[2018] UKFTT 0308 (TC)

TC06538

Appeal number: TC/2017/472

INCOME TAX/CAPITAL GAINS TAX – Seed Enterprise Investment Scheme – issue in principle – whether investment of less than £1000 can constitute an investment for the purposes of the qualifying business – yes – appeal ALLOWED

FIRST-TIER TRIBUNAL
TAX CHAMBER

OXBOTICA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN
DAVID WILLIAMS CTA (Fellow)

Sitting in public at Centre City Tower, 5 – 7 Hill Street, Birmingham on 15 May 2018.

Mrs Zoe Fatchen of Gowling WLG IUK) LLP on behalf of the Appellant

Mr Gregg Carson, representing officer of HM Revenue and Customs, for the Respondents

DECISION

1. This appeal is against HM Revenue & Customs' ("HMRC") decision (dated 17 August 2016) to refuse, under section 257EC Income Tax Act 2007 ("ITA") to give Oxbotica Limited ("the Appellant") authority to issue Seed Enterprise Investment Scheme ("SEIS") compliance certificates in respect of investment by three individuals in respect of 31,000 ordinary £0.01 shares issued in the Appellant company on 30 September 2014 on the basis that the purpose of the share issue was not to raise money for the purposes of the Appellant's qualifying business activities.

Background

2. The basic facts were not in issue between the parties.

3. The Appellant was incorporated on 30 September 2014 under the name Actiobox Limited changing its name to Oxbotica Limited on 1 October 2014.

4. The Appellant was founded to "spin out" technology from the University of Oxford's ("the University") Department of Engineering Science to conduct research in order to design and develop a range of "highly innovative products" using patented intellectual property originally developed by Paul Newman (principal investigator at the University's Robotics institute) and Herbert Ingmar Posner (Associate professor in information engineering), at the University. Continued development and commercialisation of that intellectual property was to be undertaken by the Appellant pursuant to a licence granted to Appellant by the University. Mrs Fatchem and Dr Graeme Smith (from whom the Tribunal heard evidence) described the opportunities presented by the spin out as "the culmination of the life works" of these professors.

5. Also on 30 September 2014 the Appellant issued 100,000 x £0.01 fully paid up ordinary shares to the following shareholders:

(1)	Herbert Ingmar Posner	26,600 shares for £266
(2)	Clive Scrivener	3,000 shares for £30
(3)	Philip Avery	2,000 shares for £20
(4)	Paul Newman	39,900 shares for £399
(5)	University of Oxford	28,500 shares for £285

6. The attribution of the shares was to reflect the relative contributions of each of the subscribers in terms of the initial intellectual capital but also reflecting the anticipated involvement in the ongoing operations of the business. In particular the 39.9% share taken by Mr Newman reflected that on 30 June 2014 he had personally received an offer of intent from the University in respect of the grant of a loan of £110,000 to support the activities which ultimately became the business of the Appellant. The loan offer letter was not in the Tribunal bundle but during the course of the hearing the Tribunal and HMRC were shown a copy of the letter. Despite

assertions to the contrary made in correspondence by the Appellant's former advisers the offer letter did not make the loan conditional upon the formation of the Appellant company. The offer was made to Paul Newman personally but on terms that clearly contemplated the formation of a company as there was provision for the possibility of conversion of debt to equity.

7. On 29 October 2014 the sum of £110,000 was paid by the University to the Appellant by way of a loan. The Tribunal were shown not shown a copy of the final terms of the funding agreement.

8. Clive Scrivener has a distinguished background leading high growth businesses and is the Appellant's chairman. Philip Avery founded NavTech Radar, a world leading developer of commercial off-the-shelf radar sensors, a proponent of UK industry particularly high tech design and manufacturing. He was appointed as an advisor to the Appellant and non-executive director.

9. The funds were held in the Appellant's solicitors account until 6 November 2015 when they were transferred to the Appellant.

10. On 23 July 2015 the Appellant made an application, by way of form SEIS1, for authority to issue SEIS compliance certificates in respect of the 31,600 issued to Herbert Ingmar Posner, Clive Scrivener and Philip Avery.

11. By letter dated 13 August 2015 HMRC acknowledged receipt of the SEIS1 but informed the Appellant that "subscriber shares, issued on formation of the company, rarely qualify" for SEIS as "to be eligible, the shares must be fully paid for in cash by the time they are issued. As the company does not exist until it has been formed it is unusual for the formation shares to satisfy this requirement". Further information and documentation as to whether the shares had been paid for was invited.

