Neutral Citation: **[2024] UKUT 00075 (TCC)**

Case Number: UT/2022/000123

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, Fetter Lane,
London, EC4A 1NL

SEED ENTERPRISE INVESTMENT SCHEME – whether arrangements for issuing shares were "disqualifying arrangements" – whether Condition A in s257CF(3) Income Tax Act 2007 met – scope of "arrangements" in s257HJ – meaning of "relevant person" and "party to the arrangements" in s257CF(6)

Heard on: 16 October 2023
Judgment date: 25 March 2024

Before

JUDGE GREG SINFIELD

JUDGE ASHLEY GREENBANK

Between

COCONUT ANIMATED ISLAND LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Harriet Brown, counsel, and Rebecca Sheldon, counsel, instructed by the Appellant

For the Respondents: Ruth Hughes, counsel, and Tomos Rees, counsel, instructed by the Solicitor's Office to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by the appellant, Coconut Animated Island Limited ("CAIL"), against a decision of the First-tier Tribunal (the "FTT") dated 23 August 2022 (the "FTT Decision")[1]. In the FTT Decision, the FTT dismissed CAIL's appeal against the refusal of the respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), to authorize CAIL to issue compliance certificates for the Seed Enterprise Investment Scheme ("SEIS") under section 257EC of the Income Tax Act 2007 ("ITA")[2] in respect of shares issued by CAIL between 19 March 2018 and 5 April 2018.

2. HMRC initially refused to authorize the issue of compliance certificates on the grounds that CAIL failed the "risk-to-capital condition" (as required by section 257AA(za) and set out in section 257AAA) because CAIL did not have "objectives to grow and develop its trade in the long term" (section 257AAA(1)(a)). HMRC subsequently advanced two further reasons for their refusal to authorize the issue of compliance certificates, namely that:

> (1) CAIL failed to meet the "qualifying company requirement" (as required by section 257AA(d) and set out in section 257D) because, at the relevant times, CAIL's trade consisted wholly or as to a substantial part of "excluded activities" namely receiving royalties or licence fees relating to intangible assets that it had not "created" (section 189(1)(b), section 192(1)(e), section 195); and or alternatively
>
> (2) that the relevant shares issued by CAIL did not meet the "general requirements" (section 257AA(c) and Chapter 3 Part 5A ITA) because the arrangements for issuing the shares were "disqualifying arrangements" as defined in section 257CF(2) ITA on the grounds that either Condition A (in section 257CF(3) ITA) or Condition B (in section 257CF(4) ITA) was met.

3. CAIL appealed to the FTT. The FTT dismissed CAIL's appeal against HMRC's decision on the grounds that the arrangements for issuing the shares were "disqualifying arrangements" because Condition A was met. However, the FTT also rejected the other grounds that HMRC advanced in support of its decision to refuse to authorize CAIL to issue compliance certificates. In particular, the FTT decided that:

> (1) the risk-to-capital condition was met;
>
> (2) the whole or greater part of the value of the intangible assets from which CAIL received royalties and licence fees was created by CAIL and so CAIL's trade did not consist wholly or as to a substantial part of excluded activities;
>
> (3) Condition B was not satisfied and so the arrangements for issuing the shares were not disqualifying arrangements for that reason.

4. The FTT refused permission to appeal. However, CAIL was granted permission to appeal against the FTT Decision by the Upper Tribunal. HMRC filed a respondents' notice in which, in addition to the grounds on which the FTT reached its decision, HMRC requests that this tribunal uphold the FTT Decision on one or more of the grounds that were rejected by the FTT.

BACKGROUND

5. In the FTT Decision, the FTT first set out certain agreed facts (FTT [8]). It then considered the documentary evidence (FTT [10]-[20]) and the witness evidence of Mr

[1] In this decision, we refer to paragraphs from the FTT Decision in the form "FTT [xx]".
[2] References to section numbers in this decision are to provisions of ITA unless otherwise stated.

Christopher Fenna on behalf of CAIL (FTT [21]) before making certain findings of fact on two specific issues (FTT [24]-[38]).

6. We adopt the facts as set out and determined by the FTT.

7. We will refer in more detail to the facts as found by the FTT as we address the issues that are before the tribunal. However, it will assist our explanation of those issues if we first summarize the facts that form the background to this appeal.

The CHF Group

8. CHF Media Group Limited ("CHF MGL") is the parent company of a group of companies (the "CHF Group").

9. The CHF Group raised funds for programmes through a "fund" (the "CHF Fund") pursuant to which third-party investors were invited to subscribe for shares in special purpose investee companies, each of which held the intellectual property rights to a particular concept or show. The CHF Fund is not a legal entity. It is a collection of investment management agreements between the independent manager of the fund and the investors.

