



**Appeal number
UT/2016/0156**

Income Tax – Seed Enterprise Investment Scheme – compliance statement completed using form for Enterprise Investment Scheme by mistake – whether compliance statement a nullity – whether company able to make a supplementary claim under section 42(9) Taxes Management Act 1970

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

X-WIND POWER LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER
MAJESTY'S REVENUE AND CUSTOMS**

Respondents

Tribunal: The Hon Mr Justice Arnold

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 6 July 2017

Patrick Way QC, instructed by direct access, for the Appellant

**Barbara Belgrano, instructed by the Solicitor to HM Revenue and Customs,
for the Respondents**

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal (Tax) (Judge Colin Bishopp) (“the FTT”) dated 10 May 2016 ([2016] UKFTT 317) (TC) dismissing an appeal by X-Wind Power Ltd (“X-Wind”) against decisions of the Commissioners of Her Majesty’s Revenue and Customs (“HMRC”) to refuse to authorise the issue of compliance certificates for the purposes of the Seed Enterprise Investment Scheme (“SEIS”) and to refuse to permit X-Wind to replace a compliance statement that it had provided to HMRC in that connection.

The facts

2. There is no dispute as to the facts, which can be shortly stated.
3. X-Wind is engaged in the design and manufacture of small and medium-sized wind turbine generators. On 25 September 2012 it issued shares to eight initial investors who had, together, injected £90,000 into the company. Further shares were issued in December 2013 and January 2014 in exchange for additional investments. It is common ground that the investors would be entitled, provided they satisfied the relevant conditions, to relief for proportions of their respective investments against their income tax liabilities in accordance with the Enterprise Investment Scheme (“EIS”) or the SEIS.
4. The EIS dates from 1994, whereas the SEIS was introduced by the Finance Act 2012, and was therefore very new when the first tranche of investment in X-Wind occurred. The relevant statutory provisions are now to be found in Parts 5 (EIS) and 5A (SEIS) of the Income Tax Act 2007 (“the ITA”). The difference between the two schemes of particular significance for present purposes is that the rate of relief under the EIS is 30%, while the SEIS allows for relief at 50%. There are in each case upper limits on the amounts which may be relieved which are not material here. In broad terms, the SEIS is aimed at investors in start-up companies and the EIS at investors in small companies, not necessarily at start-up, and the rates of relief reflect the difference in investment risk between newly-formed companies and those which, although relatively small, have some history behind them.
5. The procedural requirements for claiming EIS and SEIS are similar. The requirement which is important in this case is that, before he may claim relief, an investor must have obtained from the company a “compliance certificate” as evidence that he has made a qualifying investment. A compliance certificate may be issued only with the authority of an officer of HMRC. In order to secure such authority, the company is required to provide HMRC with a “compliance statement”. The compliance statement must set out certain information, which differs to some extent between the EIS and the SEIS.

6. On about 22 March 2013 X-Wind sent a compliance statement to HMRC. The statement was made on a form, identified as EIS1, intended for the EIS. The FTT found that X-Wind had intended to submit a compliance statement for the SEIS and that the use of the wrong form was attributable to an inadvertent and innocent mistake.
7. On 21 May 2013, on the strength of the compliance statement submitted by X-Wind and some supplementary information he had requested, an officer of HMRC authorised X-Wind to issue EIS compliance certificates to the eight original investors. The FTT found that there was nothing to put HMRC on notice that X-Wind had intended to seek SEIS compliance certificates rather than EIS compliance certificates.
8. On 25 April 2014 X-Wind submitted further compliance statements, this time using the SEIS form, identified as SEIS1, in respect of the second and third investment tranches. HMRC refused to authorise the issue of SEIS compliance certificates because it is not permissible to do so if there has been an earlier EIS investment: see section 257DK of the ITA.
9. On 23 May 2014 X-Wind submitted an SEIS1 form in place of the EIS1 form, and requested the authorisation of SEIS compliance certificates in respect of all three tranches of investment, but HMRC refused to allow X-Wind to replace the earlier form.
10. X-Wind appealed against HMRC's refusal to allow it to replace the EIS1 form and to authorise the issue of SEIS compliance certificates. X-Wind argued that it was entitled to submit the replacement SEIS1 form pursuant to section 42(9) of the Taxes Management Act 1970 ("the TMA"). The FTT dismissed the appeal.