12. The Appellant's former advisers responded by letter dated 24 September 2015 confirming that the subscription income had been paid by the subscribers in full into the Appellant's solicitor's client account. All requested documentation was also provided.

13. HMRC accepted, by letter dated 7 October 2015, that the shares were fully paid. However, the compliance certificate was rejected on the basis that "I have now looked into a number of other factors, including the amount of money raised. There is no minimum figure for this, but we would expect it to be more than the cost of the share issue, otherwise the funds cannot be said to have been raised for the purposes of the business activity. If the money raised is more than the cost of the share issue we would expect it to be enough to be of meaningful use to the company in its business. The SEIS form shows that 31,600 shares were issued to 3 investors on 30 September 2014 for £316, and it is my view that this amount would not be enough to be of meaningful use to the company in its business". HMRC invited the Appellant to "explain why the company believes the purpose of the share issue was for the qualifying business activity and provide evidence to support this i.e. business plans, board minutes etc.

14. The response on behalf of the Appellant dated 2 December 2015 highlighted to HMRC that there was no statutory minimum investment required for the purposes of a qualifying SEIS investment and provided the following narrative by way of explanation as to the reason for the issue:

> "The Company is a spin out from the University of Oxford. In line with many other university spin-outs this meant that the CEO and Board were appointed on a putative basis some months before company formation and were already working on business development plans before the company formation. Oxford academics were also lined up to work on the R&D and almost immediately following incorporation the company began engineering work supporting a project at the University, and within a few weeks had hired two DPhil graduates from the Mobile Robotics Group to support this. The Company did not prepare a detailed business plan because it was not seeking investment outside the University. However, it is clear that the University would not have invested in Oxbiotica, or entered into important commercial agreements with it without satisfying itself that the company was in a position to carry out viable activities.
>
> This was not a company formed by a group of individuals with a vague business idea that may or may not get off the ground. The initial investment round, which totalled £1000 and of which the £316 was part, was the first step in the process by which the business activities began in earnest. The investment was a pre-requisite for IP being licenced in from the University and also to secure bridging funding from the University.
>
> …
>
> You mention that you expect that the investment should be more than the cost of the share issue. The legal fees received by the company do not isolate this specific cost from other fees for example of entering into licensing and funding agreements, but the specific cost of issuing shares is considered to be less than the £1000 total share capital raised."

15. On 16 December 2015 HMRC simply responded that whilst they accepted there was no statutory minimum investment under the SEIS legislation the rationale for its introduction was "to allow smaller investors to make investments via crowd funding websites. The outcome being the company was able to raise the level of funding it required, all be it from a larger number of investors". The letter went on to say "I do not believe [Parliament] envisaged a company would issue more than 30% of its shares under the venture capital schemes for a total consideration of £316."

16. Correspondence ensued and HMRC requested documentary evidence to substantiate: (1) that the share issue was part of a wider fund raising; (2) that the investment was a pre-requisite for the IP licence and to secure bridging funding from the University; (3) how funding was to be used; and (4) any other relevant documentation.

17. The Appellants provided various documentation by letter dated 18 July 2016. It was asserted that "The formation of a suitable limited company was a pre-requisite to obtain seed capital through [the University Capital Seed Fund] which then allowed the

Company to enter all the IP Licence Agreements with ISIS [the University's corporate vehicle for granting IP licences]. Without the company being formed and all related agreements being suitably approved, the IP Licence Agreement could not have been granted by ISIS, as there was clearly no company to be a counter party to that Agreement. The IP licence simply could not have been executed by ISIS without the Company demonstrating initial funding. Oxbotica was able to demonstrate this initial funding by establishing itself, securing initial equity investment (first) and entering into the UCSF finance agreement". The letter also set out the terms of the Subscription and Allotment Agreement (to which both the University and ISIS were parties) which, it was contented, supported the conclusion that the equity investment secured by the Appellant, including the investment from the SEIS investors, was a requirement for both the UCSF funding and the IP licences.

18. HMRC's decision is contained in a letter dated 17 August 2016 concluding that as the provisions of s257CB require that the relevant shares must be issued in order to raise money for the purpose of a qualifying business activity carried on by the issuing company and that the purpose of the legislation is to enable companies who would otherwise struggle to access finance from traditional means the Appellant was not entitled to issue the compliance certificate. In HMRC's view the size of the investment was too small and in circumstances where the company had already secured funding from the University, HMRC considered that the purpose of the share issue was an attempt to secure capital gains tax relief.