10. The typical model was for investors to acquire shares representing 50% of the voting rights and economic equity in an investee company, which held the rights to a particular programme or project. The investors' shares would be held through a nominee company which was a member of the CHF Group. CHF MGL would acquire shares representing the remaining 50% of the voting rights and economic rights in the investee company.

11. Suitable concepts or shows for investment by the CHF Fund were identified by the fund's creative commercial committee (the "CCC"), which was made up of directors, employees, and consultants of the CHF Group. Where appropriate, a concept or show would then be recommended to the independent manager of the fund by CHF Enterprises Limited ("CHF Enterprises"), a member of the CHF Group. The manager could also take advice from the CCC.

12. If the manager decided that the CHF Fund should participate in a new concept or show, the intellectual property rights relating to that concept or show would be transferred to a newly-incorporated investee company, which would be owned in the manner described above.

CAIL and the acquisition of rights in Coconut Bay

13. CAIL was one-such special purpose investee company. CAIL was incorporated on 16 May 2017 to exploit the intellectual property rights to a pre-school animation programme called "Coconut Bay", and related spin-offs.

14. On incorporation: CAIL's registered office was the same as other members of the CHF Group at that time; its sole director was Mr Adrian Wilkins, the chief executive officer of the CHF Group; and its sole shareholder was Ms Jean Hawkins, who held 100 A ordinary shares in CAIL. Ms Hawkins was not a director or employee of a member of the CHF Group, but was a director of other special purpose investee companies.

15. Coconut Bay was conceived by Mr Fenna at some point in the late 1990s. In April 2017, Mr Fenna proposed the Coconut Bay concept to the CCC. At the time, Mr Fenna was the creative director of CHF Entertainment Limited ("CHFE"), a member of the CHF Group. He was also a member of the CCC (although he did not himself participate in the decision to recommend the investment in Coconut Bay).

16. In August 2017, CAIL and Mr Fenna entered into an agreement (the "IP Assignment Agreement") under which Mr Fenna assigned the intellectual property rights in Coconut Bay

to CAIL in consideration for the payment of £1 and the right to 10% of the net profits of CAIL with effect from the date of the agreement.

The issue of shares to investors and correspondence with HMRC

17. On 6 September 2017, Mr Wilkins wrote to HMRC on behalf of CAIL asking for advance assurance that CAIL's shares would qualify for investment under the SEIS and provided information to HMRC about CAIL and the activities that it intended to carry on (the "AA Letter"). The AA Letter enclosed a copy of a draft production services agreement (the "draft PSA") between CAIL and CHFE, pursuant to which CHFE would provide the services to produce initial "webisodes"; a copy of an information memorandum for the CHF Fund (the "IM"); and an investor brochure which had been prepared for prospective investors in CAIL by the CHF Group on behalf of the CHF Fund (the "Investor Brochure").

18. On 16 October 2017, HMRC confirmed that, on the basis of the information which CAIL had supplied, HMRC would be able to authorize CAIL to issue compliance certificates under Section 257EC(1) in respect of shares issued to individual investors.

19. On 19 October 2017, Ms Hawkins was appointed as a director of CAIL and, on 23 October 2017, Mr Wilkins ceased to be a director of CAIL.

20. CAIL issued B ordinary shares to nominee companies to be held on behalf of investors – including a nominee company for investors in the CHF Fund – on various dates between 13 December 2017 and 5 April 2018. A total of 526,621 B ordinary shares were issued for a total subscription price of £144,397; of which 253,221 B ordinary shares were issued on dates between 19 March 2018 and 5 April 2018 for an aggregate subscription price of £63,306.25. CAIL submitted compliance statements for the various share issues to HMRC.

21. On 6 June 2018, Mr Fenna was appointed as a director of CAIL and Mr Fenna and CAIL entered into a services agreement (the "Services Agreement").

22. On 5 July 2018, CAIL entered into a production services agreement (the "PSA") with CHFE pursuant to which CHFE agreed to provide production services in return for payments set out in the PSA. The terms of the PSA were substantially the same as those in the draft PSA that had been sent to HMRC with the AA Letter, subject to certain exceptions which are identified by the FTT (at FTT [19]).

23. On 3 August 2018, Ms Hawkins transferred 98 of her 100 A ordinary shares to CHF MGL.

24. On 7 August 2018, HMRC wrote to CAIL informing CAIL of the new "risk-to-capital condition" requirement for SEIS relief that was in the course of being enacted and which would apply to shares issued on or after 15 March 2018. HMRC expressed the view that it was likely that the issue of B ordinary shares made on 19 March 2018 would fall foul of the new condition.

25. On 10 August 2018, HMRC sent to CAIL authority to issue compliance certificates in relation to each of the issues of B ordinary shares made by CAIL between 13 December 2017 and 28 February 2018.

