Neutral Citation: [2022] UKFTT 00306 (TC)

Case Number: TC08578

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00816

Enterprise Investment Scheme – risk-to-capital condition in section 157A(1)(a)ITA 07 – whether at the date of issue the appellant had objectives to grow and develop its trade in the long-term – whether the appellant exists wholly for the purpose of carrying on a qualifying trade – no – appeal dismissed

Heard on: 5 August 2022
Judgment date: 25 August 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER PATRICIA GORDON

Between

VALYRIAN BLOODSTOCK LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: **Mr Stephen Williams of Williams Solicitors LLP**

For the Respondents: **Mr Dave Lewis, litigator of HM Revenue and Customs' Solicitor's Office**

DECISION

INTRODUCTION

1. This appeal concerns the availability of relief under the Enterprise Investment Scheme ("EIS") in respect of an issue of shares in the appellant on 22, 28 and 29 March 2019 and 19 June 2019. After the shares were issued the appellant made four applications on EIS Compliance Statement VCSEIS1 v0.1 form ("EIS1") to the respondents ("HMRC") who decided that the appellant did not meet the criteria for EIS. HMRC refused to grant the appellant authority under section 204(3) Income Tax Act 2007 ("ITA") to issue Compliance Certificate EIS3 to its shareholders under section 204(1) ITA.

2. With the consent of the parties the form of the hearing was video attended by both parties, various observers and the four witnesses for the appellant using the Tribunal video hearing system. A face-to-face hearing was not held for the convenience of all parties.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such the hearing was held in public.

4. The documents before the Tribunal were contained in a Bundle extending to 578 pages together with a separate Bundle of Authorities. We had Skeleton Arguments for both parties and Mr Williams helpfully furnished a copy of his Closing Submissions.

Preliminary issue

5. In the days before the hearing the Tribunal had sight of the correspondence between the parties which was copied to the Tribunal administration in Birmingham.

6. The appellant's agent had argued that the witness statements should be taken as evidence-in-chief since no contrary argument had been advocated by HMRC. HMRC objected and said that the timescale for the hearing should be extended because there were now four witnesses who required to be cross-examined.

7. Frankly, we were surprised.

8. We had read into the appeal and it had been my intention to raise at the outset the argument that the three additional witness statements by the investors were, no doubt, interesting. Nevertheless, in large part, they were expressions of their opinion of the risk level of the investment. Witnesses, unless expert witnesses, speak to the facts. Whilst we noted the opinions, our role is to decide on the facts, as proven.

9. Therefore, at the outset of the hearing, I raised the whole issue of the relevance of those witness statements.

10. The parties both then argued that they both wished to explore the evidence. We did. We heard evidence from Mr Nick Brown, Mr Neil Greatorex, Mr Malcolm Lindley and Dr Paul Darer.

Approach to the evidence

11. Mr Williams argued that HMRC's reliance on *Hargreaves v HMRC*[1] ("Hargreaves") should be disregarded since that case was irrelevant as the issue there turned on the mind of a hypothetical officer rather than on the intention of the parties to an EIS scheme. We disagree. Whilst, of course, it deals with a completely different part of the tax legislation, nevertheless,

[1] [2019] UKFTT 244

we agree with Judge Amanda Brown QC and Member Duncan McBride in *Cry Me A River Limited v HMRC*[2] ("Cry Me") where they state at paragraphs 11 to 14 as follows:-

"Approach to evidence

> 11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.
>
> 12. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:
>
> "26 …
>
> - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
> - the process of … litigation … subjects the memories of witnesses to powerful bias …
> - witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist …".
>
> 13. The judgments summarised by Judge Brooks conclude that:
>
> 'The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose … But its value lies largely … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth." '
>
> 14. This approach is particularly relevant in the present appeal."

15. Mr Lewis had relied only on the first sentence in the quotation from *Hargreaves* in paragraph 13 of *Cry Me.* The broader context provided in these paragraphs from *Cry Me* are particularly relevant in this appeal because, as will be seen, we had some difficulties with evidence and the relevant "facts and matters" all occurred a long time ago. It should be noted that, the hearing in this matter having been listed for 21 April 2022, on 1 April 2022, Mr Williams intimated that he had only recently been appointed and wished to file additional evidence. Thomas Quinn, and specifically Mr Beard to whom we refer later, had been the previous representatives. The witness evidence from the three investors was probably dated thereafter (we say that because Mr Greatorex's witness statement is dated 5 April 2022 but the dates of the other two are indecipherable). Those witness statements all state in the second paragraph "I wish to give evidence against the decisions to refuse authority under Section….".

16. The Tribunal pointed out at paragraph 15 of *Cry Me* that entitlement to EIS (there SEIS) in respect of the share issues is determined at the point of issue. Accordingly, as they stated:

[2] [2022] UKFTT 182 (TC)

> "The various rules which determine entitlement are therefore generally to be assessed by reference to the evidence at that date. The review of the documentary evidence is therefore broadly limited to documents in existence or with purported effect…"

as at, in this instance, 22, 28 and 29 March 2019 and 19 June 2019. That posed a number of problems as we will explain.