The legislative framework

Part 5 of the ITA (EIS)

11. Chapter 5 of Part 5 of the ITA includes the following provisions:

"203. Entitlement to claim

- (1) The investor is entitled to make a claim for EIS relief in respect of the amount subscribed by the investor for the relevant shares if the investor has received from the issuing company a compliance certificate in respect of those shares.
- (2) For the purposes of PAYE regulations no regard is to be had to EIS relief unless a claim for it has been duly made.
- (3) No application may be made under section 55(3) or (4) of TMA 1970 (application for postponement of payment of tax pending appeal) on the ground that the investor is eligible for

EIS relief unless a claim for the relief has been duly made by the investor.

204. Compliance certificates

- (1) A 'compliance certificate' is a certificate which -
 - (a) is issued by the issuing company in respect of the relevant shares,
 - (b) states that, except so far as they fall to be met by or in relation to the investor, the requirements for EIS relief are for the time being met in relation to those shares, and
 - (c) is in such form as the Commissioners for Her Majesty's Revenue and Customs may direct.
- (2) Before issuing a compliance certificate in respect of the relevant shares, the issuing company must provide an officer of Revenue and Customs with a compliance statement in respect of the issue of shares which includes the relevant shares.
- (3) The issuing company must not issue a compliance certificate without the authority of an officer of Revenue and Customs.
- ...
- (5) If an officer of Revenue and Customs -
 - (a) has been requested to give or renew an authority to issue a compliance certificate, and
 - (b) has decided whether or not to do so,the officer must give notice of the officer's decision to the issuing company.

205. Compliance statements

- (1) A 'compliance statement' is a statement, in respect of an issue of shares, to the effect that, except so far as they fall to be met by or in relation to the individuals to whom shares included in that issue have been issued, the requirements for EIS relief (see section 157) -
 - (a) are for the time being met in relation to the shares to which the statement relates, and
 - (b) have been so met at all times since the shares were issued.
- ...
- (3) A compliance statement must be in such form as the Commissioners for Her Majesty's Revenue and Customs direct and must contain-
 - (a) such additional information as the Commissioners reasonably require, including in particular information relating to the persons who have requested the issue of compliance certificates,
 - (b) a declaration that the statement is correct to the best of the issuing company's knowledge and belief, and

- (c) such other declarations as the Commissioners may reasonably require.
- (4) The issuing company may not provide an officer of Revenue and Customs with a compliance statement in respect of any shares issued by it in any tax year –
 - (a) before the requirement in section 176(2) or (3) (trade etc. must have been carried on for 4 months) is met, or
 - (b) later than two years after the end of that tax year or, if that requirement is first met after the end of that tax year, later than two years after the requirement is first met.

206. Appeal against refusal to authorise compliance certificate

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.

207. Penalties for fraudulent certificate or statement etc.

The issuing company is liable to a penalty not exceeding £3,000 if–

- (a) it issues a compliance certificate, or provides a compliance statement, which is made fraudulently or negligently, or
- (b) it issues a compliance certificate in contravention of section 204(3) or (4).”

Part 5A of the ITA (SEIS)

12. Chapter 4 of Part 5A of the ITA includes section 257DK, which provides so far as relevant as follows:

“257DK. No previous other risk capital scheme investments

- (1) The requirement of this section is that –
 - (a) no EIS investment or VCT investment is or has been made in the issuing company on or before the day on which the relevant shares are issued, and
 - ...
- (2) An ‘EIS investment’ is made in the company if the company –
 - (a) issues shares (money having been subscribed for them), and
 - (b) (at any time) provides a compliance statement under section 205 in respect of the shares;
 and the EIS investment is regarded as made when the shares are issued

...”

13. Chapter 5 of Part 5A of the ITA includes sections 257EB-257EF, which correspond to sections 203-207 in Chapter 5 of Part 5 of the ITA, although there are certain small differences. Section 257EE is identical to section 206.

Part IV of the TMA

14. Part IV of the TMA, which is entitled “Assessment of claims”, includes the following provisions:

“31. Appeals: right of appeal

- (1) An appeal may be brought against—
- (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
 - (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
 - (c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
 - (d) any assessment to tax which is not a self-assessment.

...

31A. Appeals: notice of appeal

- (1) Notice of an appeal under section 31 of this Act must be given—
- (a) in writing,
 - (b) within 30 days after the specified date,
 - (c) to the relevant officer of the Board.

...

42. Procedure for making claims

...

- (1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

...

- (9) Where a claim has been made (whether by being included in a return under section 8, 8A, or 12AA of this Act or otherwise) and the claimant subsequently discovers that an error or mistake has been made in the claim, the claimant may make a supplementary claim within the time allowed for making the original claim.”

Part V of the TMA

15. Part V of the TMA, which is entitled “Appeals and other proceedings”, contains various provisions relating to appeals which it is not necessary for present purposes to set out.

