TC04523

Appeal number: TC/2014/02681

CAPITAL GAINS TAX – Enterprise Investment Scheme – eligible shares – EIS income tax relief not claimed because income below personal allowance – whether CGT exemption only available if EIS relief claimed – whether the legislation should be interpreted "purposively" on a reverse* Ramsay *basis – whether the legislation can be "read down" under the Human Rights Act section 3 – HMRC refusal to allow late claim – whether TMA s 118(2) allows a late claim on the basis of reasonable excuse – whether Tribunal has jurisdiction over HMRC's care and management powers – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT AMES **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
SHAMEEM AKHTAR

Sitting in public at Fox Court, Gray's Inn Road, London on 16 April 2015

The Appellant in person

Mr John Corbett, of HM Revenue & Customs Appeals and Reviews Unit, for the Respondents

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DECISION

Introduction and outline

1. This appeal turns on a single point of law. On 27 January 2005 Mr Robert Ames invested £50,000 in shares which HM Revenue & Customs ("HMRC") accepted were eligible for Enterprise Investment Scheme ("EIS") income tax relief. However, Mr Ames did not claim that relief because he had no taxable income in the relevant year.

2. On 17 June 2011 Mr Ames sold the shares for £333,200. He did not include the gain of £272,540 in his self-assessment ("SA") calculation because he understood that there was no capital gains tax ("CGT") on disposal.

3. HMRC opened an enquiry and subsequently amended Mr Ames' SA return to include the gain, on the basis that the CGT exemption was only available if EIS income tax relief had been claimed. His liability was recalculated to include tax of £72,811.20.

4. We agree with HMRC that the wording of the legislation means that the CGT exemption is only available if an individual's income tax has been reduced following a claim for EIS relief. In coming to this conclusion, we considered both the normal rules for statutory interpretation, and whether the legislation breached Mr Ames' human rights, so as to allow the relevant provision to be "read down" to prevent such a breach.

5. Mr Ames also made a late claim for EIS income tax relief. Mr Corbett told us that HMRC allow late claims if the person has a reasonable excuse, but that Mr Ames did not have such an excuse. However, HMRC's refusal to allow a late claim is not a matter which can be appealed to this Tribunal.

6. We were also asked to require HMRC to exercise their care and management discretion in Mr Ames' favour. That, too, is a matter over which the Tribunal has no jurisdiction.

7. We know that Mr Ames will consider the outcome of his appeal to be unfair. His only legal remedy in relation to matters of fairness and the exercise of HMRC's discretion (including the late claim) is to ask the High Court for permission to bring a judicial review. He can of course ask HMRC to reconsider his late claim, see §112-3.

The notification to the Tribunal

8. HMRC's review letter was dated 27 March 2014. On 14 April 2014, Mr Ames' then agent wrote to HMRC saying that Mr Ames wished to appeal to the Tribunal and asking HMRC to "progress it to a contested appeal." On 30 April 2014, HMRC responded, saying that the appeal had to be notified to the Tribunal by the Appellant and referring to the guidance given in the review letter. The appeal was notified on 13 May 2014, around two weeks late.

9. HMRC did not object to the appeal being admitted late and we considered that it was in the interests of justice to do so.

The evidence

10. Mr Ames provided a helpful bundle of documents which included:

5 (1) the correspondence between the parties and between the parties and the Tribunal;

(2) various HMRC Helpsheets and guidance, including a booklet entitled "the Enterprise Investment Scheme" which in this decision is referred to by its reference number, IR137;

10 (3) Inland Revenue Press Releases dated 29 December 1994 and 28 July 1995; and

(4) Mr Ames' SA tax calculation notices for 2003-04 and 2004-05.

11. During the hearing Mr Ames referred to certain emails between himself and HMRC which were not included in the Bundle; Mr Corbett did not object to these 15 being provided after the hearing and Mr Ames sent them to us within a few days. We accepted this late evidence.

12. Mr Ames gave oral evidence and answered questions from the Tribunal. We found him to be transparently honest and unhesitatingly accept his evidence.

The issues

20 13. The key issue for determination was whether the gain on Mr Ames' shares was exempt from CGT, or whether it was taxable because Mr Ames had not claimed EIS income tax relief. There were no other technical issues involving the EIS provisions. In particular, we record that although Mr Ames was a director of the company in question, HMRC accepted that he was not "connected" with the company and that he 25 was therefore eligible to claim EIS income tax relief under Income and Corporation Taxes Act 1988 ("ICTA") s 291.

14. If a claim for EIS income tax relief was required, Mr Ames sought to appeal HMRC's refusal to allow him to make a late claim.

15. He also argued, in the alternative, that HMRC should exercise their "care and 30 management" discretion to exclude the gain from taxation on the basis that:

(1) he had been misled by HMRC's guidance; and/or

(2) exempting the gain was clearly within the purpose and spirit of the legislation.

16. Although the parties had previously discussed whether Mr Ames could have 35 made an EIS claim to reduce his tax for the previous year, this point was not pursued at the Tribunal because:

(1) Mr Ames' 2003-04 income, like that for 2004-05, was below his personal allowance; and

(2) the legislation in force at the time only allowed claims to reduce the previous year's tax if the shares were issued before 6 October in the tax year, see ICTA s 289(3)(a). Mr Ames' shares were issued on 27 January 2005.

