against a decision by the Respondents (“HMRC”) dated 24 August 2016 (“the Refusal”) to refuse to authorise the issue of a compliance certificate under the Seed Enterprise Investment Scheme in respect of shares issued by the Appellant on 23 September 2014.
2. The parties agreed that the appeal should be determined without an oral hearing (Tribunal Procedure Rule 29 refers) and that course of action was directed by Judge Jane Bailey on 31 January 2017.
3. I have considered:
 - (1) The Notice of Appeal.
 - (2) HMRC’s statement of case dated 6 January 2017, and skeleton argument dated 2 June 2017 (prepared by HMRC Solicitors Office).
 - (3) The Appellant’s statement of case dated 30 January 2017, and outline of case dated 1 June 2017 (prepared by Freeths LLP).
 - (4) The bundle of documents, which includes a statement of agreed facts.
 - (5) Submissions from both parties (HMRC on 4 August 2017 and the Appellant on 11 August 2017) concerning the Upper Tribunal’s decision (issued on 27 July 2017) in *X-Wind Power Limited v HMRC* [2017] UKUT 0290 (TCC).

Background

4. The facts and circumstances giving rise to this appeal are similar to those in two cases previously decided by this Tribunal: *X-Wind Power Limited v HMRC* [2016] UKFTT 03317 (TC) (“*X-Wind/FTT*”) (before Judge Colin Bishopp), and *GDR Food Technology Limited v HMRC* [2016] UKFTT 0466 (TC) (“*GDR*”) (before Judge Jonathan Richards). The decision in *X-Wind/FTT* was upheld by Arnold J in the Upper Tribunal in *X-Wind Power Limited v HMRC* [2017] UKUT 0290 (TCC) (“*X-Wind/UT*”).
5. In all three cases a company inadvertently filed the wrong form with HMRC; the form related to Enterprise Investment Scheme relief (“EIS”) (Part 5 Income Tax Act 2007 refers) instead of Seed Enterprise Investment Scheme relief (“SEIS”) (Part 5A ITA 2007 refers). When they spotted the errors the companies sent the correct forms to HMRC, but HMRC refused to accept them; the effect was to deny SEIS to the investors in the company. In both *X-Wind/UT* and *GDR* the appeals were dismissed, for reasons discussed below.
6. The distinction between EIS and SEIS was explained by Arnold J in *X-Wind/UT*:

5 “4. ... The relevant statutory provisions are now to be found in Parts 5
10 (EIS) and 5A (SEIS) of the Income Tax Act 2007 (“the ITA”). The
15 difference between the two schemes of particular significance for
20 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.

15 5. The procedural requirements for claiming EIS and SEIS are similar.
20 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. A compliance certificate may be issued only with the
authority of an officer of HMRC. In order to secure such authority, the
company is required to provide HMRC with a “compliance statement”.
The compliance statement must set out certain information, which
differs to some extent between the EIS and the SEIS.”

7. The relevant parts of the legislation are cited in *X-Wind/UT* at [11-13]. I need
restate only s 257DK (so far as relevant), which is the provision that has caused the
problem faced by the companies in all three cases by denying SEIS relief:

“257DK. No previous other risk capital scheme investments

25 (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
30 (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
...”

8. The relevant facts in the current appeal may be summarised as follows:

35 (1) On 26 June 2014 Freeths wrote to HMRC on behalf of “JS
Commissioning Limited” headed “Seed Enterprise Investment Scheme (SEIS):
Request for advance assurance (Part 5A of the Income Tax Act 2007)”. The
address of JS Commissioning Limited is given as 1 Mariner Court, Wakefield.
40 The proposal is that the company will establish a wholly-owned Dubai
subsidiary to carry out a trade in the Middle East, and the company will raise

5 £150,000 new share capital (which was the cap on SEIS relief). Further details are provided, effectively checking off the statutory qualifying conditions for SEIS. Advance assurance of qualification for SEIS was requested, and it was confirmed “that the company expects to be able to complete the declaration on form SEIS1 in due course”. Form SEIS1 is the compliance statement for SEIS (s 257ED ITA 2007 refers).