The appeal

16. X-Wind advances two main grounds of appeal. First, it contends that the EIS1 form it submitted on about 22 March 2013 was not a “compliance statement” within the meaning of section 205 of the ITA, because X-Wind did not intend to enable the investors to claim EIS relief and used the wrong form by mistake. Secondly, it contends that it is entitled to make a supplementary claim by virtue of section 42(9) of the TMA.

First ground of appeal

17. The first ground of appeal is not one which was advanced before the FTT. X-Wind points out that, by virtue of section 205(1), an EIS compliance statement is a statement, putting it shortly, that the requirements for EIS relief have been and are being met in relation to the relevant shares. In the present case, X-Wind did not intend to enable the investors to claim EIS relief, it intended to enable them to claim SEIS relief. It used the wrong form by mistake. It follows, X-Wind argues, that the EIS1 form it submitted was a nullity.
18. I am unable to accept this argument. The EIS1 form which X-Wind submitted was on its face a compliance statement for the EIS which satisfied the requirements of section 205. As counsel for HMRC submitted, it is clear from section 205(3)(b) that the legislature intended that HMRC should be able to rely upon the accuracy of the compliance statement and it is clear from section 207 that the company’s intention, even if it is fraudulent or negligent, does not prevent it from having provided a compliance statement. It is therefore unnecessary for me to consider counsel for HMRC’s further submission based on the restrictions on state aid.

Second ground of appeal

19. X-Wind argues that (1) the refusal by HMRC to authorise the issue of an SEIS compliance certificate in respect of the first tranche of investment is to be taken to be a decision disallowing a claim by the company by virtue of section 257EE of the ITA and (2) by virtue of section 42(9) of the TMA, the company, having discovered that there was a mistake in the EIS1 form, was entitled to make a supplementary claim in the form of a SEIS compliance statement.

20. Although counsel for X-Wind presented its case as if there was a connection between section 257EE of the ITA and section 42(9) of the TMA, in my judgment there is no relevant connection.
21. So far as section 257EE of the ITA is concerned, there is no dispute that HMRC refused to issue SEIS compliance certificates in respect of the three tranches of investment. Nor is there any dispute that, by virtue of section 257EE, that refusal is to be taken to be a decision disallowing a claim by X-Wind, with the consequence that X-Wind can appeal against it, as it has done. But that in itself does not assist X-Wind, because it is common ground that the refusal was justified unless X-Wind can rely upon the replacement compliance statement. Thus X-Wind still requires some other basis for attacking HMRC's refusal to allow it to do that. It follows that it is immaterial that, as counsel for X-Wind pointed out, Part IV of the TMA contains provisions relating to appeals as well as Part V. In particular, as counsel for HMRC pointed out, this is not an appeal falling within section 31.
22. Turning to section 42(9) of the TMA, the FTT held that a compliance statement was not a claim and therefore X-Wind could not rely upon section 42(9). Counsel for X-Wind submitted that the FTT was in error. I do not accept this submission. A compliance statement is not a claim, it is a statement made by the issuing company in order to obtain authorisation for compliance certificates under sections 204 or 257EC of the ITA which can be used by the investors to make claims under section 203 or 257EB for EIS relief or SEIS relief (the terms "EIS relief" and "SEIS relief" being defined elsewhere in the ITA), as the case may be. The legislation draws a clear and logical distinction between "statements", "certificates", "claims" and "relief". It is precisely for this reason that sections 206 and 257EE are required in order to enable a company to appeal against a refusal of a compliance certificate. As counsel for HMRC pointed out, there are similar deeming provisions in sections 236(1) and 257GA in respect of notices under sections 234(3)(b) and 257FR(3)(b) of the ITA respectively.
23. Furthermore, as counsel for HMRC submitted, there are two other difficulties with X-Wind's reliance upon section 42(9). The first is that, even if a compliance statement can constitute a claim, the EIS1 form did not amount to a valid claim since it did not quantify the claim as required by section 42(1A). Moreover, this was not an error or mistake which could be rectified under section 42(9), because it follows from the nature of a compliance statement that it does not attempt to quantify the claim. The replacement SEIS1 form is thus no improvement in this regard.
24. The second is that it is difficult to describe the replacement SEIS1 form as a "supplementary" claim. It is not intended to supplement the original claim, but to replace it in its entirety. This provides further support for the view that section 42(9) is not intended to deal with cases such as this.

Conclusion

25. For the reasons given above, the appeal is dismissed.

MR JUSTICE ARNOLD

Release date: 27 July 2017