17. Finally, we record that when Mr Ames' appeal was notified to the Tribunal, it stated that Mr Ames also appealed on the basis that he was entitled to entrepreneur's relief. However, at the hearing Mr Ames said he accepted that he was unable to notify this to the Tribunal as no decision on that claim had been made by HMRC. He also indicated that he was no longer pursuing that claim.

The facts

18. The facts were not in dispute and were as follows.

The company

19. Mr Ames was a skydiver. He realised that the risks and costs of the sport, together with the British weather, limited the growth of his sport in the UK. He had the idea of teaming up with a small number of other individuals to provide the first UK indoor skydiving simulator.

20. On 22 June 2003, he asked HMRC to provide EIS advance assurance in relation to his company, Skyventure UK Limited ("Skyventure"). On 16 July 2003, HMRC granted that assurance. In making his request, Mr Ames relied on IR137.

21. On 10 September 2003 Mr Ames became a director of Skyventure but took no money out of the company. Life was difficult: he had recently divorced and was co-parenting his two very young children, who spent every other week with him. The family lived on working tax credits and child benefit. Mr Ames taught sky diving on a self-employed basis but his costs slightly exceeded his income.

22. During 2004 and early 2005 he worked to raise finance for Skyventure; this money was used to design and build the premises at Milton Keynes from which the business would operate. On 27 January 2005, Mr Ames subscribed for £50,000 fully paid shares, financing the purchase from the sale proceeds of his marital home, which he had recently received.

23. At some point during 2005, Skyventure changed its name to Airkix. It raised the rest of the capital required, completed the construction work and started trading at the end of October 2005.

24. However, by that time Mr Ames had resigned, following a dispute with the company's major shareholder about his working and financial arrangements, and in particular, how those arrangements could be reconciled with his childcare obligations. Mr Ames stopped working for the company on 4 April 2005.

25. The period which followed was very difficult for Mr Ames, both financially and emotionally. His involvement with Airkix, the venture in which he had invested so much effort, had ended. He had little other remunerative work and significant parenting responsibilities.

26. Meanwhile, Airkix prospered. It now employs 66 staff and as at 31 December 2013 had paid over £2m in corporation tax.

Tax returns and sale of shares

27. On 18 January 2006, Airkix issued Mr Ames with form EIS3(2006). Part 1 of the form is headed "certificate." It states that Airkix certifies that "the conditions of the scheme, other than those which you [Mr Ames] have to satisfy, are for the time being satisfied in relation to these shares." It also sets out various details such as the number of shares, their value, and their "termination date," being the date to which the shares must be held in order to continue to qualify for tax relief. The termination date for Mr Ames's shares was 12 August 2008.

28. Part 2 was headed "Claim Form." No part of this form had been completed. On the reverse side are notes headed "Income Tax relief" and "Deferral Relief." The former explains how to claim relief in relation to PAYE, how to claim relief for a previous tax year, and then says "in all other circumstances, you do not need to complete this form, but keep it carefully until you receive your Tax Return." It goes on to explain which boxes to complete on an SA return.

29. Since 2001 Mr Ames has always completed his own SA tax returns. His taxable income for 2004-05 year was £42, well below his personal allowance. As he had no taxable income, he made no claim for EIS relief. His taxable income for the previous year was £34, also below his personal allowance.

30. On 21 April 2011 Mr Ames called HMRC's Small Company Enterprise Centre for advice because he was thinking of selling his shares. He spoke to a Mr Andrew Davidson. Mr Ames made a contemporaneous note of that call and has subsequently asked for the transcript from HMRC, but has been told that no records are kept in relation to calls made or received by that department. However, Mr Corbett did not dispute Mr Ames' account of his conversation, and we accept it. Mr Ames said that Mr Davidson told him that:

> "…provided Mr Ames had not been connected with the company he was eligible for full EIS CGT exemption and that no forms needed to be filled in and the CGT did not need to be declared. If he wished, Mr Ames could send a letter or mention it on his Self Assessment tax return in the box provided."

31. On 17 June 2011, Mr Ames sold his shares for £333,200. When he completed his 2011-12 SA return, he included a note in the white space referring to the disposal and stating that it was not taxable; he also attached the EIS3.

32. On 13 June 2013, HMRC opened an enquiry into Mr Ames' 2011-12 SA return. Correspondence ensued. HMRC accepted that all relevant EIS conditions had been met, and said that had Mr Ames made a timeous claim for EIS income tax relief, no CGT would have been payable on the disposal of the shares.

33. On 28 January 2014, HMRC issued a closure notice, and amended Mr Ames' 2011-12 SA return by including the gain of £272,540, the tax on which was

£72,811.20. After losses brought forward, and a small adjustment for tax overpaid, the sum due from Mr Ames was £72,176.18.

34. Mr Ames appealed the amendment to his return and, following a statutory review, notified the appeal to the Tribunal.

The legislation

35. The CGT exemption in dispute is set out at TCGA s 150A. At the time Mr Ames disposed of his shares, the first two subsections of that provision read:

> "(1) For the purpose of determining the gain or loss on any disposal of shares by an individual where–
>
> (a) an amount of EIS relief is attributable to the shares, and
>
> (b) apart from this subsection there would be a loss,
>
> the consideration given by him for the shares shall be treated as reduced by the amount of the EIS relief.
>
> (2) Subject to subsection (3) below, if on any disposal of shares by an individual after the end of the period referred to in section 312(1A)(a) of the Taxes Act or section 159(2) of ITA 2007 where an amount of EIS relief is attributable to the shares, there would (apart from this subsection) be a gain, the gain shall not be a chargeable gain."