19. The Appellant appealed the decision on 15 September 2016. The appeal reiterated that as there was no minimum investment requirement for SEIS the investments could not be excluded from relief by virtue of their size. By the appeal letter it was asserted that the equity funding was not the means by which the UCSF funding was secured. The appeal rejected the contention that the purpose of the share issue was to obtain capital gains tax relief on the basis that the investment was genuinely to raise initial investment which would result in capital gains tax relief if, and only, the Appellant were successful and all other requirements for relief were met.

20. HMRC's review decision dated 25 October 2016 confirmed their view that the purpose of the share issue was not to raise money for the purposes of a qualifying trade but, by this letter, it was contended that the purpose of the share issue was "to forge close ties with the University and to form a company which was a pre-requisite to securing the debt funding from the University Seed Capital Fund". The letter continued:

> "I note the view expressed by the company's accountants that even if an equity commitment was needed before the University funding could be secured this was not tied to the SEIS relief, which was entirely a matter for the company and its shareholders; but it could nevertheless affect the purpose. HMRC's argument is tenable, so the requirements of section 257CB ITA are not met.
>
> Contrary to this however is the fact that the money was used in the business in paying professional fees connected with the financing of the share issue which

is accepted as a qualifying use of money raised by a share issue. The argument that the SEIS funding were used by the company for the purposes of preparing to carry on its qualifying business activity has therefore been advanced.

To counter this the caseworker has suggested that there may be another purpose behind the investment in SEIS shares such as future capital Gains Tax relief as the £1000 raised by the share issue on 30 September 2014 of which the SEIS shares was negligible and insignificant in comparison to the debt funding of £111,000 received from the University. It was not made to raise a critical sum of money to benefit the company through investment but was made to secure the investors stake in the company. This is a sustainable counter argument and would mean that the requirements of section 257CB ITA 2007 are not met and the share issue does not qualify under the SEIS.

HMRC has accepted that for the purposes of the SEIS the company engaged in qualifying business activity, and that the shares issued on 30 September 2016 to the 3 SEIS investors were fully paid up in cash when they were issued.

It does not accept that the company is due relief under SEIS as it considers that the purpose of the share issue was not to raise money for the company's qualifying business, but to secure debt funding from the university and possibly to secure future reliefs under SEIS for the 3 investors by acquiring qualifying shareholdings in the company.

The requirements of section 257CB ITA 2007 are not therefore met and the share issue does not qualify for relief under the SEIS".

Evidence and finding of fact

21. The Tribunal was provided with all correspondence and documentation which had passed between the parties and received evidence from Dr Graeme Smith the CEO of the Appellant.

22. Dr Smith is the CEO of the Appellant. His background is in delivering complex projects and services from research and development to customer launch primarily in the automotive sector. He previously worked with/for Nissan and Ford in connection with the development of parking sensors, adaptive cruise control and other automated functionality of cars.

23. His evidence confirmed that the approach taken by the University in the setting up of the Appellant was to follow a relatively established model for the further development and commercialisation of University intellectual property whereby ISIS licences the initial IP to a separate company in which the University also has an equity interest and to which, frequently, the University grants seed capital by way of debt finance.

24. Dr Smith explained that the proportion of shares attributable to each of the non-University subscribers was determined by reference to their contribution to the Appellant irrespective of the consequences for SEIS i.e. Paul Newman was allocated

39.9% of the share capital fully cognisant that such an allocation resulted in him having no eligibility for SEIS having exceeded the statutory maximum interest in the Appellant.

25. Dr Smith went on to explain that for some months prior to 30 September 2014 he, together with Paul Newman and Ingmar Posner had been considering the establishment of the Appellant company with a view to the fulfilment of the ambition to commercialise the life's work of the academics.

26. By reference to the documentation and Dr Smith's evidence it is clear to the Tribunal that £715 was paid by the 4 non-University subscribers into their solicitor's client account. Dr Smith told the Tribunal that whilst the sum was apparently small it was real investment by the individuals with a view to forming working capital for the Appellant. Dr Smith stated, and the Tribunal accepts, that as at 30 September 2014 it was clear that Paul Newman had agreed with the University that it would provide Seed Capital Fund monies to him for the development and commercialisation of the IP but that the time frame for the receipt of that debt funding was not certain.

27. Dr Smith explained that the company had been formed in order to be the recipient of an IP licence from ISIS, which covered 80 individual items of patented intellectual property. Pursuant to the terms of the licences the Appellant pays the University a royalty which, since formation, has amounted to in excess of £400k. In Dr Smith's experience it is normal for such IP licences to be granted only to corporate bodies and hence the spin-out model invariably involves the formation of a limited liability company for these purposes.