10 (2) HMRC replied on 31 July 2014 stating, “On the basis of the information provided, I would be able to authorise the company to issue compliance certificates under Section 257EC(1) ITA 2007 in respect of the shares to be issued, following receipt of a form SEIS1 satisfactorily completed. The conditions relating to the company and its trade have to be complied with throughout the three year period related to the shares. The form SEIS1 is available at [link to page of HMRC website].”

15 (3) On 20 July 2015 a form EIS1 (not SEIS1) was submitted by “Innovate Commissioning Services Limited” of 1 Mariner Court – it appears from subsequent correspondence that this is the same company as JS Commissioning Limited, after a name change – but the same HMRC reference was given as on the HMRC advance assurance dated 31 July, so it was clearly in relation to the same proposal. Form EIS1 is the compliance statement for EIS (s 205 ITA 2007 refers). The EIS1 was signed by a director, Mr Bywater; it shows new investment of £150,000; and a negative answer is given to the question “Has the company issued shares under the Seed Enterprise Investment Scheme (SEIS)?”

(4) On 6 August 2015 HMRC acknowledged receipt of the EIS1 and stated:

25 “I note the amount of the subscription totals £150,000; the SEIS maximum. As the company applied for and received assurance under the SEIS I thought it prudent to check the company had provided the correct compliance statement. If an EIS1 is authorised the company cannot rectify the position if an incorrect form has been used. Please either provide the correct SEIS1 or confirm the EIS1 should be processed?”

35 (5) No reply was received to the 6 August 2015 letter. On 25 August 2015 the Appellant registered a change of address (to 5 Mariner Court) at Companies House. There is no suggestion that the Appellant updated its correspondence address to HMRC. The Appellant states that it did not receive the 6 August letter.

40 (6) On 23 September 2015 HMRC issued to the Appellant (at 1 Mariner Court) an authority (on form EIS2) to issue EIS compliance certificates in respect of the shares detailed on the form EIS1. That letter was subsequently returned undelivered by Royal Mail marked “addressee gone away”.

(7) On 13 January 2016 the Appellant emailed HMRC (apparently after a telephone conversation) referring to an application for an “SEIS1 certificate”

on 15 July 2015 for JS Commissioning Limited. The HMRC reference given is the same as on the EIS1 and a copy of the form is said to be attached. The Appellant notified its change of address and asked for a copy to be sent to 5 Mariner Court. I understand that on 22 January 2016 HMRC sent a copy of the EIS2 to the new address.

(8) On 31 March 2016 Freeths wrote on behalf of the Appellant to HMRC and, after reciting the history of the matter, stated:

“The SEIS Clearance Response [ie the advance assurance] was dated 31 July 2014, and included HMRC's reference [ref no given]. We then advised the Company to submit a duly completed and signed SEIS1 form once the Company had been trading for at least 4 months.

On 15 July 2015, the Company submitted a form EIS1 to HMRC. This was submitted entirely in error as the Company intended to submit a form SEIS1.

Due to the Company subsequently changing their registered office address, and HMRC's correspondence being delivered to the Company's old address, HMRC's response to the EIS1 was not received by the Company until recently at which point it became clear that the Company had submitted an EIS1 by mistake instead of the intended SEIS1.

Withdrawal of EIS1

Upon recognition of their error, the Company now requests that the EIS1 (submitted by the Company 15 July 2015) be withdrawn. In coordination of the withdrawal of the EIS1, the Company will submit a duly completed SEIS1 in respect of the relevant issue of shares immediately by post to HMRC with a cover letter referencing this email.”

(9) HMRC replied by email on 18 April 2016, stating:

“The only time a compliance statement, either SEIS or EIS, can be withdrawn is where authority to pass on the certificates has yet to be issued. I would refer you to the legislation that covers this particular point which is found at s 257DK(2)(a) & (b) ITA 2007.”

(10) On 29 April 2016 Freeths wrote to HMRC enclosing an SEIS1, asking for it to be substituted for the EIS1 submitted in error, and for the earlier EIS2 be disregarded. The SEIS1 includes the statement: “before issue of the shares neither the company, nor any company which is a subsidiary at the time of issue, has ... issued any shares for which it has provided a Compliance Statement (form EIS1) under the Enterprise Investment Scheme (EIS)”

(11) There was further correspondence between the parties, in which both parties referred to *X-Wind/FTT* and *GDR*, and on 24 August 2016 HMRC issued the Refusal, stating:

“As explain in an exchange of correspondence the legislation governing the Seed Enterprise Investment Scheme does not allow a company to issue shares after an investment under the Enterprise Investment Scheme (EIS) has occurred.