36. It is clear from TCGA s 150A(2) that for the gain to be exempt from tax, an amount of EIS relief must be "attributable to the shares." The meaning of that phrase depends on the date the shares were issued, see the final subsections TCGA s 150A:

> "(11) Chapter III of Part VII of the Taxes Act or Part 5 of ITA 2007 (enterprise investment scheme) applies for the purposes of this section to determine whether EIS relief is attributable to any shares and, if so, the amount of EIS relief so attributable; and "eligible shares" has the same meaning as in that Chapter or means shares that meet the requirements of section 173(2) of ITA 2007.
>
> (12) References in this section to Chapter III of Part VII of the Taxes Act or any provision of that Chapter are to that Chapter or provision as it applies in relation to shares issued on or after 1st January 1994.
>
> (13) References in this section to Part 5 of ITA 2007 or any provision of that Part are to a Part or provision that applies only in relation to shares issued after 5 April 2007."

37. Since Mr Ames acquired his shares in January 2005, the meaning of that phrase is to therefore be found in Chapter III of Part VII of ICTA, see TCGA s 150A(11) and (12). Chapter III is headed "Enterprise Investment Scheme." It opens with s 289, which sets out the main conditions to be satisfied before an individual is eligible for EIS relief.

38. ICTA s 289A is headed "form of relief" and begins:

> "(1) Where an individual eligible for relief in respect of any amount subscribed for eligible shares makes a claim, then, subject to the following provisions of this Chapter, the amount of his liability for the year of assessment in which the shares were issued ("the current year") to income tax on his total income shall be the following amount.
>
> (2) That amount is the amount to which he would be so liable apart from this section less whichever is the smaller of–
>
> (a) an amount equal to tax at the lower rate for the current year on the amount or, as the case may be, the aggregate of the amounts subscribed for eligible shares issued in that year in respect of which he is eligible for relief, and
>
> (b) the amount which reduces his liability to nil."

39. The section also sets out various options and conditions, none of which were in issue.

40. ICTA s 289B is headed "Attribution of relief to shares" and begins:

> "(1) References in this Chapter, in relation to any individual, to the relief attributable to any shares or issue of shares shall be read, subject to the provisions of this Chapter providing for the reduction or withdrawal of relief, as references to any reduction made in the individual's liability to income tax which is attributed to those shares or that issue in accordance with this section."

41. The rest of that section deals with complications such as multiple issues of eligible shares in a tax year, bonus shares and the withdrawal of EIS relief, none of which is relevant to Mr Ames.

42. Finally, we revert to TCGA s 150A, which at subsection (3) provides how much of a gain is exempted from tax. It says (so far as relevant to this case):

> "(3) Where—
>
> (a) an individual's liability to income tax has been reduced…for any year of assessment under section 289A of the Taxes Act…in respect of any issue of shares,
>
> (b) the amount of the reduction ("A") is less than the amount ("B") which is equal to tax at the EIS original rate for that year on the amount subscribed for the issue, and
>
> (c) A is not found under section 289A(2)(b) of the Taxes Act or (as the case may require) is not within paragraph (b) solely by virtue of section 29(2) and (3) of ITA 2007,
>
> then, if there is a disposal of the shares on which there is a gain, subsection (2) above shall apply only to so much of the gain as is found by multiplying it by the fraction A/B."

43. Our understanding of this somewhat complicated provision is that subsection (3)(a) sets out the precondition: the provision applies "where…an individual's liability to income tax has been reduced" under ICTA s 289A. The main part of

subsection (3) then provides that the CGT exemption is restricted where B (the total share subscription multiplied by the EIS relief rate) is more than A (the actual relief given). This might happen if, for example, a person invested £600,000 in shares at a time when the EIS limit was £500,000 and the rate of relief was 20%. He would receive EIS relief of £100,000 (£500,000 x 20%). When he came to sell the shares, the CGT exemption would be restricted by 100,000/120,000 to only 83.33% of the gain.

44. However, that A/B restriction does not apply in the two situations set out in subsection (3)(c), namely:

(1) where "A is not found under section 289A(2)(b) of the Taxes Act." ICTA s 289A provides that a person's income tax liability for the year in which the shares are issued is the lower of (a) the amount which would be charged, less the EIS relief given, and (b) "the amount which reduces his liability to nil." In other words, the CGT exemption is not restricted where the EIS income relief was more than was needed to eliminate the tax liability; and

(2) where A "is not within paragraph (b) solely by virtue of section 29(2) and (3) of ITA 2007." Those subsections provide that certain reliefs can only reduce taxable income "so far as there is sufficient tax…from which to deduct it." Thus, if the only reason why a person cannot use all their EIS relief is because they have other tax reliefs, that too does not trigger a reduction in the eventual CGT exemption.

The interaction of income tax and CGT – statutory interpretation

45. Mr Ames accepted that TCGA s 150A(1)(a) required that there be an amount of EIS relief "attributable to the shares" and that the meaning of that term was to be found in ICTA s 289B, being a reference "to any reduction made in the individual's liability to income tax which is attributed to those shares."