26. On 20 February 2019, CAIL entered into an agreement with CHF TV Limited ("CHF TVL") pursuant to which CAIL licensed to CHF TVL the right to show animated shorts of "Coconut Bay" on certain channels and platforms between 1 May 2018 and 30 April 2023 an unlimited number of times for a fee equal to 50% of the gross receipts received by CHF TVL in respect of the programme.

27. On 30 April 2019, HMRC informed CAIL of their decision to refuse to authorize the issue of compliance certificates in relation to each of the issues of B ordinary shares made by CAIL between 19 March 2018 and 5 April 2018.

ISSUES BEFORE THE TRIBUNAL

28. We have summarized at [3] and [4] above, the main conclusions from the FTT Decision and the issues, which the parties have brought before this tribunal. In summary, those issues are:

(1) on CAIL's appeal, whether the FTT erred in law in finding that the arrangements for issuing the shares were "disqualifying arrangements" because Condition A (in section 257CF(3)) was met;

(2) on HMRC's respondents' notice, whether the FTT erred in law in finding that:

(a) the risk-to-capital condition was met;

(b) the whole or greater part of the value of the intangible assets from which CAIL received royalties and licence fees was created by CAIL and so CAIL's trade did not consist wholly or as to a substantial part of excluded activities;

(c) Condition B (in section 257CF(4)) was not satisfied and so the arrangements for issuing the shares were not disqualifying arrangements for that reason.

CAIL'S APPEAL: DISQUALIFYING ARRANGEMENTS

29. We turn first to the question of CAIL's appeal and whether Condition A is met in relation to the arrangements in this case.

Relevant legislation

30. The issues on CAIL's appeal concern the application of one of the "general requirements" for the application of SEIS relief in Chapter 3 Part 5A ITA. This is the requirement that the relevant shares must not be issued in connection with "disqualifying arrangements". This requirement is set out in section 257CF, so far as relevant, as follows:

> **257CF The no disqualifying arrangements requirement**
>
> (1) The relevant shares must not be issued, nor any money raised by the issue spent, in consequence or anticipation of, or otherwise in connection with, disqualifying arrangements.
>
> (2) Arrangements are "disqualifying arrangements" if—
>
> (a) the main purpose, or one of the main purposes, of the arrangements is to secure—
>
> (i) that a qualifying business activity is or will be carried on by the issuing company or a qualifying 90% subsidiary of that company, and
>
> (ii) that one or more persons (whether or not including any party to the arrangements) may obtain relevant tax relief in respect of shares issued by the issuing company which raise money for the purposes of that activity or that such shares may comprise part of the qualifying holdings of a VCT,
>
> (b) that activity is the relevant qualifying business activity, and
>
> (c) one or both of conditions A and B are met.
>
> (3) Condition A is that, as a (direct or indirect) result of the money raised by the issue of the relevant shares being spent as required by section 257CC, an amount representing the whole or the majority of the amount raised is, in the course of the arrangements, paid to or for the benefit of a relevant person or relevant persons.
>
> (4) Condition B is that, in the absence of the arrangements, it would have been reasonable to expect that the whole or greater part of the component

activities of the relevant qualifying business activity would have been carried on as part of another business by a relevant person or relevant persons.

(5) For the purposes of this section it is immaterial whether the issuing company is a party to the arrangements.

(6) In this section—

"component activities" means—

(a) if the relevant qualifying business activity is activity A (see section 257HG(2)), the carrying on of a qualifying trade, or preparing to carry on such a trade, which constitutes that activity, and

(b) if the relevant qualifying business activity is activity B (see section 257HG(4)), the carrying on of research and development which constitutes that activity;

"qualifying holdings", in relation to the issuing company, is to be construed in accordance with section 286 (VCTs: qualifying holdings);

"relevant person" means a person who is a party to the arrangements or a person connected with such a party;

"relevant qualifying business activity" means the activity for the purposes of which the issue of the relevant shares raised money;

"relevant tax relief", in respect of shares, means one or more of the following—

(a) SEIS relief in respect of the shares;

...

31. Those provisions contain various defined terms, the definitions of which are set out in other parts of the legislation. We will not set out all those defined terms as they are not in issue. We should, however, note the following:

(1) The term "qualifying business activity" is defined for these purposes in section 257HG. In summary, a "qualifying business activity" involves either the carrying on of a new qualifying trade (or preparation to carry on a new qualifying trade) by the issuing company (or a 90% subsidiary of the issuing company) or the carrying on of research and development by the issuing company (or a 90% subsidiary of the issuing company) from which a new qualifying trade will be derived.

(2) The definition of "arrangements" is found in section 257HJ. It is as follows:

"arrangements" includes any scheme, agreement, understanding, transaction or series of transactions (whether or not legally enforceable)

It follows that "relevant person" means a person who is a party to any scheme, agreement, understanding, transaction or series of transactions (whether or not legally enforceable) or is connected with such a party.