5 There are also no provisions within the legislation that permit HMRC to accept a substitute compliance statement. I enclose a copy of the latest letter on this point for your additional information.

10 The company's statement on form SEIS1 relating to the share issue made on 23 September 2014 has been duly considered and I hereby give notice of my decision as follows:

Authority to issue compliance certificates under Section 257EC(1) Income Tax Act 2007 is refused, The grounds of this decision are that:

- 15 • The company did issue shares on the 23 September 2014 and provided a compliance statement in accordance with Section 205 Income Tax Act 2007;
- An EIS investment is defined by Section 257DK(2) Income Tax Act 2007; and
- 20 • The providing of a compliance statement under Section 257ED Income Tax Act 2007 cannot apply as the company does not satisfy the requirements of Section 257DK(1) Income Tax Act 2007.”

(12) On 21 September 2016 the Appellant filed the Notice of Appeal.

Appellant's case

9. The Appellant submitted as follows.

25 10. A Form EIS1 was filed in error. If a correctly completed Form SEIS1 had been filed in July 2015 instead of the EIS1 then HMRC would have granted authority (Form SEIS2) for issue of SEIS compliance certificates. A Form SEIS1 was submitted on 29 April 2016.

30 11. HMRC's letter dated 6 August 2015 shows that HMRC believed that the Form EIS1 was submitted as a result of clerical error. The Appellant never intended to provide an EIS compliance statement under s 205. The communicated intention of the Appellant was clearly indicated by the submission of the advance assurance application specifying SEIS relief.

35 12. Both HMRC's letter dated 6 August 2015 and the subsequent Form EIS2 were not received by the Appellant, due to a change of address.

13. As a matter of practice, HMRC do not accept the submission of a Form EIS1 as being the provision of “a compliance statement under section 205” for the purposes of s 257DK. HMRC routinely respond to such a form with questions regarding the

5 contents, validity or intention behind the submission of the form. Parliament's intention cannot have been that an EIS investment is deemed to be made simply because Form EIS1 is received by HMRC. It might be that the form was submitted by an unauthorised person, or with important information omitted, or immediately
5 rescinded prior to consideration by HMRC. That seemed to be accepted by HMRC in their letter dated 18 April 2016, where they state that a compliance statement can be withdrawn before authority to issue compliance certificates has been given.

10 14. There must be a duty on HMRC to ascertain that any Form EIS1 submitted is truly intended to be an EIS compliance statement. HMRC did request confirmation from the Appellant, but then failed to obtain the requisite confirmation from the Appellant.

15 15. The Appellant sending Form EIS1 and HMRC receiving the same did not constitute the provision of a compliance statement. HMRC were on notice that an SEIS investment was intended – indeed they rightly queried that with the Appellant.

15 16. The current case could be distinguished from *GDR* and *X-Wind*:

(1) The Appellant had sought an advance assurance of SEIS qualification from HMRC – that was not done in the other two cases.

20 (2) In the other two cases HMRC did not query the submission of an EIS compliance statement. In *X-Wind/UT* the Upper Tribunal stated (at [7]): “The FTT found that there was nothing to put HMRC on notice that X-Wind had intended to seek SEIS compliance certificates rather than EIS compliance certificates.” Also (at [18]): “The EIS1 form which X-Wind submitted was on its face a compliance statement for the EIS which satisfied the requirements of section 205.” Here the opposite was the case; HMRC were on notice and so
25 the form did not satisfy the requirements of s 205.

30 (3) The Appellant had believed that SEIS relief had been applied for, and was unaware of HMRC's queries. In *GDR* the agent repeatedly asserted that EIS relief was being sought, despite several opportunities to make contrary representations. In *X-Wind* the company had opportunities to discover its error through correspondence with HMRC but did not do so.

17. HMRC were wrong to exercise their discretion to treat the Form EIS1 as a s 205 compliance statement, and no EIS investment had been made under s 257DK. Therefore HMRC should grant authority to the Appellant to issue SEIS compliance certificates to the investors.