46. He also accepted that his income tax had not been reduced following a claim to EIS relief, saying:

> "By ordinary interpretation of the legislation, section 150A(2) can only apply where there has been a reduction in liability to income tax, and therefore as such it cannot apply in this case."

47. He submitted, however, that this interpretation was "anomalous" because Parliament had specifically inserted TCGA s 150A(3)(c) into the original legislation in order that an individual could obtain full CGT exemption on disposal, despite having insufficient tax to utilise all his EIS relief.

48. He explained the history of the provision. The EIS scheme had been introduced in Finance Act 1994, and, as originally drafted, TCGA s 150A(3) did not contain subsection (c). As a result, the CGT exemption was restricted whenever a person had been unable to claim full EIS relief on his share purchase, even if this was because his income tax liability was less than the amount of the tax relief. However, in the Budget of 29 November 1994, the Inland Revenue Budget Press Release issued on that day set out "a number of proposals to ensure the scheme works as intended," all

of which were all to be backdated to 1 January 1994, being the start date of the EIS scheme. The first of these changes was to insert subsection (c) in TCGA s 150A(3); the Press Release said that the reason for the change was so that "the capital gains tax exemption will not be restricted where an investor has insufficient income tax liability to make full use of the relief."

49. Mr Ames accepted that the amended legislation nevertheless requires that:

(1) an individual's liability to income tax must have been reduced under ICTA s 289A, see TCGA s 150A(3)(a); and

(2) ICTA s 289A(1) requires that EIS relief be claimed.

50. He said that, as a result:

> "someone who has £1 of taxable income can have 100% CGT exemption, but someone with no income has no CGT exemption. It is therefore argued that the literal meaning of s150A leads to absurdity, in that the situation described above is absurd."

51. He went on to say that this was not intended by Parliament when they made the amendment to the EIS Scheme in 2005: it was clear from the Press Release that Parliament intended that a person with eligible EIS shares should not be prevented from obtaining the CGT exemption on disposal, merely because he had no tax liability at the time the shares were issued.

52. Mr Ames reminded the Tribunal that his shares satisfied all the stringent EIS criteria. He had invested his own money in the Airkix start-up business, and worked without a salary in that crucial early period. He had done exactly what the EIS scheme was designed to do: invest so as to encourage the growth of a small businesses from scratch. He asked that the Tribunal interpret the legislation in accordance with the intention of Parliament, rather than in accordance with the literal words of the legislation.

53. Mr Corbett disagreed with Mr Ames. He said that the legislation was "perfectly clear" and there was no basis on which the Tribunal could read it in any other way. TCGA s 150A provided that the exemption was only available if an amount of EIS relief was "attributable" to the shares. ICTA 289B said this was only the case where a reduction in the individual's liability to income tax was attributed to those shares. There had been no reduction in Mr Ames's income tax attributed to the shares and so the CGT exemption could not apply.

Reverse Ramsay *approach*

54. Mr Ames' submission focuses on TCGA s 150(3)(c). That provision is dependent upon subsection (3)(a), so that it only applies "where an individual's liability to income tax has been reduced…under section 289A of the Taxes Act." ICTA s 289A(1) requires that an individual "makes a claim" for EIS relief.

55. Mr Ames is thus asking the Tribunal:

(1) to read TCGA s 150(3) as if it contained no requirement that an individual's income tax be reduced; and

(2) to find that, where there is no income tax, and so nothing which could be reduced, the statutory requirement to make a claim for EIS income tax relief falls away.

56. Mr Ames submits that Parliament's intention as to the meaning of these provisions is clear from the Press Release issued before the introduction of TCGA s 150(3)(c), and the provisions should be interpreted purposively rather than in accordance with their literal meaning.

57. That submission is one which is more commonly put forward by HMRC in the context of avoidance schemes, and is often referred to as the *Ramsay* principle, after the decision of the House of Lords in *Ramsay v IRC* [1982] AC 300. Where the taxpayer, rather than HMRC, seeks to argue that provisions should be given a purposive interpretation, this is sometimes called a "reverse *Ramsay*" approach.

58. Since *Ramsay* the courts have clarified and developed their guidance on how to interpret legislation. In *Eclipse Film Partners v HMRC* [2015] EWCA Civ 95 at [110], the Court of Appeal said in a combined judgment:

> "There is no special rule for interpreting tax legislation. *Ramsay (WT) Ltd v IRC* [1982] AC 300 marked the end of an unduly literal interpretative approach to tax statutes and a formalistic insistence on examining steps in a composite scheme separately. As Lord Nicholls, giving the judgment of the Judicial Committee, said in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL, [2005] 1 AC 684 at [32], the essence of the new approach was to give the statutory provision a purposive interpretation in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. This brought the interpretation of tax statutes into line with general principles of statutory interpretation and required notice to be taken of the reality of the transaction in issue."