(3) The meaning of "connected" persons – which is relevant for the purposes of the definition of a "relevant person" in section 257CF(6) - is given by section 993. We do not need to refer to the definition in full. The key point for present purposes is that a company will be treated as connected with another company if the two companies are under common control (section 993(5) and (6)).

32. As can be seen from the summary above, the definition of "disqualifying arrangements" in section 257CF is set out in section 257CF(2)(a)-(c). The first two elements of that definition (contained in section 257CF(2)(a)-(b)) are that:

(1) the main or one of the main purposes of the arrangements is to secure that:

(a) a qualifying business activity is carried on by the issuer or a 90% subsidiary of the issuer, and

(b) the prospect for investors of obtaining SEIS relief; and

(2) the qualifying business activity must be the one for which the relevant shares are issued.

33. These requirements will be met in the case of most (if not all) share issues that are designed to qualify for SEIS relief. They set the "ballpark" in which the provision is intended to operate. The "arrangements" at which the provision is truly targeted are defined by reference to the criteria in Condition A (section 257CF(3)) and Condition B (section 257CF(4)), which are referred to in section 257CF(2)(c).

34. It is Condition A that is relevant for the purpose of CAIL's appeal. In essence, Condition A is met if, as part of the arrangements, the whole or the majority of the amount raised by the relevant share issue is paid to or for the benefit of a relevant person as a result of the proceeds of the share issue being spent on the qualifying business activity.

The FTT Decision

35. Before the FTT, CAIL accepted that the requirements of section 257CF(1) and sections 257CF(2)(a) and (b) were met (FTT [73]). It followed that the only issue that fell to be decided by the FTT was whether either Condition A or Condition B was satisfied (FTT [74]). As regards Condition A, CAIL also accepted that the majority of the amount raised by CAIL from the relevant share issues had been paid to CHFE under the PSA.

36. The FTT found that Condition A was satisfied and so the relevant shares were issued in connection with disqualifying arrangements. The FTT stated its conclusion at (FTT [87]-[92]) in the following terms:

> 87. In our view, it is clear beyond any reasonable doubt that the arrangements in this case satisfy Condition A in Section 257CF(3) and that therefore:
>
> (1) the relevant shares in this case were issued and the money raised by the issues was spent in consequence or anticipation of, or otherwise in connection with, 'disqualifying arrangements';
>
> (2) the general requirements in respect of the relevant shares are not met because there were 'disqualifying arrangements' for the purposes of Section 257C(f); and
>
> (3) the investors who subscribed for the relevant shares were not entitled to SEIS relief in respect of those shares because the condition in Section 257AA(c) was not met.
>
> 88. We cannot see how it is possible to reach a contrary conclusion on the facts in this case given the extensive involvement of members of the CHF Group in virtually every aspect of the 'arrangements'.
>
> 89. The 'arrangements' in this case clearly involved:
>
> (1) the incorporation of the Appellant;
>
> (2) the acquisition by the Appellant of the intellectual property of Mr Fenna;
>
> (3) the raising of funds by the Appellant by the issue of B ordinary shares to the investors in the CHF Fund in order for the Appellant to be in a position to carry on its 'qualifying trade'; and

(4) the Appellant's commissioning the development of various intangible assets and using the funds so raised to discharge the invoices of those whom it had commissioned to carry out that development, as that was essential to the carrying on of that 'qualifying trade'.

90. Although it ultimately makes no difference to the outcome on this question, it is arguable that the 'arrangements' also involved:

(1) the exit strategy outlined in the IM in relation to investee companies in general. This is because, although that exit strategy has yet to be deployed in relation to the Appellant specifically, it is part of the model pursuant to which all of the investee companies were held and, as such, we would see it as being an integral part of the overall 'arrangements' in relation to the Appellant as well; and

(2) the licensing of the Coconut Bay programme to CHF TVL pursuant to the Acquisitions Agreement because that was an integral part of the 'qualifying trade' carried on by the Appellant.