28. He further explained that the Appellant had incurred legal fees associated with the setup of the company, securing the debt funding and the IP licence from ISIS. These costs from the solicitors had totalled £6000. Dr Smith's evidence was that as far as he was aware the costs of the share issue were a small part of this sum but he was not in a position to particularise the actual portion of the costs though he considered it to be below £1000. By reference to the document showing client account movements Dr Smith said that he had decided to transfer £6000 in cash to meet the full legal costs in July 2015 rather than use the £715 as part payment.

29. When the £715 was transferred to the Appellant by the solicitors on 6 November 2015, Dr Smith said the sum had simply been received into the Appellant's general working capital and had been used in the business to meet the ongoing costs of the business.

30. Dr Smith also confirmed that as at the date of the hearing no dividend had been paid to any of the shareholders. He explained that all the shareholders continued to hold their shares and to participate in the business which was doing well.

31. It was clear, following Dr Smith's evidence and a review of the documentation available, including the copy of the award letter to Paul Newman which had not previously been available to HMRC, that there was no requirement imposed by the University to set up a corporate entity or that it issue equity in order for the USCF

debt funding to have been made available. To the extent that it had been stated to the contrary by the Appellant's accountants and former representatives in correspondence (in particular their letter dated 16 July 2016) they had been mistaken and they thereby misled HMRC. The Appellant's current representatives did restate the position correctly by their letter dated 15 September 2016 but did not provide a copy of the award letter or any explanation of or apology for the error in prior correspondence.

32. The only direct evidence as to the reason to establish the company was that it was one of the steps normally taken in connection with the commercialisation of University IP through a spin out and that IP licences were more commonly (if not exclusively) granted to legal persons. The Appellant's former representative's letter of 18 July 2016 had stated that creation of the company was requirement for the IP licences. The Tribunal accepts that the creation of the Appellant was a step taken following a process ordinarily followed in a spin out scenario.

33. On the basis of the evidence the Tribunal determines that it is most unlikely that the cost of issuing shares cost any significant proportion of the £6000 paid by the Appellant to its solicitors such payment covering the costs associated with the formation of the company, the issue of shares, formalities in connection with the receipt of debt funding from the University and the completion of the IP licences.

34. Finally the Tribunal finds that £715 was transferred to the Appellant by its solicitors on 6 November 2015 at which point it was absorbed into the cash funds of the Appellant and used as working capital.

Summary of SEIS

35. The apparent underlying purpose of SEIS is to encourage individuals to make equity investments in start-up trading companies thereby alleviating the difficulties such companies have in raising finance.

36. Under SEIS income tax relief, capital gains tax exemptions and reinvestment reliefs are available to individuals who make direct equity investments in companies that qualify under the scheme. The reliefs can apply to investments that have not yet started to trade and companies that carry on research and development.

37. SEIS rules are contained in Part 5A of ITA (for income purposes) and sections 150E-F and Schedule 5BB Taxation of Chargeable gains Act 1992 (for CGT purposes).

38. In summary investors may claim relief against income tax, up to an annual investment limit of £100,000 for funds used to subscribe for new ordinary shares issued by qualifying companies. Further, a SEIS investor is entitled to CGT relief on the disposal of the shares provided that the shares have been held for three years. Relief is also given for any allowable losses arising on the disposal of the shares less any income tax relief already claimed on those shares.

Relevant legislation

39. The legislation is highly prescriptive and runs to some 84 sections of ITA and 8 sections (or paragraphs of a schedule) Taxation of Chargeable Gains Act 1992 (TCGA). Only those set out below are relevant to the present appeal.

> s257CB The purpose of the issue requirement
>
> (1) The relevant shares … must be issued in order to raise money for the purposes of a qualifying activity carried on, or to be carried on, by the issuing company …
>
> S257CC The spending of the money raised requirement
>
> (1) The requirement of this section is that before the end of period B [three years] all of the money raised by the issue of the relevant shares … is spent for the purposes of the qualifying business activity for which it was raised.
>
> (2) Spending money on the acquisition of shares or stock in a company does not of itself amount to spending the money for the purposes of a qualifying business activity.
>
> (3) This requirement does not fail to be met merely because an amount of money which is not significant is spent for another purpose or remains unspent at the end of period B
>
> S257CE The no tax avoidance requirement
>
> The relevant shares must be issued for genuine commercial reasons, and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.