59. Included in that summary is Ribeiro PJ's oft-cited dictum from *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], which was subsequently approved by the Appellate Committee of the House of Lords in the *Barclays Mercantile* case referred to by the Court of Appeal in *Eclipse.* Ribeiro PJ said:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

60. In *Astall v HMRC* [2010] STC 137 ("*Astall*") at [44], Arden J, giving the leading judgment with which the rest of the Court of Appeal concurred, said that:

> "…applying a purposive interpretation involves two distinct steps: first, identifying the purpose of the relevant provision. In doing this, the court should assume that the provision had some purpose and Parliament did not legislate without a purpose. But the purpose must be discernible from the statute: the court must not infer one without a proper foundation for doing so. The second stage is to consider whether the transaction against the actual facts which occurred fulfils the statutory conditions. This does not, as I see it, entitle the court to treat any transaction as having some nature which in law it did not have but it does entitles the court to assess it by reference to reality and not simply to its form."

61. Finally, in *Berry v HMRC* [2011] STC 1057 ("*Berry*") at [31], Lewison J set out, by way of a helpful list, the different elements of the *Ramsay* approach derived from the case law authorities. The list contains the principles set out in the immediately preceding paragraphs of this decision, and at [31(vi)] he adds this:

> "However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in *Astall v Revenue and Customs Comrs* [2010] STC 137 at [34], 80 TC 22 at [34]). As Lord Hoffmann put it in an article on 'Tax Avoidance' ([2005] BTR 197): 'It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there': see *Mayes v Revenue and Customs Comrs* [2009] EWHC 2443 (Ch) at [30], [2010] STC 1 at [30])."

Discussion of submissions

62. Arden LJ in *Eclipse* directs us to identify "the nature of the transaction to which [the legislation] was intended to apply." Here, Parliament have clearly set out the conditions for obtaining the CGT exemption. ICTA s 289A(1) requires that an EIS income tax relief claim be made, and by TCGA s 150A(2) that claim effectively passports the shares through to the CGT exemption, so long as the relevant conditions continue to be met. It is clear that the legislation was only intended to apply where there had been a valid EIS income tax claim. Mr Ames's share disposal does not meet those statutory criteria.

63. In other words, Parliament has set out the scope of the statutory machinery in a prescriptive manner. As a result, there is no room for an "an appeal to a purpose which is not the literal meaning of the words" see Lewison J in *Berry.* As Lord Hoffman said, it is not for the Tribunal to "rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there." And as Arden J stated in *Astall,* the purpose must be discernible from the statute: the court must not infer a purpose without a proper foundation for so doing.

64. It is true that Parliament amended TCGA s 150A with the object of allowing investors to obtain the full CGT exemption even where their low income tax liability

prevented them making full use of the EIS income tax relief. But when Parliament made this change, it did not detach the CGT exemption from the EIS income tax relief (although it could have solved the problem in that way) but rather retained the same mechanism: there has to be a claim, and the individual's income tax must be reduced as a result.

65. We therefore find that under the accepted canons of statutory interpretation we are not unable to interpret the legislation in a way which allows us to find that Mr Ames is entitled to the CGT exemption.

66. We also observe that, even were able to take the Press Release into account, that document says that the reason for introducing TCGA s 150A(3)(c) was so that "the capital gains tax exemption will not be restricted where an investor has insufficient income tax liability to make *full use* of the relief" (our emphasis). It does not say that its purpose was to allow the CGT exemption to be claimed by a person with eligible shares who did not use the relief. Parliament does not appear to have had not considered the possibility that a person would invest out of capital, as Mr Ames did, in a year when his income was negligible.

Human rights

67. Neither party raised the issue of human rights. As Mr Ames was unrepresented, we thought it right to consider this possible argument in the context of how we should read the statutory provisions.

68. The Human Rights Act 1998 ("HRA"), s 3(1) provides that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

69. Thus if this legislation breached Mr Ames' rights under the European Convention on Human Rights ("the Convention"), it has to be construed in accordance with his Convention rights "as far as it is possible to do so."

70. We first summarise the legislation and case law, and then consider, in the light of that case law, whether there has been a breach of Mr Ames' human rights so as to engage HRA s 3.

The Convention and the case law

71. It is accepted that taxation engages Article 1 Protocol 1 ("A1P1") of the Convention. The first paragraph of A1P1 reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

72. However, A1P1 continues:

> "The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control

> the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

73. The European Court of Human Rights ("ECtHR") has consistently held that member states have a "wide margin of appreciation" in relation to tax legislation, see for example *Gasus Dosier and Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403 where the Court says at [60]:

> "In passing such laws the legislature must be allowed a wide margin of appreciation...The Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation."

74. In *NKM v Hungary* [2013] STC 1104, the ECtHR summarised the earlier case law and said that tax legislation should meet the following tests:

(1) be lawful (see [46]);

(2) be "sufficiently accessible, precise and foreseeable" in its application, and that a rule is "'foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities" (see [48]);

(3) pursue a legitimate aim (see [44]); and

(4) the interference with the right to peaceful enjoyment be proportionate in the sense that it strikes a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see [42]).

75. Finally, in *Špaček sro v Czech Republic* (2000) 30 EHRR 1010 ("*Špaček*"), the appellant argued that the Czech government had breached its rights under A1P1 because a particular legal change had not been properly published. The ECtHR pointed out at [57] that "the Convention does not contain any specific requirements as to the degree of publicity to be given to a particular legal provision."

Application to this legislation

76. The first of the factors extracted from *NKM* are clearly met, the statutory provisions are lawful.

77. In relation to the second, there is, as the ECtHR said in *Špaček,* no requirement for the law to be published in any particular form. The relevant legislation here was published as part of the normal process for Finance Acts, and was explained in various HMRC guidance booklets, which made it more accessible. The provisions are both precise and "foreseeable." The second *NKM* factor is met.