35 **Respondents' case**

18. HMRC submitted as follows.

19. HMRC were correct to refuse to authorise the issue of compliance certificates by the Appellant. The Appellant was not a “qualifying company” for SEIS because there were “previous other risk capital scheme investments” by virtue of s 257DK; an

EIS investment had been made in the company because “the company ... issues shares (money having been subscribed for them) and (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.”

5 20. Section 205 defined a compliance statement and the form it must take. Form EIS1 was the document designated by HMRC as the s 205 EIS compliance statement. The Appellant provided a Form EIS1 signed by a director, and stating that the company had not issued shares under the SEIS. That form could not be a compliance statement for SEIS relief.

10 21. The Appellant claimed that the Form EIS1 was provided in error. HMRC accepted that the Appellant may have intended to provide an SEIS compliance statement but that is not what was done; an EIS compliance statement was provided. In *X-Wind/FTT* the Tribunal stated (at [16]):

15 “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.”

25 22. In *GDR* the Tribunal stated (at [16]): “... 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.”

30 23. The Appellant’s arguments that the Form EIS1 was somehow not “valid” were misplaced. In *X-Wind/FTT* the Tribunal found against the company, despite the fact that (as stated at [4] & [9]) the Tribunal accepted the company’s evidence that the filing of the Form EIS1

35 “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. ... 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; ... 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 [company director] 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.”

5 24. Further, in *X-Wind/UT* Arnold J stated (at [17-18]):

10 “17. The first ground of appeal is not one which was advanced before the FTT. X-Wind points out that, by virtue of section 205(1), an EIS compliance statement is a statement, putting it shortly, that the requirements for EIS relief have been and are being met in relation to the relevant shares. In the present case, X-Wind did not intend to enable the investors to claim EIS relief, it intended to enable them to claim SEIS relief. It used the wrong form by mistake. It follows, X-Wind argues, that the EIS1 form it submitted was a nullity.

15 18. I am unable to accept this argument. The EIS1 form which X-Wind submitted was on its face a compliance statement for the EIS which satisfied the requirements of section 205. As counsel for HMRC submitted, it is clear from section 205(3)(b) that the legislature intended that HMRC should be able to rely upon the accuracy of the compliance statement and it is clear from section 207 that the company’s intention, even if it is fraudulent or negligent, does not prevent it from having provided a compliance statement. ...”

Consideration and Conclusions

25 25. As I have already stated, the facts and circumstances giving rise to this appeal are similar to those in the cases of *X-Wind* and *GDR*. While *X-Wind/FTT* and *GDR* are not binding precedents, the decision in *X-Wind/UT* is, of course, binding on this Tribunal. The conclusion of the Upper Tribunal (so far as relevant to this appeal) was:

30 “16. X-Wind ... contends that the EIS1 form it submitted on about 22 March 2013 was not a “compliance statement” within the meaning of section 205 of the ITA, because X-Wind did not intend to enable the investors to claim EIS relief and used the wrong form by mistake. ...

35 17. ... X- Wind points out that, by virtue of section 205(1), an EIS compliance statement is a statement, putting it shortly, that the requirements for EIS relief have been and are being met in relation to the relevant shares. In the present case, X- Wind did not intend to enable the investors to claim EIS relief, it intended to enable them to claim SEIS relief. It used the wrong form by mistake. It follows, X-Wind argues, that the EIS1 form it submitted was a nullity.

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that HMRC should be able to rely upon the accuracy of the compliance statement and it is clear from section 207 that the company's intention, even if it is fraudulent or negligent, does not prevent it from having provided a compliance statement. ...”

5 26. So the Appellant's appeal must fail unless its case can be distinguished from *X-Wind/UT*. The Appellant draws two distinctions.

27. The first is that in this case HMRC were clearly on notice that SEIS was in the mind of the Appellant, because the Appellant submitted (successfully) the request for “advance assurance” that SEIS would be available on the proposed share issue. That
10 is correct, and it is also the case that HMRC spotted that although the previous correspondence envisaged SEIS, the company had filed a form relating to EIS instead, and in their letter dated 6 August 2015 they queried this:

15 “I note the amount of the subscription totals £150,000; the SEIS maximum. As the company applied for and received assurance under the SEIS I thought it prudent to check the company had provided the correct compliance statement. If an EIS1 is authorised the company cannot rectify the position if an incorrect form has been used. Please either provide the correct SEIS1 or confirm the EIS1 should be processed?”