40. It is to be noted that there is no provision in TCGA similar to that provided for in section 257CE.

The dispute

41. This appeal was limited to one narrow issue: whether the shares issued to Ingmar Posner, Clive Scrivener and Philip Avery ("the SEIS shares") were issued by the Appellant "in order to raise money for the purposes of the qualifying business activity carried on, or to be carried on by the issuing company".

The Appellants' submissions

42. The Appellant's principal contentions were:

(1) since the legislation does not require a minimum level of investment, the amount invested is not itself a bar to the availability of SEIS Relief;

(2) even a small sum can be invested for the purposes of the qualifying business activities; and

(3) consequently, the investment to which this appeal relates meets the requirements for SEIS relief.

43. The Appellant submitted that the purpose of its issue of shares on 30 September 2014 was in order to raise money for the qualifying business activities to be carried on by it. This it was contended was demonstrated by the fact that the funds in question were indeed used for the purpose of its qualifying business activities.

44. The Appellant contended that the size of the investment was irrelevant when considering its purpose; that such sum was not merely nominal and was of practical use to the newly established company.

45. It was argued that it is often the case that small initial investments were accompanied or followed by larger, non-qualifying investments or sources of loan funding which together enabled the company in question to establish its trade. On that basis the Appellant contended that the existence of the seed finding from the University was irrelevant when considering the purpose for which the shares were issued.

46. The Appellant was clearly aggrieved that what they considered to be a standard approach for spin out companies generally and specifically from the University had been challenged by HMRC.

47. The Appellant submitted that whilst the initial £1000 investment was not made in order that the University would then provide seed funding by way of a loan, it did not matter even were that to be the case. The £1000 was a useful sum of money and whether or not it facilitated the receipt of a substantial loan the only purpose of the share issue was to raise money for use in the ongoing business.

48. It was emphasised that the minimum investment requirement provided for in the similar Enterprise Investment Scheme (EIS) was not a requirement for SEIS and absent any statutory basis for a minimum investment level it was not open to HMRC to impose one.

49. The Appellants contended that no sum of money was too small to contribute in a meaningful way to the raising money for the purposes of the qualifying business. Mrs Fatchen contended that a £1 share issue to pay for a stamp to be put on an application for loan funding, or a grant application, or a first proposal would meet the statutory test, and justifiably so. She resisted HMRC's contention that the sum invested "as a seed" needed to represent a sufficient sum to be the eco-system for growth.

50. Further emphasis was placed on the statute also provides that the money raised from a share issue must be used either for the purposes of a qualifying business activity carried on at the time of the issue or one to be carried on. The Appellant business was a spin out in start-up mode. The money from the share issue was not specifically allocated to any identified expenditure but was used in the business post November 2015 when it was transferred by the solicitors.

51. In regard to the assertion that the purpose of the investors was to derive a capital gains tax benefit the Appellant contended that such relief was available and relevant only in the context of a gain which could not necessarily be anticipated when the compliance certificate was issued and any relief was entirely dependent on the success of the company. It was submitted that the legislation would have done exactly as it intended if as a consequence of investments, a business developed and grew, employing staff and delivering value in the economy. Then and only then is capital gains relief relevant. Mrs Fatchen contended that for the investors the capital gains relief, if it came would be welcome but could not be described as a motivation, she hypothesised that such would also be the position for every SEIS investor.

52. The Appellant also contended that the purpose for which the shares had been issued was supported by the fact that it was accepted by HMRC that the money raised had been spent, in accordance with section 257CC on a qualifying business activity.

HMRC's submissions

53. HMRC opened by challenging that they accepted that the moneys raised by the share issue had been spent on qualifying purpose. HMRC contended that the Appellant's assertion was predicated on a misinterpreted reading of the statutory review letter of 25 October 2016 the material parts of which are set out in paragraph 20 above.

54. HMRC contended that the Appellant's failed to meet the "purpose" test prescribed in section 257CB ITA. Mr Carson noted that as "purpose" is not defined in ITA it is to be given its ordinary dictionary meaning i.e. "the reason for which something is done".

55. HMRC submitted that the reason for the Appellant's share issue on 30 September 2014 was not in order to raise money for the Appellant's qualifying business activities.

56. HMRC asserted that it was not parliament's intention was that small, early stage companies should attract nominal investment which would be of limited use in carrying on a qualifying business and thus contended that the size of investment was a relevant factor when considering the purpose of the investment such that by legislating that the equity finance had to be "for the purpose of a qualifying business activity carried on" parliament intended the money raised to be of practical use in carrying on the relevant company's qualifying business activities.

57. As the Appellant's business was the development of software for autonomous vehicles HMRC contended that the £316 or even the £1000 of which it formed part was not sufficiently large to allow the Appellant to carry on its chosen business.