78. The legislation links EIS income tax relief (which can only be claimed if certain prescriptive conditions are met) with the CGT exemption. This ensures that a gain is exempt only where shares have satisfied the relevant conditions, which is a legitimate aim. That remains the position, even though the linkage means that some shares do not qualify for the exemption (as in Mr Ames' case).

79. Mr Ames compared his position with that of someone who had £1 of EIS income tax relief. He suffers tax of £72,811.20, the other person pays nothing. Although Mr Ames does not use the word, this is in terms a submission that the legislation is disproportionate.

80. In *Bluu Solutions v HMRC* [2015] UKFTT 0095 at [161]-[180] I considered the case law on proportionality in the context of A1P1 and import that analysis by reference. One factor which emerges from the case law is the high threshold which must be met before a court or tribunal can find that primary legislation (such as that in issue here) is disproportionate.

81. Green J summarised the position in *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin):

> "All of the case law underscores the point that an Act of Parliament is at the apex of the exercise of the democratic decision making process. A court should only interfere with the [the Act in question] if there are fundamental errors or where the policy choices adopted are wholly unsupported by evidence or unconnected with any lawful policy objective and cannot on any logical or sensible basis be said to be consistent with the various limbs of the proportionality test."

82. There is no "fundamental error" or other flaw in the statutory provisions which link EIS income tax relief with the CGT exemption, and no other factor which comes close to satisfying this high threshold.

Conclusion on human rights

83. For the reasons set out above, we therefore find that there has been no breach of A1P1 and no basis on which the Tribunal can "read down" the statutory provisions under HRA s 3. We are required to apply the law as enacted by Parliament.

Whether taxable income gives entitlement to the exemption

84. Mr Ames's second argument was that:

(1) his taxable income in 2004-05 was £42;

(2) HMRC's online SA calculation programme had automatically given him a personal allowance and contained no machinery allowing him to leave £42 of income into charge;

(3) the statute requires that a personal allowance be claimed, and the operation of online SA calculation programme was a unilateral action by HMRC and not a claim;

(4) as he had not made a claim for a personal allowance, he still had taxable income; and

(5) that was sufficient for him to be entitled to the CGT exemption, without him needing to claim EIS relief.

85. Although Mr Ames' skeleton argument referred to the Income Tax Act 2007 ("ITA"), he agreed at the hearing that the relevant provisions were ICTA ss 256-257. Section 256 begins:

> "**General**
>
> (1) An individual who makes a claim in that behalf…shall be entitled to such relief as is specified in sections 257 to 274, subject however to the provisions of sections 275 to 278."

86. Section 257 is headed "Personal Allowance" and subsection (1) says that "the claimant shall be entitled to a deduction from his total income of £4,745."

87. Mr Ames relied in part on the statement made by Mr Davidson of HMRC's Small Company Enterprise Centre, that "provided Mr Ames had not been connected with the company he was eligible for full EIS CGT exemption."

88. Mr Corbett said that, even if Mr Ames had not in fact claimed the personal allowance, EIS income tax relief required a claim: ICTA s 289A(1) begins "where an individual eligible for relief in respect of any amount subscribed for eligible shares *makes a claim…*" Mr Ames had not made a timeous claim, and so the gain is not exempt.

89. We agree with Mr Ames that the statute requires that the personal allowance be claimed. He said that the SA online filing system does not give taxpayers the option of claiming, or not claiming, the personal allowance and thus that he had not made a claim. However, we do not need to decide whether or not he is correct, because we agree with Mr Corbett that this issue is beside the point.

90. Even if Mr Ames had sufficient income left in charge as a result of not claiming his personal allowance, EIS relief is not automatic. In order to obtain EIS income tax relief, Mr Ames had to make a timeous claim. That is an explicit requirement of ICTA s 289A(1). Unless HMRC allow a late claim, that is the end of the matter.

The late claim

91. The time limit for EIS income tax claims is given by ITA s 202:

> "(1) A claim for EIS relief in respect of shares issued by a company in any tax year may be made
>
> (a) …
>
> (b) not later than the fifth anniversary of the normal self-assessment filing date for the tax year."

92. The earlier provisions were substantially identical: ICTA s 306(1)(b) said that the claim had to be made "not later than the fifth anniversary of the 31st January next following that year of assessment."

93. Given that the shares were issued to Mr Ames during the 2004-05 tax year, it was common ground that the latest date by which he could have made a timeous claim under that provision would have been 31 January 2011.

94. Neither party addressed us on how the five year time limit interacted with TMA s 42, which says (subject to a number of exceptions, none of which apply in this case) that:

> "…a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included."

95. TMA s 9ZA provides that returns, once filed, can be amended by the taxpayer during the twelve months following the "filing date." In relation to 2004-04 returns filed on time, the filing date was 31 January 2006.

96. Mr Ames received his EIS3 on 18 January 2006. Although we were not provided with the date on which he filed his 2004-05 return, it seems to us that the claim could have been made in that return, either as filed or as subsequently amended.