91. On the basis of that description of the 'arrangements', we do not see how it is possible to assert that no member of the CHF Group was a party to the 'arrangements' as so described. On the contrary, the fingerprints of the CHF Group are all over every step in the 'arrangements'. For instance:

(1) the Appellant was incorporated as a result of a successful presentation by Mr Fenna to the CCC, the body described by the IM as being 'at the heart of the CHF Media Fund and…key to its success' and composed entirely of employees of the CHF Group, including the chief executive officer of the group, Mr Wilkins;

(2) the concept of Coconut Bay came from Mr Fenna, who was the creative director of CHFE at the time when the Proposal was put to the CCC and, in the words of the IM, like the other employees and independent contractors of CHFE, Mr Fenna was one of the people 'whose job it is not only to produce and develop the shows or concepts but also to come up with ideas to be considered for development by the CCC';

(3) 49% of the equity in the Appellant was held by CHF MGL;

(4) all of the investors in the Appellant invested through the CHF Fund – that was the case even for investors in the Appellant who came to invest as a result of advice from financial intermediaries such as Kuber Ventures - and it was the CHF Fund which decided on the deployment of the investors' funds as between the various investee companies. Although the CHF Fund had its own independent manager, the IM made it clear that:

(a) the manager's decisions were based on advice from CHF Enterprises, having consulted the CCC; and

(b) the fees of the manager would be discharged by the investee companies and, if not so discharged, would be recouped by the CHF Fund on exit prior to any dividends being paid to investors;

(5) the CHF Group paid various initial expenses in establishing the CHF Fund and became entitled to receive various fundraising fees from the CHF Fund on an ongoing basis;

(6) the greater part of the shares in the Appellant which were held by the investors were held through a nominee which was a member of the CHF Group (CHF Nominees);

(7) the first director of the Appellant was Mr Wilkins, the chief executive officer of the CHF Group, the second director of the Appellant was Ms Hawkins, who, although not employed by the CHF Group, was nominated by the CHF Fund to act as the investors' champion in relation to the Appellant and the other investee companies, and the third director of the Appellant was Mr Fenna, the creative director of CHFE;

(8) the IM emphasised that:

(a) to ensure the success of each investee company, each investee company would 'have access to the full range of CHF's extensive in-house expertise and support';

(b) the CHF Group would receive various fees from investee companies, including development and production fees, licensing and merchandising fees, and distribution fees; and

(c) the investee companies faced a significant commercial exposure to the CHF Group,

and, in the case of the Appellant specifically, the Appellant had access to the employees and independent contractors of CHFE, paid most of its budget to CHFE under the production services agreements and faced a significant commercial exposure to CHFE;

(9) the revenue projections and budget in relation to the Appellant in the Investor Brochure were prepared by Ms Johnston, the head of the corporate finance arm of CHF Enterprises and a member of the CCC;

(10) the anticipated exit strategy in relation to each investee company outlined in the IM involved, in the first instance, the acquisition by the CHF Group of the shares held by investors in that investee company, using its own shares in the investee company as leverage; and

(11) the Appellant licensed the Coconut Bay programme to CHF TVL pursuant to the Acquisitions Agreement and CHF TVL was entitled to retain 50% of the gross receipts from its use of the programme.

92. Given all of that, it is plain that several members of the CHF Group were party to the 'arrangements' and, as each member of the CHF Group was connected with each other member of the group for the purposes of Section 993, it follows that each member of the CHF Group, including CHFE, was a 'relevant person' by virtue of the participation in the 'arrangements' of any one or more of those members. If one then asks whether, as a direct or indirect result of spending the money raised from the investors for the purposes of the 'qualifying business activity' for which that money was raised, an amount representing the majority of the amount raised was, in the course of the 'arrangements', paid to or for the benefit of CHFE, that question can have only one answer, which is that it did. The evidence of Mr Fenna was that more than half of the Appellant's budget was paid to CHFE under the production services agreements and Ms Brown accepted that that was the case.

The Grounds of Appeal

37. CAIL's overarching ground of appeal against the FTT Decision is that the arrangements were not "disqualifying arrangements" because Condition A in subsection 257CF(3) ITA 2007 was not met. In support of that ground, CAIL makes five points in its grounds as follows:

…:

(1) Neither CHFE nor any other member of the CHF Group was a "party to the arrangements." The natural meaning of "party to arrangements" under

Condition A is analogous to a party to a contract. As a similar example, it is submitted that drafting a contract does not make an individual or company a party to that contract. Whilst CHFE and CHF Group were to varying extents "involved" in the arrangements, they were not a "party" to them.

(2) Further, the FTT did not attempt to define what being a "party" to arrangements means. Instead, the meaning of "party" is subsumed into the much broader meaning of "arrangements" in para 92. This is an error of law, as the legislation clearly requires that there is an arrangement which an individual or company is party to, not merely that there is an "arrangement".

(3) This error is further demonstrated by paragraph 9 of the FTT permission refusal, where the FTT Judge outlines that "we understood that a party to arrangements is a person involved in the arrangements". A party is necessarily involved in arrangements, but it does not follow that anyone involved in arrangements is necessarily a party to them.

(4) The subcontracting of production services to CHFE was not part of the "arrangements" as held in para 93, but the provision of services by CHFE in return for payments pursuant to agreements which had been entered into on an arm's length basis. The payments made by the Appellant to CHFE were made pursuant to the production services agreement, not in the course of any "arrangement" to funnel funds to CHFE. The requirement in s257CF(3) ITA 2007 that "an amount representing the whole or the majority of the amount raised is, in the course of the arrangements, paid to or for the benefit of a relevant person or relevant persons" is consequently not met.