58. On the question of whether the sum could qualify as for the purpose of preparing to carry on a qualifying business activity HMRC contended that as the funds had remained in the solicitor's client account for approximately 12 months it could not be said to have been intended for or in fact used for preparations to carry on a qualifying business activity.

59. HMRC relied on the judgement of Lightman J in the matter of *Forthright (Wales) Ltd v Davies [2004] EWHC 524*. The case concerned EIS. One of the issues before the court was whether the use of money to pay dividends in investors could be a use for the purposes of a qualifying business activity within s289 of Income and Corporation Taxes Act 1988 ("ICTA") which contains identical wording to that of s257CB i.e. that the shares are issued in order to raise money for the purpose of a qualifying business activity.

60. Forthright had been incorporated on 23 February 1998, it acquired the assets and trade of a company and commenced trading on 3 April 1998 providing the same services as had been provided prior to acquisition. On the same date it made a share issue to the existing shareholders using the funds raised to pay trade expenses, pay off liabilities taken over on acquisition and to pay dividends.

61. Forthright contended that provided that the money raised through the share issue was used for the purpose of the relevant company it need not be used for the purpose of the trade. The Special Commissioners had determined that the money raised by the share issue had to be wholly and exclusively for the purpose of the qualifying business activity which itself meant the carrying on of a qualifying trade. As part of the money raised was used to pay a dividend it could not be said that the money raised was wholly and exclusively for the purpose of a qualifying business activity.

62. Lightman J identified that the critical issue between the parties was the proper construction of qualifying business activity. He upheld the Special Commissioner's judgment on the basis of five reasons:

(1) The broad statutory purpose of EIS is to provide relief where individuals invest in companies that use the money for the qualifying business activity and not for the purpose of making dividend payments

(2) The statutory language of qualifying business activity is a pointer that the monies raised be used for an activity or trade

(3) Forthright's interpretation ignored the definition of qualifying business activity which clearly required a trade to be carried on or prepared for

(4) There was a wholly and exclusively requirement in order for there to be eligibility

(5) The predecessor legislation required the money to be raised for qualifying trade or activity.

63. HMRC contended that the case supported its position that £316 was neither enough to carry on the qualifying business activities of the Appellant's technological development company, nor was it raised for the use in preparing the qualifying trade.

64. By their skeleton HMRC relied on the award letter from the University to Mr Paul Newman in June 2014 (which they had not seen) as evidence that the Appellant business was assured of funding from the University thereby rendering the share issue redundant as a means of raising money for the purposes of the qualifying business activity. Based on the argument presented by the Appellant's previous representatives

HMRC contended that the share issue, at its highest, could be said to have been in order to satisfy the conditions in the award letter thereby securing the debt funding but that did not qualify as raising money for the purpose of the qualifying business activity. Following sight of the award letter Mr Carson accepted that there was no requirement for equity investment in order to secure the debt funding from the University.

65. On the basis that the Appellant had close ties with the University, knew that the debt funding would be received when coupled with the fact that the investors and the Appellant took tax advice HMRC surmised that the real reason for the share issue was to secure future capital gains tax exemptions which could not be considered to be for the purpose of the qualifying business activity.

66. HMRC's case explicitly however, did not rest on the provisions of section 257CE and the "no tax avoidance requirement".

67. It appeared to the Tribunal that HMRC's case appeared to be very much founded on their own view that the purpose of the legislation was to provide incentives for investors into business which could not otherwise raise either equity or debt funding. It was HMRC's view that SEIS was introduced so as to allow substantial capital raising but via a large number of small investors. Where the total raised was not meaningful it could not be said to meet the statutory purpose of the scheme.

68. HMRC also contended that the fact that the money was, in November 2016, in fact used for general business expenses was not the same as it having been raised for a qualifying business activity.

69. During the hearing the Tribunal was concerned that Mr Carson was unable to address concerns expressed by the Tribunal that there appeared to be no statutory basis for his submissions on legislative purpose and in particular that there had to be a meaningful level of investment in order to qualify.

70. After the lunch adjournment Mr Carson, having taken instruction, submitted that HMRC accept that there is no legislative basis for there to be a minimum total investment but that where the amounts raised were small that was evidence that the purpose of the investment was not for a qualifying business activity. This, it was said, was particularly the case where the cost of raising the capital exceeded the capital raised as HMRC asserted was likely to be the case for the Appellant. Where, as here, the sums were small that indicated, in HMRC's view, that the investor's motivation was to secure capital gains tax relief. Despite this submission Mr Carson confirmed that HMRC did not rely on section 257CE.