97. In any event, nothing turns on this, as Mr Ames' claim was out of time in any event. Mr Corbett accepted that Mr Ames had subsequently made a late claim, either by way of including the EIS3 with his 2011-12 tax return on 18 October 2012, or in the course of subsequent correspondence. He also accepted that had HMRC allowed the late claim, they would also have agreed that Mr Ames could "disclaim" his 2004-05 personal allowance (if it had been claimed) so as to "uncover" his taxable income for that year. However, HMRC refused to accept the late claim.

The dispute about the late claim

Mr Ames's submissions

98. Mr Ames asked the Tribunal to allow his late claim. He said that he had a reasonable excuse for making the claim outside the time limits. He was not a tax specialist or lawyer, but an ordinary taxpayer. He had taken "all reasonable and responsible steps to do the right thing in terms of tax compliance." He had read and relied on IR137, but nowhere in that document does it warn that a person will be denied a CGT exemption on disposal if he does not claim EIS income tax relief. In particular, he said that IR137 at Question 45 gave the impression that insufficiency of income meant that income tax relief does not need to be claimed.

Mr Corbett's submissions

99. On 18 March 2015, Mr Corbett had emailed Mr Ames as follows:

> "I have now considered if relief could be allowed under Section 118(2) Taxes Management Act 1970 but it is clear from my reading of IR137 that you should have been aware of the need to claim the relief and have no reasonable excuse for the error."

100. Before the Tribunal, Mr Corbett submitted that whether or not HMRC allowed a taxpayer to make a late claim was a discretionary matter within their care and management powers, over which the Tribunal had no jurisdiction. However, he told us that HMRC's practice is to allow a late claim if they consider that the taxpayer has a reasonable excuse for his lateness.

101. He had therefore considered whether Mr Ames had a reasonable excuse as a result of relying on IR137. He said that booklet made it clear that an EIS income tax relief claim was the first step in the process of obtaining the CGT exemption. It opens by saying (emphasis added):

> "*If you obtain income tax relief* you may also be eligible for one of the following reliefs when you dispose of the shares in question"

102. The reliefs then listed include the CGT exemption, so IR137 clearly linked it with the EIS income tax relief.

103. In relation to Q45, to which Mr Ames had drawn attention, Mr Corbett said (again, emphases added) that the question read "What happens if I make a gain on disposal of shares *to which income tax relief is attributable* and the disposal is after the end of my relevant period?" and the answer says:

> "The gain which represents the increase in value of the shares over the holding period will be wholly exempt from capital gains tax if *none of the income tax relief* has been withdrawn, and…*the relief* was not obtained in full solely because your income tax liability in the year for which *relief was claimed* was too low."

104. Mr Corbett said that, as a result, HMRC did not accept that Mr Ames had a reasonable excuse and so were unable to admit his late claim.

TMA s 118(2)

105. We first considered Mr Corbett's reliance on the reasonable excuse provision in TMA s 118(2) to see if that subsection did apply to late claims. If it did, we would then need to consider whether the Tribunal had the relevant jurisdiction. The subsection reads (our emphasis):

> "For the purposes of this Act, a person shall be deemed not to have *failed to do anything required to be done within a limited time* if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

106. There are two possible readings of the italicised phrase. The first is that "a person shall be deemed not to have failed to do anything / required to be done within a limited time." On that reading, it may extend to late claims, because a claim is something "required to be done within a limited time" which the taxpayer has failed to do.

107. The second possible reading is: "a person shall be deemed not to have failed to do anything required to be done / within a limited time." On that reading, it applies where a person has failed to do something which he was required to do, complying

only after the due date. The subsection would then apply, for example, to a failure to file a return, or pay taxes, by the statutory deadline. It would not extend to late claims, because a claim is not something "required to be done" but is at the taxpayer's option.

108. The wording in the later part of TMA s 118(2) makes it clear that the second reading is correct. It says that "where a person had a reasonable excuse *for not doing anything required to be done* he shall be deemed not to have failed to do it." Were the first reading to be correct, this reference back would say something like "where a person had a reasonable excuse for not doing anything *within the required time limit*" or "where a person had a reasonable excuse for not doing anything *which he was required to do within a limited time.*"

109. As a result, we find that neither HMRC nor the Tribunal can allow a late claim by relying on TMA s 118(2).

Jurisdiction over late claims

110. Not only does the Tribunal have no jurisdiction to allow a late claim under TMA s 118(2), we were also unable to identify any provision which gives a person the right to appeal against an HMRC refusal to allow a late claim. TMA s 33 simply states the time limit. TMA Sch 1A, which provides for claims made outside returns, only allows appeals against amendments to claims, not against a refusal to extend a time limit so as to admit a claim. We therefore find that the Tribunal has no jurisdiction to allow Mr Ames to make a late claim.

111. The same is not necessarily true of HMRC. Although Mr Corbett relied on TMA s 118(2) in his email, during his oral submissions he referred to HMRC's care and management powers, and their practice of allowing a late claim if a taxpayer has a reasonable excuse. That HMRC have a discretion to extend time limits was confirmed by Sir Thomas Bingham in *R v CIR (ex p Unilever plc)* [1996] STC 681 at p 686.

112. As explained in the following part of this decision, how HMRC exercise their care and management powers is outwith the jurisdiction of this Tribunal. We merely observe that the factors considered by Mr Corbett when deciding whether or not to allow the late claim did not appear to include any of the personal information provided during the hearing – the stress caused to Mr Corbett by the loss of his role with the company he had founded, only five weeks after purchasing the shares, set against the background of his family responsibilities and straitened financial circumstances.