(5) Additionally, there are several inferences of fact which do not follow in the judgment which were used to support the position that the CHF Group was a party to the arrangement.

(i) At para 30 of the judgment it was accepted that Mr Fenna was wearing "two hats" at the relevant time, and yet at para 91(2), Mr Fenna's involvement with CHFE is cited as a reason for why CHFE was a party to the arrangements. This inference is inconsistent with the findings of fact.

(ii) At para 91(7) it was highlighted that Ms Hawkins was not a member of the CHF group, yet this was still cited in support of showing CHF Group being a party to the arrangement;

(iii) At para 91(11), it was set out the Appellant licensed Coconut Bay to CHF TVL, but this is not a part of the CHF group.

38. The Grounds of Appeal therefore focus on two main points:

(1) the scope of the "arrangements" – and, in particular, whether the PSA was part of the arrangements; and

(2) the meaning of a "party" to the arrangements – and, in particular, whether members of the CHF Group and others could be treated as parties to the arrangements, and so whether they (and their connected persons) are relevant persons for the purposes of Condition A.

The parties' submissions

39. Ms Brown makes the following submissions on behalf of CAIL:

(1) The FTT failed properly to determine the scope of the "arrangements". The arrangements in question extended only to the issue of shares to the investors and the acquisition of the intangible assets by CAIL from Mr Fenna. They did not include the exit strategy, which may or may not have been applied to CAIL, and they did not include

the PSA, which was a commercial contract on arm's length terms. It was not designed to "benefit" CHFE.

(2) No member of the CHF Group was a party to the arrangements. No member of the CHFE Group was a "relevant person" for the purposes of Condition A. It was not sufficient that a person was somehow involved in the arrangements. Nor was it relevant that, in the words of the FTT, "the fingerprints of the CHF Group were all over every step in the arrangements" (FTT [91]). In order to be a "party" a person had to assume some responsibility for the arrangements or have some control over them. The reference to being a "party" to the arrangements was akin to being a party to a contract. If that were not the case, the scope of the provisions would be materially affected by whether the arrangements in question were or were not legally enforceable.

40. Ms Brown took the tribunal through each of the indicative factors to which the FTT referred in coming to its conclusion that members of the CHFE Group were a party to the arrangements as set out in paragraph [91] of the FTT Decision. The key themes of her submissions were as follows:

(1) In relation to several of the factors, the FTT relied on actions undertaken by individuals who had some connection with the CHF Group, but who were not acting on behalf of the CHF Group at the time and, therefore, those actions could not be attributed to the CHF Group. For example, Mr Fenna made his presentation of the concept for Coconut Bay to the CCC in his personal capacity (FTT [(91(1)] and [91(2)]). Mr Wilkins and Ms Hawkins acted as directors of CAIL and, in Ms Hawkins case, shareholder in CAIL (FTT [91(7)]) rather than in a capacity in which they had an association with the CHF Group.

(2) The CHF Group held a minority shareholding in CAIL (FTT [91(3)]. The shareholding did not make any member of the group a "party" to any arrangement. The CHF Group could not control CAIL.

(3) The FTT referred to actions of the CHF Fund (FTT [91(4)]). The CHF Fund was not a legal person and could not be regarded as a relevant person through whom a connection could be traced. It was operated by an independent manager who was not connected to the CHF Group.

(4) At times, the FTT referred to transactions which were not part of the arrangements even as identified by the FTT (FTT [91(5)], [91(8)]).

(5) The fact that CAIL had significant commercial exposure to the CHF Group was not relevant to the question as to whether a member of the CHF Group was a party to any arrangements (FTT [91(3)], [91(8)]).

(6) The FTT referred to the agreement with CHF TVL (FTT [91(11)]). There was no evidence that CHF TVL was part of the CHF Group and no finding of fact that CHF TVL was part of the CHF Group.

41. Miss Hughes, for HMRC, referred us to the strength of the FTT's conclusion that Condition A was satisfied. In argument before the tribunal, she focused, however, on the PSA. She says the PSA was clearly part of the "arrangements". It was the means by which CAIL undertook its "qualifying activity". CHFE was clearly a party to the PSA and so a party to the arrangements. It did not matter that the PSA was a commercial contract on arm's length terms.

Discussion

42. The only issue before us on CAIL's appeal is whether or not Condition A is satisfied. Condition A requires that, as a result of the money raised by the share issue being spent on the

qualifying trade, the whole or a majority of the amount raised by the share issue is, in the course of the arrangements, paid to or for the benefit of a relevant person.

