

Neutral Citation Number [2024] UKUT 00350 (TCC)



**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

<b>Applicant: Craig Kay</b>	<b>Tribunal Ref: UT/2024/000026</b>
<b>Respondents: The Commissioners for His Majesty's Revenue and Customs</b>	

**APPLICATION FOR PERMISSION TO APPEAL  
Decision upon oral renewal of permission hearing of 8 October 2024**

**DECISION NOTICE**

**Background**

1. The applicant, Mr Craig Kay, applies to the Upper Tribunal (Tax and Chancery) (“UT”) for permission to appeal against the decision, made on the papers, of the First-tier Tribunal (Tax Chamber) (“the FTT”) released on 12 October 2023 (“the FTT Decision”) and published as *Kay v HMRC* [2023] UKFTT 861 (TC).
2. Mr Kay renewed his application to the UT. I had previously refused permission to appeal on paper in my decision of 28 June 2024 sent to the parties. This is my decision following the oral renewal of the application heard on 8 October 2024. Mr Kay represented himself. HMRC attended as observers.
3. The FTT Decision concerned Mr Kay’s appeal against a closure notice in relation to the amount of relief on a gift of shares on 2 April 2004 in a company, Access Intelligence Plc, which Mr Kay had made to a charity. The only issue before the FTT was the market value of the shares at the time of the gift. The FTT preferred HMRC’s valuation of 9.44p per share rather than Mr Kay’s valuation of 42.5p per share, reducing the claimed amount of relief Mr Kay had claimed of £80,750 down to £17,936.

### **Upper Tribunal's jurisdiction on appeal**

4. An appeal to the UT from a decision of the FTT can only be made on a point of law (s11 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007")). It is therefore the practice of the UT in this Chamber only to grant permission to appeal where the grounds of appeal disclose an arguable error of law on the part of the FTT.

### **Grounds of appeal**

5. Mr Kay's overall ground of appeal is that the FTT erred in relying on HMRC's expert's report because it was deficient in that it failed "to consider important facts and failed to examine documents and/or supporting documentation in determining its valuation." He accepts the share figure was not 42.5p per share as he claimed but argues the correct share figure was 37p per share. In particular, he argues the expert report was wrong to dismiss real transactions which had taken place on 1 December 2003 at 37p per share as not being at arm's length in circumstances where although the transactions were by subscribers, the subscribers were unconnected parties, and where there was a legal commitment to further subscription (which he says the expert ought to have investigated further but did not).

6. At the oral hearing on renewal of permission before me Mr Kay emphasised his points regarding the significance of the commitment, explaining in essence his view that it meant there had been bargain struck upfront at a point in time in which the subscriber was not an existing shareholder. The commitment was "all part and parcel of the original 3<sup>rd</sup> party bargain".

7. He points out the valuation of 37p per share reflected the proposed acquisition of Readymarket Limited and subsequent flotation and also the view of the NOMAD.

8. Mr Kay has since provided me a copy of the expert's report, HMRC's skeleton argument, the Offer of Subscription document and a later placing document, and his own notes of closing submissions before the FTT. The commitment Mr Kay relies on is contained within the Offer for Subscription document for Readymarket PLC and refers to be it being a term of the Offer that a new shareholder agrees to "make or procure the making of a further subscription for new Ordinary Shares at the time of Admission". The amount is stipulated to be "equivalent to approximately 23 per cent of the amount invested pursuant to the Offer for Subscription and will be a debt due and owing from the New Shareholder upon Admission."