113. Mr Ames may wish to ask Mr Corbett to reconsider the position in the light of those extra factors, taken together with: the lack of any explicit warning in IR137 that a failure to claim EIS relief would block the CGT exemption; the automatic "claim" for personal allowances; Mr Ames' record of careful compliance and his lack of technical knowledge. But whether or not any such further request for a late claim is allowed is a matter for HMRC and not this Tribunal. Mr Ames only legal remedy against HMRC's refusal to allow a late claim is by way of judicial review, see §XX.

Care and management

114. In the alternative, Mr Ames asked HMRC to exercise their "care and management" discretion to allow the gain to be exempt from tax, but HMRC refused. Mr Ames asked the Tribunal to require HMRC to exercise their discretion in his favour because:

(1) the HMRC guidance on which he reasonably relied was inadequate and did not make clear the necessary link between the EIS income tax claim and the CGT exemption; and/or

(2) Parliament had not intended that there be a difference between someone who received £1 of income tax relief, and a person who received none because his income was covered by the personal allowance.

115. Mr Corbett reiterated that the Tribunal had no jurisdiction over HMRC's care and management powers, but that in any event (as already set out in the previous part of this decision) HMRC did not accept that their guidance was inadequate.

116. In relation to Mr Ames's second point, Mr Corbett said that HMRC's care and management powers do not:

> "provide the commissioners any discretion from collecting taxes and duties that Parliament has unequivocally decreed shall be paid merely because it might seem unfair or morally objectionable that the tax or duties should be paid."

117. We agree with Mr Corbett that the Tribunal does not have jurisdiction over HMRC's exercise of their care and management powers. Whether HMRC have exercised those powers unfairly is a matter for judicial review. This is clear from the case law. In *Aspin v Estill* [1987] STC 723 Donaldson LJ, giving the leading judgment with which the rest of the Court of Appeal concurred, found that the General Commissioners had no judicial review powers. In *HMRC v Hok Limited* [2012] UKUT 363 Warren J and Judge Bishopp considered *Aspin v Estill* and also the statutory jurisdiction under which the Tribunal was established, before saying that there is "no room for doubt that the First-tier Tribunal does not have judicial review jurisdiction."

118. We also considered *Lobler v HMRC* [2015] UKUT 0152 (TCC), a case which has some parallels with Mr Ames' appeal. Mr Lobler had withdrawn $1.3m from a number of life insurance policies. He had not understood that the withdrawal would be taxed as income under the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), even though the amount withdrawn was less than the amount invested, so there was no profit. He had failed to realise that, had he surrendered sufficient individual policies rather than withdrawing money evenly from each policy, there would have been no liability. HMRC assessed Mr Lobler to tax of some $560,000.

119. The First-tier Tribunal (Judge Hellier and Mr Hossein) said at [1] that this "remarkably unfair result" arose "as a result of a combination of prescriptive legislation and Mr Lobler's ill-advised actions." At [3] they said:

> "He made no profit or gain as that term is commonly or commercially understood and yet he becomes liable to pay tax which exhausts his life savings and may bankrupt him. That is an outrageously unfair result."

5 120. They held, however, that:

> "the jurisdiction given to this tribunal in a case such as this does not extend to making orders to overturn (or 'review') the administrative process of HMRC…. The power to review HMRC's decision rests with the High Court (see eg paragraphs [39ff] *HMRC v Hok Ltd*
10 [2012]UKUT 363 TCC)."

121. Mr Lobler appealed to the Upper Tribunal. He argued that *Hok* had been wrongly decided and that this Tribunal did have the power to determine whether the tax assessment and resulting charge were valid. However, Proudman J said at [122] that *Hok* was correctly decided, and concluded her analysis at [127] by saying:

15
> "There is no dispute that ITTOIA applies and that the liability incurred is a direct result of the statute. The question is whether HMRC should be precluded from imposing and collecting a disproportionate tax charge, namely whether it would be fair and reasonable of them to do so…I do not consider that the FTT would
20 have had jurisdiction to decide this matter and therefore I dismiss this ground of appeal"

122. Although Mr Corbett did not cite *Lobler,* his submissions essentially reflect Proudman J's judgment, which (like *Hok*) is binding on us and with which we in any event agree.

25 123. As a result, Mr Ames' only remedy in law for the unfairness he perceives to have occurred (including HMRC's refusal to allow a late claim) would be to seek judicial review at the High Court.

124. For completeness we record that Proudman J found in favour of Mr Lobler for other reasons. His "ill-advised action" was the result of him opting for "partial
30 withdrawal" from all his policies rather than for the full surrender of sufficient individual policies to raise the money needed. Proudman J said that this was a mistake and that the contract between Mr Lobler and the insurance company could be "rectified," see [45]-[74]. This would have the effect of turning back the clock in terms of the way in which Mr Lobler had made his withdrawals

35 125. The remedy of rectification is, however, not available to Mr Ames. His mistake was not to realise, before the expiry of the relevant time limit, that he needed to make a claim to EIS income tax relief. There is no contract in issue, so rectification is impossible.

Decision

40 126. For the reasons set out above, Mr Ames' appeal is refused and HMRC's amendment to his SA return upheld.

Appeal rights

127. 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 REDSTON

TRIBUNAL JUDGE
RELEASE DATE: 7 July 2015