20 28. That is in contrast to the facts in *X-Wind* and *GDR* where there was no advance assurance request; also in *GDR* the company repeatedly asked for “your agreement that these shares qualify for EIS relief” (*GDR* at [6-7]); and in *X-Wind/UT* Arnold J stated (at [7]): “The FTT found that there was nothing to put HMRC on notice that X-Wind had intended to seek SEIS compliance certificates rather than EIS
25 compliance certificates.”. However, I do not consider this difference assists the Appellant. HMRC did point out (in their letter dated 6 August 2015) the apparent discrepancy; in their skeleton they described that as “a matter of customer service”. They sent that letter to the address given on both the advance assurance correspondence and the Form EIS1, but did not receive any reply. As HMRC point
30 out, the Appellant was entitled to change its proposal to claiming EIS relief rather than SEIS; HMRC then authorised the issue of EIS compliance certificates. So if the drift of the Appellant's argument here is that HMRC have behaved unreasonably or incorrectly in giving the EIS authorisation in response to the Form EIS1 then – even if that is a matter for this Tribunal – I reject it. In *X-Wind/FTT* Judge Bishopp
35 commented (at [17] - *obiter*), “The most which can be said, with the benefit of hindsight, is that Mr Setterfield [the HMRC officer considering the Form EIS1] might have asked some more questions.” In the current case some questions were asked but no reply was received, so the authorisation was given.

29. The second purported distinction follows from the same distinguishing fact –
40 that HMRC were aware that SEIS was in the mind of the Appellant and the submission of a Form EIS1 was incompatible with that intention – and contends the effect is that the Form EIS1 was invalid, and so did not constitute a “compliance statement” within s 205. I shall approach this by examining what is meant by the

phrase in s 257DK “the company ... (at any time) provides a compliance statement under section 205 in respect of the shares.”

30. The view of HMRC has been, consistently, that the important event (as it were, the point of no return) is their authorisation of the compliance statement that has been submitted. In the 6 August 2015 letter they stated (emphasis added), “*If an EIS1 is authorised* the company cannot rectify the position if an incorrect form has been used.” In their 18 April 2016 email they stated (again, emphasis added), “The only time a compliance statement, either SEIS or EIS, can be withdrawn is *where authority to pass on the certificates has yet to be issued.*” In *X-Wind/FTT* (at [8]) it was stated (again, emphasis added): “HMRC’s position ... 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.” In both *X-Wind* and *GDR*, HMRC raised questions on the Forms EIS1 that were submitted (see *X-Wind/FTT* at [4] and *GDR* at [7-8]) before authorisation was given.

31. While I agree that the trigger being HMRC’s authorisation of the compliance statement would be a sensible mechanism, that is simply not what is provided by the legislation. As stated by Judge Richards in *GDR* (at [15]), “[Section 257DK] does not invite any consideration of whether or not HMRC subsequently authorise the issue of a compliance certificate.” The focus of s 257DK is on the provision of a compliance statement, not its subsequent authorisation.

32. Furthermore, it is now clear from *X-Wind/UT* that the provision of a faulty compliance statement is still sufficient for s 257DK, and does not render the compliance statement invalid or ineffective; to repeat Arnold J’s statement (at [18] – emphasis added):

“... it is clear from section 205(3)(b) that the legislature intended that HMRC should be able to rely upon the accuracy of the compliance statement and it is clear from section 207 that the company’s intention, *even if it is fraudulent or negligent*, does not prevent it from having provided a compliance statement.”

33. I suppose there must be some limits to this; to take an example put forward by the Appellant, if a compliance statement is submitted to HMRC by a person who did not have authority to make the submission then I suppose it is arguable that the statement was not *provided by the company*. However, that was not the case here and it is clear from *X-Wind/UT* that the mistaken submission of the wrong form does not prevent there having been provision of a compliance statement for the purposes of s 257DZ.

34. Accordingly, the appeal must be dismissed.

Decision

35. The appeal is DISMISSED.

5 36. 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.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

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RELEASE DATE: 06 OCTOBER 2017