71. The issue for HMRC is that there is no dispute in the present case as to what qualifying business activity the Appellant carried on. Nor, in light of the evidence was there any dispute as to the use of the money. It is clear that the money raised was held for a period of over one year and was therefore unlikely to be used for preparing the trade though even that is not beyond certainty as it is equally clear that the

solicitors did not bill for the preparatory acts until July 2015 and Mr Smith's evidence was that he decided in July 2015 to transfer sufficient funds to cover the bill rather than use the £715 which could have been set off against the bill. It appears that the solicitors would have had some comfort that at least £715 of their costs was secured by the monies held in their client account.

Discussion

72. This issue to be decided is a comparatively simple one and rests entirely on the interpretation to be placed on the language of section 257CB in the context of the facts of the present case.

73. Section 257CB requires that the shares "must be issued in order to raise money for the purposes of a qualifying business activity".

74. In the Tribunal's view this provision can be broken down into two elements:

(1) The shares must be issued in order to raise money

(2) The money must be for the purposes of the qualifying business activity

75. Put simply the Appellant contended that self-evidently any share issue will raise money. In the present case that money was for the purposes of and spent in connection with the qualifying business activity.

76. HMRC on the other hand, though it was somewhat difficult to discern, seemed to interpret the provision as requiring that the purpose of the share issue was for a qualifying business activity and that the money so raised was spent on such an activity. Their argument appeared to move the position of the word purpose within the statutory provision. Their focus was again and again and again on the articulation in their own guidance that the intention of parliament when enacting the legislation was to facilitate the raising of a "meaningful" amount of money by reference to the business undertaken by the fund raiser in this case a business set up to commercialise IP connected with autonomous cars. In cross examination of Dr Smith HMRC sought to and did establish that £1000 was not enough, on its own, for the Appellant's business to operate.

77. Dealing first with the uncontentious interpretive aspects of the provision: qualifying business activity is defined in section 257HG and includes a new qualifying trade, the preparations for such a trade or carrying on research and development. There is no dispute between the parties that the Appellant met the conditions of section 257HG and was carrying on a qualifying business activity.

78. Section 257CC provides that the money raised by the share issue must, within a specified period, have been spent, as intended, for the purposes of the qualifying business.

79. As set out above there was a dispute between the parties as to whether it was accepted by HMRC that the moneys raised by the share issue had been spent for a qualifying purpose.

80. The Tribunal considers the relevant parts of the review letter (see paragraph 20) were poorly drafted. The officer articulates a "tenable" argument on behalf of HMRC that the shares raised were for the purpose of securing the funding from the University. The letter proceeds "contrary to this however is the fact that the money was used in the business in paying professional fees connected with financing the share issue" but "to counter that" the caseworker has suggested that there may be another purpose behind the investment.

81. There are simply too many counter factuals within the letter for its meaning to be clear as to whether HMRC accepted how the £316 or indeed the £715 had been spent though it was not unreasonable for the Appellants to conclude that there had been such an acceptance. However, such acceptance was, in any event, predicated on a misunderstanding created by the Appellant's accountants and former representatives that the equity sums raised had been spent on legal bills.

82. However, as set out above, before the Tribunal, and by reference to the bank statement from the Appellant's solicitors' client account, it was illustrated that the legal bills had been met in full by a cash transfer from the Appellant with a subsequent transfer of the £715 equity investment being made back to the Appellant in November 2015. Dr Smith confirmed this in evidence and stated that receipt of the £715 had been into the Appellant's general account and the money had been spent on general business expenditure. Mr Carson did not cross examine the evidence of Dr Smith in this regard and later appeared to accept that the money raised from the share issue had been spent on qualifying purposes.

83. The Tribunal considers on the evidence it has been established that the money raised from the share issue meets the requirement of section 257CC and was in fact spent on the Appellant's qualifying business activity.

84. HMRC's case however remained that the purpose of the share issue was not to raise money for a qualifying business activity.

85. As set out in paragraphs 64 above following sight of the award letter HMRC accepted that there was no requirement in the letter that the Appellant issue shares in order to secure the USCF funding from the University. That, therefore, only left whether the shares had been issued for the purposes of forging a closer connection with the University or providing the individual shareholders with a capital gains tax advantage.

86. No rationale or basis was offered for the assertion that the share issue would forge a closer connection with the University nor why a desire to forge closer relationships with the University deprived the rationale for the issue of the shares to be anything other than to raise money for the purposes of the qualifying business.