The Facts

17. The appellant was incorporated on 6 February 2019 and its activities consist of the raising of horses and other equines and the purchase and sale of bloodstock. Mr Nick Brown is the sole director.

18. The appellant has model articles of association. The appellant allotted the following ordinary £1 shares:-

Date	**Amount paid up**	**Shares acquired**
6/02/2019	£1	1
22/03/2019	£120,000	300
28/03/2019	£ 40,000	100
29/03/2019	£120,000	300
19/06/2019	£120,000	300

19. Mr Nick Brown was allotted the single £1 share on incorporation of the company. The shares allotted on 22 March 2019 were to an investor from whom we did not hear. Dr Darer was allotted shares on 28 March 2019, Mr Greatorex on 29 March 2019 and Mr Lindley on 19 June 2019.

20. The appellant has purchased six horses:-

Horse name	**Date of purchase**	**Purchase price**
La Perrotine	26 February 2019	£42,400
Intrepide Sud	15 May 2019	£36,000
Miss Bailly	22 May 2019	£45,000
Donna Graciosa	29 May 2019	£25,000
Hey Laura	4 August 2019	£21,000
Yellow Big Boss	6 November 2019	£23,000

21. The total purchase price paid, over the period February to November 2019, was £192,400. There is a certificate of insurance covering all of the horses which is undated but shows that each horse is insured for its acquisition cost. HMRC's review conclusion letter states that the horses were insured in January 2020.

22. The appellant did not request Advance Assurance that it was a qualifying company for the EIS as provided for in ITA. We have been offered no explanation as to why that was not done.

23. Mr Williams had referred us to *Fashion on the Block Limited*[3] ("Fashion") for other reasons but we note from paragraph 4 thereof that the application form for Advance Assurance requires a business plan, draft prospectus, details of prospective investors and details of the company's objectives in the long term.

24. On 8 November 2019, the appellant's agents, Thomas Quinn, emailed HMRC with four forms EIS1 dated 29 August 2019 accompanied by some supporting documentation.

25. On 25 November 2019, HMRC responded pointing out that the appellant had not applied for an Advance Assurance prior to the shares being issued and therefore requesting additional information in relation to whether or not the company and the shares issued met the criteria for EIS.

26. On 3 January 2020, the agent responded, but with limited information.

27. On 24 January 2020, HMRC responded indicating that the information provided thus far did not demonstrate that the criteria for EIS were met. Further questions were asked and the appellant was referred to HMRC's guidance in the Venture Capital Schemes manual VCM8520-8560.

28. On 13 March 2020, the agent responded.

29. The key points arising from the correspondence include:-

(a) Mr Nick Brown and a Mr J D Moore had undertaken, and would undertake, the selection of the horses which would be sold on at two or three years old. They would not undergo training. The list of horses and insurance details were provided.

(b) They would be kept at a third party stud with whom the appellant had an undated agreement which extended to one page stating that the daily rate was £17 per horse plus other costs including "stabling, medication etc". We were bemused to note that the very sketchy financial information, extending to half of an A4 page, said that livery was £5,840 per annum which equates to £16 per day. Therefore, something is inaccurate.

(c) The undated financial information recorded that the annual cost of vets and worming was specified as being £500 and £50 respectively per horse and the farrier was £480 per horse. There was an annual management fee of £1,800 so the total cost per horse per year was described as being £8,670.

(d) The remainder of that financial information stated that there had been horse purchase commission at 6% and sales agent commission at 5%. There is no clarity as to whether that is included in the purchase price recorded for each horse. Since the purchase price for each horse is a round sum, on the balance of probability the appellant will therefore have incurred commission costs totalling £21,164. Lastly it stated under "Other costs": "Staff sales day costs £400/day".

(e) There were no detailed financial forecasts beyond that. There was no business plan.

(f) There was no prospectus.

(g) In the email dated 13 March 2020, the agent stated that:

> "The remainder of the investment [after expenditure on the purchase of the horses (£192,400) and the annual costs for the horses (£52,020] will continue to be used to cover the running costs of the business and the costs per horse…As and when one is sold, there may be reinvestment at that time."

[3] [2021] UKFTT 306 (TC)

30. On the balance of probability Advance Assurance was not sought because the requisite supporting information was, in large measure, not available. Furthermore, as the agent pointed out, a "directly similar scheme with different investors" had received approval in the previous financial year. On the balance of probability it had been assumed that EIS would be approved.

31. On 7 May 2020, HMRC wrote to the appellant explaining that the appellant was not considered to have met the conditions of the risk-to-capital condition under section 157A(1) ITA and the appellant had not demonstrated that it met the conditions set out in section 193 ITA that provides for exemption. Effectively, HMRC were refusing the request for authorisation under section 204(3) ITA to issue certificates under section 204(1) ITA.

32. HMRC explained that their concerns included:

(a) There was no indication that the number of employees or turnover were likely to be increased.

(b) The company had neither provided any financial forecasts nor a business plan to demonstrate growth and development of the company in the long term.