43. Ms Brown accepts that the greater part of the funds raised by the relevant share issues was paid to CHFE under the PSA. So, in determining whether Condition A is satisfied, we need to address the following issues.

(1) What was the scope of any "arrangements" and were the sums raised by the share issue to which those arrangements related paid to CHFE "in the course of" the arrangements?

(2) Was CHFE a relevant person in relation to those arrangements – i.e. was CHFE a party to the arrangements or a connected person of a party to the arrangements?

Arrangements

44. The definition of "arrangements" in section 257HJ is similar to that found in many other provisions in the tax legislation. For example, the same definition of "arrangements" is used in the loan relationships code (section 698C(2) Corporation Tax Act 2009), in the restrictions on buying capital losses (section 184A(4) Taxation of Chargeable Gains Act 1992), and in the provisions of the general anti-abuse rule (see section 214(1) Finance Act 2013). It is recognized as being widely drawn.

45. In other contexts, the courts have acknowledged that the concept of an "arrangement" must involve some degree of unity or coordination between its component parts. This concept is described by Donovan LJ in *Crossland v Hawkins* [1961] Ch 537 at pages 549-550 as the relevant parts of an "arrangement" having "sufficient unity" in the context of the meaning of "arrangements" in the settlement provisions (now in chapter 5 Part 5 Income Tax (Trading and Other Income) Act 2005). However, the courts have been reluctant to go beyond that point and impose any further restriction or gloss on the definition (see Lord Walker in *Jones v Garnett* [2007] UKHL 35 at [50]). We take the same approach. In our view, questions concerning the scope of the arrangements can only be answered by reference to the context in which the term is used and the facts and circumstances of the particular case.

46. In the context of section 257CF, the first point that we note is that the arrangements must exist or be in contemplation either at the time at which the relevant shares are issued or at the time at which the proceeds of the share issue are spent (see section 257CF(1)).

47. As we have described above, the context also requires that the arrangements must have as a main purpose to secure (i) that a qualifying business activity is carried on by the issuer (CAIL) and (ii) that investors may obtain SEIS relief. The arrangements therefore, in addition to having "sufficient unity", had to have a particular purpose. For want of a better word, we will describe it as a "plan".

48. It is clear to us that there was such a plan. That plan is set out in the Information Memorandum that was sent to investors. It encompassed the incorporation of a special purpose investee company (CAIL), the issue of shares to nominee companies to hold those shares for the benefit of investors, and the acquisition of the rights to the concept for the show. The question for the FTT was whether the payment of funds to CHFE for production services was part of that plan.

49. The Information Memorandum refers to the fact that each investee company "may engage CHFE for development, production and animation services". In CAIL's case, the production services were provided under the PSA. Although the PSA was not signed until 5 July 2018 – which was after the relevant share issues in this case – the FTT found as a fact that there was an oral agreement in place between CAIL and CHFE based on the terms of the draft PSA (which the FTT found was on substantially the same terms as the PSA) "over the period

in question". Having taken into account the other findings of the FTT, we take the reference to the "period in question" to mean at least the period between 6 September 2017, when the draft PSA was sent to HMRC under cover of the AA letter, and the date of execution of the PSA. That finding is not challenged. It follows that, at the time of the issues of the relevant shares to the investors, there was an agreement between CAIL and CHFE for the production services to be provided by CHFE. It is accepted that the bulk of the proceeds of the relevant share issues were paid by CAIL to CHFE for production services.

50. On those facts, we agree with FTT's conclusion (at FTT [89] and [93]) that there were arrangements at the time of the relevant share issues which encompassed the incorporation of CAIL, the acquisition by CAIL of the intellectual property from Mr Fenna, the raising of funds by CAIL by the issue of shares to the investors in the CHF Fund, and CAIL's commissioning the development of various intangible assets and using the funds raised by the share issues to pay for those services. Those arrangements were designed as a whole, were described in the Information Memorandum, and were in existence at the time of the relevant share issues. They included the oral agreement with CHFE which formed the basis of the PSA. It was part of those arrangements that funds would be paid to CHFE.

51. We also reject Ms Brown's submission that the PSA (and the oral agreement based on the draft PSA) cannot be part of the arrangements because it is a commercial contract entered into on arm's length terms. There is nothing in the context of section 257CF to suggest that the arrangements as a whole, or an element of the arrangements, has to include some element of bounty if they are to fall within the scope of the provision. Condition A simply refers to the proceeds of the share issue being "paid to or for the benefit of" a relevant person. In our view, those words can extend to a payment made under a contract whether or not it is on commercial arm's length terms. The words "for the benefit of" do not impose any requirement for gratuitous intent. They simply ensure that the provision extends not only to cases where the direct recipient of the payment from the issuer company is a relevant person but also to cases where a payment is made to another person who holds those funds for or on behalf of a relevant person.