87. What really lay at the heart of the present case was HMRC's belief that the reason for the share issue was to derive a capital gain tax advantage. That this was the motivation was evidenced, in HMRC's view, by the size of the issue in total; compared to the nature of the qualifying business activity of the development and commercialisation of IP associated with autonomous vehicles it was not a "meaningful" amount. In addition there was no need for the share issue as the Appellant knew it had access to the debt funding from the University. This position was maintained despite an acceptance of the statutory absence of any minimum investment required to be made either by an individual investor or collectively by investors into the company.

88. Section 257CB requires the share issue to raise money for the purpose of the qualifying business activity. *Forthright* confirms that the purposes for which the share issue raises money must be those of the qualifying trade and not some wider business purpose (such as the payment of a dividend). *Forthright* therefore provides little assistance in the present case as the focus was on the meaning of qualifying business activity and the use to which the money is intended to be put.

89. As identified at paragraph 39 above the statutory provisions for SEIS are highly prescriptive and almost formulaic in application. Parliament chose not to impose any minimum level of investment. Parliament also included specifically the non tax avoidance requirement. In these circumstances the Tribunal considers that the plain language of section 257CB cannot and should not be interpreted so as to introduce a requirement that there be a 'meaningful' level of investment by way of share issue before it can be said that the purpose of the share issue is for the qualifying business activity. To do so opens up impossible uncertainty in the application of the legislation. The first and obvious question arises "meaningful" by reference to what?

90. HMRC contended that in the context of the development of software for autonomous vehicles £1000 could not be enough and in any event was not needed because the University had already agreed to advance £111,000.

91. The Tribunal posited an alternative scenario of an entrepreneur wanting to establish an ice cream round who wanted to undertake some research as to the best area in which to operate by reference to population demographic and density and who found an ice cream van on sale for £5000. He was able to secure equity funding of £1000 and debt funding of £6000 from which he could purchase the van, do the research and buy the ice creams. Would £1000 be both meaningful and necessary in such a circumstance? Mr Carson indicated that it might as the money raised from the share issue could be said to be for the purpose of revenue expenditure in the business. In doing so, in the Tribunal's view, he revealed the difficulty with HMRC's argument, it appeared that it was for them to decide on sufficiency and thereby remove any certainty from the legislation. SEIS would become relief entirely at the discretion of HMRC.

92. On this basis the Tribunal considers that the size of the investment made through the share issue cannot be a relevant factor.

93. Similarly, there is no statutory requirement that the corporate entity issuing the shares establish that it is only by share issue that it can raise funds. There is therefore no basis to exclude the share issue from the SEIS provision as a consequence of HMRC's perception that the Appellant did not need the money from the share issue because of the USCF.

94. That then leaves the contention on HMRC's behalf that the purpose of the share issue was to act as a gateway to capital gains tax relief that should not be permissible under the legislation.

95. The difficulty with this argument is that HMRC did not contend that the Appellant failed to meet the "no tax avoidance requirement" in section 257CE and thereby must have accepted that the share issue had a genuine commercial reason.

96. On that premise the Tribunal considers that it cannot at once be said the no tax avoidance requirement is met and at the same time contend that the requisite purpose for section 257CB is not met because of a motivation by the individuals investing to ultimately derive a capital gains tax relief if and only if the business is successful. A motivation almost certainly in the mind of every SEIS investor hopeful and confident in the business in which they invest.

Conclusion and decision

97. Section 257B requires that the issue of shares must raise money for the purpose of the qualifying business activity.

98. Whilst £1000 is a relatively small sum of money in the context of the qualifying business activity of the Appellant it was clear from the evidence that money had been raised by the share issue for the purpose of and in fact spent in the conduct of the Appellant's qualifying business purpose.

99. Absent a statutory minimum investment requirement there was no basis for HMRC to contend that the sum raised was required to be "meaningful".

100. Equally, there is no statutory basis to contend that because debt funding is, or may be available, with or without an equity commitment, that SEIS cannot apply.

101. Finally, on the basis that the no tax avoidance requirement was met, it was not open to HMRC to contend that the requirements of section 257CB were not met on the basis of a desire of the investors to claim capital gains tax relief in the event that the business were successful and on meeting all the other statutory requirements for claiming the relief.

102. Therefore the Tribunal determines that the Appellant was not precluded by virtue of the provisions of section 257CB from issuing compliance certificates in respect of the investment of Ingmar Posner, Clive Scrivener and Philip Avery and the appeal is allowed.

103. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 14 JUNE 2018