(c) The investment is used to acquire bloodstock and pay for the upkeep of those horses and costs relating to their purchase and sale. None of the money was utilised to build the infrastructure of the company to enable it to become a sustainable business in the long term.

(d) Whilst it was accepted that certain activities would obviously have to be sub-contracted, for example, veterinary and farrier services, in this instance almost everything that was done was undertaken by third parties. The company was not acquiring expertise that it would use to build its brand and reputation so that it could flourish in the long term.

(e) The company is not being managed by entrepreneurs. The investors are individuals using a tax advantaged scheme with little or no entrepreneurial involvement.

(f) No details of how the investment opportunity was marketed to investors had been provided.

33. On 2 September 2020, HMRC issued a letter to the appellant refusing the request for authority under section 204(3) ITA to issue certificates under section 204(1) ITA.

34. On 1 October 2020, the agent appealed against that decision on the basis that race horses develop over a two year cycle (at which point they should have increased substantially in value in the process) and hopefully the process would be repeated, it was a very high risk venture, and there was no need for a prospectus or detailed financial projections since the investors either knew the director or the other investors.

35. On 16 October 2020, the agent confirmed a request for a statutory review.

36. On 21 October 2020, HMRC issued a letter setting out HMRC's view of the matter.

37. On 4 December 2020, the review was concluded and the previous decision was upheld.

38. On 11 March 2021, the appellant appealed to the Tribunal. The appeal was therefore out of time but HMRC have not raised any objection. The Tribunal therefore allows the late admission of the appeal.

Nick Brown Racing website

39. In the Bundle lodged with the Tribunal were a number of pages from the Nick Brown Racing website. They were effectively blogs arranged by date. In addition there was an article from the website called "Pinhooking Syndicate" (Pinhooking is the term used to describe the

purchase of young horses, being foals or yearlings, with a view to selling that horse in future prior to it entering training). The key point about that very short article is that it reads:-

> "In our efforts to offer syndicate experiences like no other, we also offer the chance to get involved in our pinhooking syndicates.
>
> A one off investment, covers all costs for the three year term – purchase, transport, vets, sales costs etc. Each syndicate is wound up after the sale of the last horse within the three year term, and the contents of the syndicate account are distributed amongst investors."

40. Those syndicates are referenced in the blogs.

41. The first was a blog on Monday 15 May 2017 which stated:;

> "Recently I have been working on an investment vehicle…We have formed a company that will trade bloodstock for a three year term, qualifying as an EIS, and therefore very tax efficient".

That company was described as having two of ten shares still left on offer. That company was Whitwick Bloodstock Limited ("Whitwick"). Mr Brown was the sole director.

42. The blog for Wednesday 12 July 2017 said that there was only one share left and reiterated that it was "…our Bloodstock investment vehicle…and will trade for three years."

43. The blog for Tuesday 25 July 2017 stated that:-

> "Our investment vehicle Whitwick Bloodstock has been very well received and there is just one 10% share left in that company now".

44. In 2018, the blogs produced commenced with one dated Saturday 31 March 2018. It describes Thomas Quinn as being accountants set up by, amongst others, Phil Beard who was described as having "shares in a number of horses with us". Thomas Quinn were described as being "our chosen accountants for our Investment arm, Whitwick Bloodstock Limited, and come highly recommended".

45. The blog for Monday 3 September 2018 explained that the:-

> "…very tax effective investments …are part of the business that we will be looking to expand over the coming years. We did not put together an investment syndicate this year, but we will certainly be looking to put one together after Christmas …".

46. The blog for Thursday 25 January 2019 described a number of horses and goes on to say:-

> "We also (sic) been busy getting our ducks in a row for our investment syndicates, and we have our first one ready to go. The EIS schemes are the supreme tax efficient investment vehicle, with 30% of investments set off against income tax liabilities, all gains after the three year term are capital gains free, and any losses can also be offset against future tax liabilities …".

47. That was followed by a blog on Friday 1 February 2019, which reads:-

> "Please let me know if you are interested in joining one of our new EIS investment syndicates … These are very tax efficient, and are a fun way to invest, as you get to see the young stock grow and develop … There is very limited availability in the last syndicate for 2019 now".

48. The blog on Monday 18 February 2019 indicated that:-

"There are also a couple of places still available in our EIS investment vehicles – for more details of these very tax efficient investments please email me …". That was followed by a further blog on Thursday 28 February 2019 confirming that there were still a couple of places in one of "Our two new investment syndicates, if you fancy a very tax efficient place to place your cash …".

49. On 16 July 2019, the blog indicated that there were two shares available in "…our third EIS investment scheme, Boleyn Bloodstock Ltd" ("Boleyn") and investors should take advantage of the very beneficial tax breaks on offer.

50. By Monday 19 August 2019, the website indicated that there was just one share remaining "in our final investment syndicate for 2019".

51. The blog for Sunday 19 January 2020, indicated that "We still have a few yearlings to buy for the 2019 round of pinhooking syndicates …".