52. This interpretation is consistent with our understanding of the purpose of the provision, which, as we understand it, is to ensure that SEIS relief remains targeted at early-stage, smaller, high-risk companies and does not extend to structures used by existing larger scale businesses to obtain access to financing based on SEIS relief for which they would not otherwise qualify. It is also supported by the Explanatory Notes to the Government amendments to the Finance Bill 2012 which refer to the relevant amendments to section 257CF being required "to make it clear that the intention is to disqualify investment in companies which would be unlikely to exist in the first place, or would be unlikely to carry on the proposed activities, were it not for the disqualifying purpose".

Party to the arrangements

53. We take a similar approach to the question of whether CHFE was a "party" to the arrangements. Once again, in our view, whether a person should be regarded as a "party" to the arrangements should be determined by reference to the context in which the term is used and the facts and circumstances of the case, which include the arrangements in the form that we have described above.

54. Ms Brown submits that in order to be a party to arrangements, a person needs to be more than just involved in them. The person needs to have had some control over the arrangements or have taken some responsibility for them. We can understand that, in an appropriate case, a distinction might need to be made between a person who was directly involved in the making of the arrangements – that is, in formulating the plan – and a person who was more peripherally

involved - such as a person who becomes involved in a transaction that is contemplated by the arrangements, but played no part in devising them. For example, if arrangements involved the possibility that, at some stage in the future, an asset might be sold to a third party or an agreement might be reached with a third-party for the provision of services, the third-party purchaser or supplier, who is unaware of the purpose of the arrangements, might not be regarded as a party to arrangements at the time that they are planned and first implemented. However, that is not the case here. We do not need to decide whether a person in such circumstances would be a party or not and we do not do so.

55. We think, however, that Ms Brown's approach is too narrow. The question as to who should be regarded as a "party" to the arrangements has to be determined by reference to the context. In the context of section 257CF, as we have described, the relevant arrangements must possess two features: they have to exist or to be in contemplation at the time at which the shares are issued or when the proceeds of the share issue are spent; and they have to have a particular purpose. In our view, a person can be regarded as a "party" to arrangements that fall within section 257CF if, at the relevant time, they have sufficient involvement in the arrangements that it is appropriate to treat them as participating in that purpose. The relevant degree of involvement depends on the circumstances, but may be wider than being directly involved in devising the arrangements.

56. In the present case, the facts show that CHFE was heavily involved in the arrangements that we have just described. CHFE is referred to on numerous occasions in the Information Memorandum. It was a party to the oral agreement based on the draft PSA and later to the PSA. The oral agreement was in place at the time the investors subscribed for the relevant shares. It formed part of the arrangements and was the means by which the proceeds of the share issues were spent. This is not a case where an unwitting third-party becomes involved in arrangements which have a disqualifying purpose and has no knowledge of that purpose. CHFE's involvement was designed into the arrangements from the outset. It was a party to a step in the arrangements that was key to achieving that purpose. There is no clear finding in the FTT Decision as to which person or persons devised the arrangements but, in our view, it was not necessary to make such a finding in this case. In our view, given the degree of CHFE's involvement, it is appropriate to ascribe to CHFE some participation in the objectives of the arrangements as a whole and to describe it as a "party" to them.

57. We accept some of Ms Brown's criticism of the FTT's explanation of its conclusions (at FTT [91] and [92]). We accept that some of the factors listed in paragraph [91] of the FTT Decision do not demonstrate that a particular entity was a party to the arrangements as found by the FTT. That having been said, the factors identified by the FTT in support of its conclusion (at FTT [91]) do demonstrate the overall degree of involvement of members of the CHF Group in the establishment of CAIL and the marketing of its shares to investors. Even though the Information Memorandum was issued by the independent manager, it is inconceivable that it was issued without the agreement and participation of members of the CHF Group. Those factors are, at the very least, part of the factual background that we take into account in arriving at our conclusion.

58. For these reasons, in our view, CHFE was a "party" to the arrangements for the purposes of section 257CF.

Conclusion

59. Although our reasoning differs in some respects from that of the FTT, our conclusion is the same; the relevant shares were issued in consequence of "disqualifying arrangements" within section 257CF.

HMRC'S RESPONDENTS' NOTICE

60. Our conclusion on the first issue is sufficient to dismiss CAIL's appeal. We have considered whether we should continue to express our views on the matters set out in HMRC's respondents' notice. We have concluded that we should not do so. The issues arising in relation to them are complex. The points that have been raised by the parties include challenges to the findings of fact made by the FTT. Any conclusions that we did express on them would inevitably be obiter.

DISPOSITION

61. For the reasons that we have given, we dismiss this appeal.

COSTS

62. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE GREG SINFIELD
JUDGE ASHLEY GREENBANK

Release date: 25 March 2024