The syndicates

52. We are only aware of three syndicates being Whitwick, the appellant and Boleyn.

53. Whitwick was the first to be promoted by Mr Brown and, on 22 February 2018, Thomas Quinn wrote to HMRC seeking EIS authorisation for shares issued on 1 September 2017. HMRC replied on 21 March 2018 requesting further information and noting that it had commenced trading on 11 April 2017. On receipt of further information EIS authority was granted on 2 October 2018.

54. The Notice of statutory declaration of solvency for Whitwick dated 7 April 2021 was lodged with Companies House by the Joint Liquidator. The original share capital had been £300,000 and as at 9 March 2021, the estimated surplus on winding up was £239,230.03.

55. Boleyn was incorporated on 28 March 2019. Mr Greatorex invested in Boleyn.

56. Mr Brown was the sole director of each syndicate. His primary trading vehicle is Olney Bloodstock Limited but we know very little about it.

The Law

57. The Finance Act 2018 introduced the risk-to-capital legislation, now section 157A ITA, as an overreaching requirement for EIS for shares issued from 15 March 2018.

58. HMRC maintain that the appellant does not meet the "risk-to-capital" condition contained in section 157A(1)(a) ITA which provides, in respect of any issue of shares made on or after 15 March 2018, so far as relevant, as follows:-

"…

157A Risk-to-capital condition

(1) The risk-to-capital condition is met if, having regard to all the circumstances existing at the time of the issue of the shares, it would be reasonable to conclude that—

(a) the issuing company has objectives to grow and develop its trade in the long-term,

…

(3) For the purposes of subsection (1) the circumstances to which regard may be had include—

(a) the extent to which the company's objectives include increasing the number of its employees or the turnover of its trade,

(b) the nature of the company's sources of income, including the extent to which there is a significant risk of the company not receiving some or all of the income,

(c) the extent to which the company has or is likely to have assets, or is or could become a party to arrangements for acquiring assets, that could be used to secure financing from any person,

(d) the extent to which the activities of the company are sub-contracted to persons who are not connected with it,

(e) the nature of the company's ownership structure or management structure, including the extent to which others participate in or devise the structure,

(f) how any opportunity for investment in the company is marketed, and

(g) the extent to which arrangements are in place under which opportunities for investments in the company are or may be marketed with, or otherwise associated with, opportunities for investments in other companies or entities….".

59. Section 206 ITA provides that:

"For the purpose of the provisions of TMA 1970 relating to appeals, the refusal of an officer of Revenue and Customs to authorise the issue of a compliance certificate is taken to be a decision disallowing a claim by the issuing company".

60. Accordingly, the appeal having been notified to the Tribunal, TMA 1970 provides that the Tribunal "is to determine the matter in question", namely whether HMRC were entitled to refuse their authority for the issue by the appellant of the relevant compliance certificates. In order to do so, the Tribunal must therefore form its own view as to whether the "risk-to-capital" requirements of section 157A ITA were satisfied.

61. HMRC also argue that the appellant does not meet the trading requirements set out in section 181 ITA which are that the issuing company, ignoring any incidental purposes, exists wholly for the purpose of carrying on one or more qualifying trades.

62. Section 189 ITA (read with section 159(3) ITA) defines a qualifying trade as one conducted on a commercial basis and with a view to the realisation of profits and that that trade does not, in the period beginning with the issue of the shares until the third anniversary of that issue, consist wholly or to a substantial part in the carrying on of excluded activities.

63. Excluded activities are listed in section 192 ITA and the parties agreed that the only potential excluded activity would be "dealing in goods otherwise than in the course of an ordinary trade of wholesale or retail distribution".

64. Wholesale and retail are defined in section 193(3) and (4) ITA as follows:-

(3) A trade of wholesale distribution is one in which goods are offered for sale and sold to persons for resale by them, or for processing and resale by them, to members of the general public for their use or consumption.

(4) A trade of retail distribution is one in which goods are offered or exposed for sale and sold to members of the general public for their use or consumption.

65. Section 193(5) ITA goes on to exclude from the definition of "ordinary trade" of wholesale or retail distribution, namely:-

"(5) A trade of wholesale or retail distribution is not an ordinary trade of wholesale or retail distribution if—

(a) it consists to a substantial extent –

(i) in dealing in goods of a kind which are collected or held as an investment, or

(ii) in that activity and any other excluded activity taken together, and

(b) a substantial proportion of those goods are held for a period which is significantly longer than the period for which the trader would reasonably be expected to hold them while trying to dispose of them at their market value."

66. It is not necessary to set out any further legislation for the purposes of this decision and a broad understanding of the Enterprise Investment Scheme as a whole on the part of the reader is assumed.

67. We do not think that it was in dispute, not least because it is trite law, that Judge Gething and Member Batten were correct to say in *Fashion* at paragraph 32 that:-

> "The unanimous House of Lords decision in *Barclays Mercantile Business Finance Limited v Mawson*….at [36] indicates that the correct approach to the construction of taxing statutes is that they should be construed purposively and applied to the facts viewed realistically".

Discussion

68. Before turning to other matters, whilst we agree with Mr Williams that that quotation from *Fashion* is apt, we do not accept Mr Williams' argument that *Fashion* is of other assistance in this appeal. It concerned an issue as to whether the correct form had been utilised. That is of no relevance here. We are not bound by, but do not disagree with the views of that Tribunal as to the intentions of Parliament in regard to EIS.

69. There is no dispute between the parties that the EIS and other venture capital schemes are intended to encourage individuals to invest in certain small, higher risk, early-stage trading companies that would otherwise struggle to access the funding needed to enable them to grow and develop, as they have little or no track record.

70. Tax relief is offered as an incentive to invest directly in these companies because of the higher risk such investments pose to investors' capital. EIS is therefore aimed at investors who are prepared to lose some, or all, of their capital in making a higher risk investment.

71. HMRC have conceded that the appellant's business model was high risk. Accordingly, it is not in dispute that section 157(1)(b) ITA is satisfied.

72. Whilst there is no doubt that Mr Brown is the guiding mind of the appellant, we disagree entirely with Mr Williams' assertion in paragraph 12 of his Skeleton Argument that "Mr Brown is on trial here.". What is in issue here is quite simply whether or not the appellant meets the criteria in the EIS legislation.

Section 157 ITA

73. Both parties have correctly stressed that, when considering the requirements in section 157(1)(a) ITA, the Tribunal must consider all of the circumstances obtaining at the time of issue of the shares. It is the wording in that section, so of course, that is what we have done.

74. The oral evidence, and the very recent witness statements, of the investors can be summarised as being to the effect that they would have been guided by Mr Brown but, had the appellant been profitable, then the appellant would have continued to have traded beyond three years.

75. As can be seen from our findings, apart from the website, there is very little documentary evidence that we can identify as having been in existence in March and June 2019.

76. Mr Brown was taken to a document headed "Valyrian Bloodstock Limited 2019" which was an exhibit to Dr Paul Darer's witness statement which he said had been a "handout". In that witness statement Dr Darer stated "I saw a comprehensive prospectus some of which is no longer available but part I know I saw…" and he had exhibited this document. Since his shares were issued on 28 March 2019 that suggests that he saw it before then.

77. We will refer to it as the "Consultancy Agreement" since that is what Mr Brown said that it was.

78. It was also an exhibit to Mr Greatorex's witness statement and his shares were issued on 29 March 2019. Mr Greatorex said that the presentation made to him and other investors at a meeting in his offices in January 2019, (Mr Lindley said 2018), included references to a prospectus "much of which is no longer available" but he produced the Consultancy Agreement and a two page document.

79. Mr Lindley also exhibited that two page document and two pages of figures for Whitwick. In Closing Submissions, Mr Williams said that that two page document was a prospectus which, as a result of criticism by HMRC, had been produced by the appellant with the witness statements. Hereinafter we refer to it as the "Prospectus".

80. The response from Thomas Quinn of 3 January 2020 had said that there was no prospectus.

81. In summary, Mr Brown, whose witness statement was dated November 2021, produced none of these documents, all of the investors produced the Prospectus, Mr Greatorex and Dr Darer produced the Consultancy Agreement and Mr Lindley produced the Prospectus and two pages of figures for Whitwick.

82. Before we turn to the "Consultancy Agreement" and the Prospectus, we comment on the evidence from the witnesses.

83. There is no mention of any prospectus in Mr Brown's witness statement. He said that the appellant had been structured in an "identical manner" to Whitwick. All we know about how Whitwick was promoted is from the website.

84. His oral evidence was to the effect that he had not produced a professional bound prospectus. He had simply produced a print-out about EIS from HMRC's website, information about sales and he thought that he might possibly have included a different prospectus.

85. Mr Lindley was emphatic that he had seen documentation for Olney Bloodstock. That probably is the case as that name is on the two pages of figures that he produced but that information comprised January 2019 valuations of the Whitwick horses and forecast sale values.

86. Mr Brown's evidence was that he had met with the investors for the appellant at offices owned by Mr Greatorex. He had brought along those documents with him and had explained in detail the plans for the appellant.

87. Mr Lindley said that he had been at that meeting, which he thought had been in the latter part of 2018 but the only other attendees apart from Mr Greatorex had been Mr Brown and Mr Beard from Thomas Quinn. Mr Brown and Mr Beard had done a presentation and there had been a lot of detail offered.

88. Dr Darer said in oral evidence that he had not been at that meeting. He said that he had become an investor on the recommendation of Mr Greatorex who had told him about it in February or March 2019. He had relied on Messrs Greatorex and Lindley for information. However, we observe that his witness statement stated that he had been told about the appellant

by an acquaintance who had set up an initial meeting on 10 January 2019 with Mr Brown. That was not explored in evidence.

89. Dr Darer said explicitly in oral evidence that what he described as part of the Prospectus, being the Consultancy Agreement and the Prospectus, had been a handout. Since the font in part of the fourth paragraph of the Prospectus he exhibited is different to that in the versions exhibited by Messrs Greatorex and Lindley, it seems possible that there was some other exchange of information.

90. By contrast, Mr Graetorex said that the meeting in his offices was attended by five or six people and that Mr Brown had talked the parties through buying horses at 6 to 12 months old and selling at three years plus. He said that apart from a presentation by Mr Brown, there had been a handout of two or three pages long explaining how the system would work.

91. In his witness statement, he said that the presentation gave a clear picture of how a sustainable business could be built in the sector.

92. As can be seen, the witnesses do not have clear recollections of what happened when. We do not criticise them for that as it is not surprising given the elapse of time. It is for that reason that we agree with Judge Brooks in *Hargreaves* and Judge Brown in *Cry Me* and have looked carefully at the contemporary documentary evidence including the website.

93. There are a number of problems with the Consultancy Agreement namely:-

(a) The document appears to be a draft since there are numerous spelling errors scattered through the document.

(b) The first heading is "Parties" and the parties are described as being Mr Brown, a Mr J D Moore, the investors, who are not identified, Mr Phil Beard from Thomas Quinn, the accountant, and Mr A Moore and The Elms Stud who are described as the Stables. We note that the evidence we had was that only "Elms Bloodstock" provided stabling.

(c) The document includes two paragraphs under the heading "Recitals", a section headed "Definition and interpretation" (the Company is defined as being the appellant) and then three schedules. The first schedule has headings "Roles of the Consultants", "Horses care and management responsibilities oftbe (sic) Consultants", "Insurance" and "Passports". The Consultants were responsible for obtaining insurance and passports and the appellant was responsible for the relevant payments. At Schedule 3 it states that the appellant would be set up as a joint venture for the purpose of the Pinhooking Scheme. The body of the document, whatever it might have been, was not included and there were no signatures.

(d) Mr Brown described it as a consultancy agreement. It certainly describes consultancy services at some length. Effectively, the Consultants were responsible for everything.

(e) It states that Mr Brown, trading as Olney Bloodstock, and Mr Moore would have been the consultants. The evidence was that Mr Brown was not a sole trader trading as Olney Bloodstock as we explain in the next paragraph.

(f) As we indicate at sub-paragraph (b) above, Mr Beard of Thomas Quinn is said to be a party to the agreement. On 25 November 2019, Thomas Quinn had been asked by HMRC "What agreements are in place with any parties? Please let me have copies".

The only agreement produced, on 3 January 2020, was the one page undated agreement between the appellant and Elms Bloodstock referred to at paragraph 29(b) above. Furthermore that response said that the monthly management fee would be charged by "Olney Bloodstock Limited, a company owned by Valyrian's director Nick Brown who is not an investor". No mention was made of Mr Moore.

(g) However, the first paragraph in the Recitals in this document describes Olney Bloodstock and Mr Moore as operating a business specialising in racehorse syndicates and pinhooking services.

(h) The Recitals also state that the parties were in discussions and negotiations about a joint venture for the purchase of horses "…for investment using EIS funding…with the intention of selling at an appropriate time to achieve a return on investment for investor shareholders [of the appellant]."

94. The opening two paragraphs of the Prospectus read:

"Valyrian Bloodstock Limited has been incorporated to act as an alternative investment vehicle, qualifying as an Enterprise Investment Scheme, therefore offering valuable tax relief to prospective investors.

The business must undertake a qualifying business activity for at least three years - making this a three year investment."

95. It goes on to say that "Within the three year term it is the aim of the business to purchase young bloodstock, for resale at a later date." and to explain that selection of the bloodstock would be in the hands of J D Moore and Nick Brown. Confusingly, it states that they will work as consultants for Whitwick. Brief career highlights are given for both and it states that Nick Brown will oversee the day to day administration of the appellant.

96. Obviously, HMRC rely on the fact that the appellant was described as being a three year investment. It is arguable that by saying that bloodstock would be purchased within the three year term to be sold at a later date, it is suggested that the duration of the investment would be longer than three years. However, we find that that is less than clear. Mr Greatorex clearly understood that depending on the age of the horse there would be a two or three year cycle and that is supported by the correspondence with HMRC (see paragraph 29 above). All of the horses had been purchased within the first nine months of the appellant's existence. It was recognised that the balance of the funds available to the appellant would be required for the costs associated with rearing the horses so there would be no further investment unless or until the horses were sold.

97. It is of note that the email of 13 March 2020 from Thomas Quinn said only that "there may be reinvestment" (emphasis added). Even in the knowledge at that time that HMRC did not accept that the EIS criteria were met, there is no positive argument that there had been an intention to trade on an ongoing basis after the three years expired.

98. Of course that email was issued after the time of issuing the shares but Thomas Quinn were very involved at that time, and before, so if there had been any evidence it would be expected that they could or would have produced it. As we point out at paragraph 44 above, Mr Beard was very involved at all relevant dates.

99. The first time a continuing trade was addressed in any detail, and there was not a lot, was in the letter of appeal from Thomas Quinn dated 1 October 2020 (see paragraph 34 above) and

that was only to say that hopefully the cycle could be repeated but even that was caveated by the argument that the loss of one horse would render that unlikely.

100. The website is contemporaneous evidence and, in our view, it does not assist the appellant. In particular, as HMRC point out, the appellant was being marketed, as was Boleyn, as being a similar model to Whitwick and, as we have quoted at paragraphs 41 and 42 above, it was made explicit that it would trade for three years. For the avoidance of doubt, we have not taken into consideration the fact that Whitwick was indeed wound up after three years; what is relevant is the expressed intent not to trade for longer than three years.

101. We find that the whole tenor of the website is that there was no intention to grow and develop the individual syndicates but rather that money was being raised in, what was sold as being, a tax efficient manner to grow the broader business which was "investment". That is made explicit in the Pinhooking Article (see paragraph 39 above). The intention could not be more clear. The syndicates were each a one off investment for a three year term and would be wound up after the last horse was sold in that term with the syndicate account distributed to the investors.

102. Looking at that wording we simply do not accept Mr Williams' argument that it is "obvious" that when referring to "three years" Mr Brown was referring to the qualifying period for EIS tax relief and it just happened to coincide with the optimum age for the sale of any foal.

103. We were not persuaded by Mr Brown's argument that "I'm not a website writer", as, of course he is, and that the website entries were really just an advertisement and should be viewed in that light and not taken literally. Like Mr Williams, he argued that they should be viewed as merely a sales pitch to entice potential investors to talk to him. We understand why he would say that, with the benefit of hindsight, and undoubtedly, the website was his way of attracting investors. What interests us, however, is what he was actually selling in 2019.

104. Mr Brown freely conceded, when asked who was the decision-maker in the appellant, that effectively it was him in that he advised the investors. The fact is that once the horses were purchased they were kept until they were old enough to be sold, and then they would be sold if Mr Brown considered that the price offered was appropriate.

105. Unlike the investors in *Inferno Films Limited v HMRC*[4] ("Inferno") who were described by Judge Poole at paragraph 7 as providing that appellant with expertise and experience, the investors in the appellant were passive investors who relied on Mr Brown for his expertise and experience.

106. Mr Williams relied on *Inferno* for the proposition that a lack of employees and extended use of sub-contracts do not preclude EIS relief. Mr Williams pointed out that Judge Poole had quoted paragraph 85 of *CHF Pip! plc v HMRC*[5] ("Pip") where Judge Popplewell had said "So as a matter of principle it is my view that a company can trade by outsourcing its activities to a third party".

107. However, Judge Popplewell explained why he had come to that conclusion in the particular circumstances of *Pip*. He accepted, as we do, that section 157 ITA requires consideration of the extent to which activities of the company are sub-contracted. He went on to say at paragraph 86 that section 157 ITA shows that "Parliament accepts that subcontracting is a permissible way of conducting trading activities (whilst recognising the extent of that subcontracting may have an impact on the risk to capital condition)."

[4] [2022] UKFTT 141(TC)
[5] [2021] UKFTT 0383 (TC)

108. It is the caveat in parenthesis that is important because, whilst we agree that a company can trade by outsourcing activities, nevertheless the nature of that outsourcing and the context in which it is done, are highly relevant. In *Pip*, Judge Popplewell observed that, quite apart from having the product produced by the outsourcing, being the animation, it was "notable" that all important intellectual property rights were reserved to *Pip*.

109. He went on to find at paragraph 88 that there was no trade in the intellectual property; *Pip* used it through the medium of the animation to generate profits by licensing the animation and generating sales of related toys.

110. That is very different to the facts in this case where it concerns only the purchase and sale of bloodstock when old enough.

111. Section 157A(3) ITA contains a non-exhaustive list of indicative circumstances to which both HMRC and the Tribunal may have regard. We have cited those provisions at paragraph 58 above and it can be seen from paragraph 32 that HMRC had clearly had those circumstances in mind. Although Mr Williams has focussed on a lack of employees and the use of sub-contracting, that must be considered in the broader context.

112. That is what Judge Popplewell did in *Pip* as did the Tribunals in *Inferno* and *Cry Me.*

113. Judge Poole accepted the arguments advanced for the appellant in *Inferno* and, in particular, that there was "ample evidence before the Tribunal" to show that that appellant did not simply intend "to shut up shop" and distribute any profits after the "single project" venture had been completed. He found that it had a "mission" to develop film-making and a number of ideas for its next project down that path and it was on that basis that the investors had subscribed for their shares. He concluded that that was apparent from both contemporaneous documents, read as a whole, and from the evidence. He was satisfied that that appellant had been doing its best to transform those objectives into reality. His Findings in Fact make that clear.

114. Mr Williams conceded that the Tribunal in *Cry Me* had said at paragraph 122 that that case was not as clear as *Inferno* but he argued that in both *Inferno* and *Cry Me* the Tribunals had decided that EIS should not be denied because of a lack of employees and the extended use of sub-contracts. He argued that the evidence given by Mr Brown and the investors was that the appellant's intention had always been to continue to reinvest in more bloodstock. Effect should be given to Parliament's intention to encourage business start-ups with the granting of EIS tax relief.

115. We do not dispute that that was Parliament's intention but it is subject to the clearly articulated conditions in the legislation.

116. There is more to *Cry Me* than paragraph 122.

117. As the Tribunal in *Cry Me* pointed out at paragraph 121, there had been in *Inferno* a much clearer articulation by the taxpayer of an intention to use any profits from the first production as an investment than there was in *Cry Me*. There was indeed a clear articulation as we have pointed out in paragraph 113 above. There was documentary evidence. In particular, there was an investment memorandum which included speculative financial return figures but which clearly stated that it was intended "to fund future growth from further film projects". A list of "potential future films" giving short details was produced.

118. In *Cry Me*, the Tribunal had accepted at paragraph 97 that the 2018 Offering Memorandum specifically stated that the intention was to be an income generation vehicle for the "SCF slate [of films] going forward". The Tribunal found at paragraph 112 that "Taken

alone, that statement would indicate that by June 2018 there was a broader intent for continuity and wider purpose for the Appellant's trade".

119. The Tribunal went on to find at paragraph 115 that on balance, and taking account of all of the evidence, it was reasonable to conclude that, to the extent that further scripts were developed to a point where the production process could be initiated, there was an intention to increase turnover. It was in that context that the Tribunal found that the absence of intention to increase employees and/or the use of sub-contractors was not a "particular concern".

120. In paragraph 119 of *Cry Me* the Tribunal concluded that the financial forecasts which were available to them, were articulation of anticipated profitability of a film once produced.

121. In summary, both *Cry Me* and *Inferno* turned on their own particular facts and those facts are not replicated in this instance.

122. The investors recently articulated their subjective intention, if so advised by Mr Brown, to continue to trade beyond the three years but that is not supported by the objectively available evidence.

123. We accept that the investment is used to acquire bloodstock and to pay for the upkeep of those horses and the costs relating to their purchase and sale. We have seen no indication that revenue would increase and indeed the breakdown of costs shows that the appellant intended to spend all of the funds raised on the purchase of the horses and their upkeep. There is no longer term cash flow forecast. The appellant has neither provided financial forecasts nor a business plan to demonstrate growth and development of the company.

124. The burden of proof lies with the appellant. Looking at the totality of the evidence and, in particular, at the documentary evidence at the time of the issue of the shares, there is nothing to suggest that this would be anything other than a three year investment and there was no evidence to grow and develop the appellant. Rather, the evidence points to growing and developing a number of syndicates.

The trading requirement in Section 181 ITA as supplemented by Section 193 ITA being the excluded activities of wholesale and retail distribution

125. HMRC argue that the legislation is intended to exclude assets which may be being held with a view to capital appreciation rather than as genuine trading stock and that is broadly correct.

126. As we note at paragraph 34 above, Thomas Quinn argued that the bloodstock was developed over a two year cycle. Unsurprisingly HMRC argue that that indicates that the only assets of the appellant were being held with a view to capital appreciation.

127. Mr Lewis argues that:-

(a) The horses are not being actively marketed until such time as they are entered in a bloodstock sale.

(b) The horses are not bought and sold in different markets (although some bloodstock agents may specialise in certain types of horse, all bloodstock auctions form part of the same market as the vendors and prospective purchasers are largely the same).

(c) The appellant is not employing any staff and the costs incurred are necessary only to keep the horses in good condition.

(d) The appellant does not take physical possession of the horses at any point from purchase to sale.

128. Mr Williams relied on Dr Darer's evidence for the proposition that the appellant's intention was to buy and sell bloodstock and retain that stock for only as long as was necessary to make a profit. He also relied on Mr Lindley stating that he expected that there would be dividends and that it was a long-term business.

129. As we have indicated, we have reservations about the investors' evidence which is subjective and provided years after the event and for the specific purpose of refuting HMRC's arguments.

130. Whilst we accept that their views are honestly held, the contemporaneous documents and the correspondence with HMRC in the following year suggest that those views are not reliable. Hence, our approach to the evidence as set out in paragraph 11 above.

131. Mr Williams also relies on an extract from a website entry dated 19 August 2019 which reads:

> "we have recently bought a colt foal by Masked Marvel – out of a Siyouni mare, who is another lovely big foal that I could have sold to a trainer already! Give me a call on …".

He argues that that is not the description of a business falling within section 193(5) ITA.

132. As far as that website entry is concerned:

(a) it is after the relevant time period,

(b) there is no evidence that it relates to a foal purchased by the appellant as the colt purchased in August 2019 by the appellant was by Youmzain,

(c) we do not know to whom "we" refers, and

(d) "I" is presumably Mr Brown and we do not know in what capacity he was writing.

That website entry does not assist the appellant.

133. Mr Lewis' arguments are all unequivocally supported by the facts.

Decision

134. Mr Williams made much of the statutory purpose of EIS as encouraging investment in high-risk ventures. Like Mr Dingli, as reported at paragraph 95 of *Cry Me*, the view was expressed that this was a sector that needed EIS involvement, particularly post Covid, and to refuse the appeal would be to effectively condemn the industry.

135. Mr Brown's evidence was that raising finance for a venture such as the appellant "…is pretty much dead in the water without EIS approval". That is compelling reasoning for the proliferation of syndicates.

136. Looked at objectively, we find that it was an investment opportunity in a "wrapper" that was perceived as being tax efficient.

137. For all these reasons, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

138. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 25 AUGUST 2022