### **Discussion**

9. As mentioned above, and in my written refusal of permission decision, an appeal to the UT can only be made on a point of law. Mr Kay's ground is, in essence, that the FTT reached the wrong valuation in the light of the evidence that was before it and that it ought to have reached a different valuation. The valuation of the shares is a matter of fact. The law is clear that challenges to findings of fact can only amount to errors of law in the limited circumstances

where the finding has been made without any evidence, or where the evidence contradicted the finding, or where the only reasonable conclusion contradicted the finding.<sup>1</sup>

10. In terms of the evidence that was before the FTT, the FTT only had HMRC's expert evidence. That was a 64 page report explaining the detail of the various bases on which the expert had reached her valuation. Mr Kay did not adduce any expert evidence but he did have the opportunity to cross-examine HMRC's expert and to make submissions on what should be drawn from it. The FTT recorded (at [22]) the expert's evidence regarding the 37p price for the shares acquired pursuant to the commitment which explained "...as these were existing shareholders, the placing price is not indicative of an arm's length transaction; the price of the shares was determined by the number of new shares the Directors opted to issue." The FTT also noted (at [25]) the expert's explanation that the 37p per share valuation could not be reconciled with the actual lower sale price of the company later that day. (The 37p price gave a company value of £10m for a company sold on the same day for £2m).

11. I am not satisfied Mr Kay has demonstrated the expert's rejection of the 37p valuation and the FTT's reliance on that were irrational. The expert explained in her conclusion how the 37p price could have been either more or less than 37p depending on how many shares the Directors had decided to issue under the placing. She therefore considered it was not a reflection of market value but instead a value derived from the number of shares the Directors sought to place on the Company's admission to the AIM as an overall percentage of its ordinary issued share capital. It was plainly in such circumstances at least open to the expert and accordingly the FTT to reject the 37p valuation.

12. Mr Kay also argues it was incumbent on the valuer and HMRC to have obtained the contract and further information underlying the legal commitment for further subscription. It is not clear to me from the Offer of Subscription that there would necessarily need to be any further contract document. The terms of the application at the end of the subscription document, which contain an undertaking to be bound by the terms of the commitment as set out earlier in the document are consistent with the contract terms simply being represented by that document together with the accepted application. But in any case, to the extent Mr Kay had wanted the FTT to take account of further information or documents to show, in furtherance of his case, that the expert's analysis was wrong, then it was for him to put such evidence before the FTT. Mr Kay mentioned the difficulties in him as a small shareholder obtaining further information about the legal commitment beyond what was stated in public documents, but that would not explain why it then fell to HMRC to obtain the further information surrounding the commitment if any. (The difficulty also does not sit easily with the position Mr Kay adopted before the FTT which was that the reason HMRC ought to have found out more about the information was because the hypothetical prudent purchaser would have done so.)

13. Mr Kay's reliance on *IRC v Stenhouse's Trustees* [1992] STC 103 for the proposition that all evidence relevant to the issue was admissible unless excluded also does not take his application further. The expert's evidence regarding the transaction at 37p per share was not treated as inadmissible. Rather, its reliability as a guide to the market value was put in doubt

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<sup>1</sup> *Edwards v Bairstow* [1956] AC 14 – see also *Ingenious Games LLP and Others and The Commissioners for HM Revenue and Customs* [2019] UKUT 0226 (TCC) (at [54]) for a discussion of the UT's jurisdiction as regards challenges to factual findings

for the reasons already explained. Moreover, the nature of the commitment would not in any case detract from the expert's concern over the lack of reliability of the 37p per share valuation given the difficulty of reconciling that with the subsequent valuation based on company sale price in a transaction later that day.

14. Mr Kay also argued the FTT was wrong to accept HMRC's valuation because she wrongly took account of information, that would not have been available to a prudent purchaser in his circumstances (a small 0.67% shareholder). Although the valuer had herself identified (consistent with HMRC's own guidance) the need to look only at such publicly available information she, and in turn the FTT, had relied on various financial information and accounts which Mr Kay did not, as a small shareholder have access to. This submission reflects a point he made before the FTT that the statutory accounts of the company had not yet been filed as at the valuation date.

15. I am not however satisfied the expert was inconsistent in what she relied on, or that the FTT was accordingly wrong to rely on the expert's evidence. In accordance with her self-direction, the expert was careful in her report to identify and separate out her analysis by reference to the information that would have been available to the prudent purchaser as at 2 April 2004. That information, the report specifically noted, would include certain interim accounts announced on 27 February 2004. The FTT also noted at [23] that accounts were not available at the time of the gift but that the expert had "relied on the comprehensive overview in the prospectus". The expert and FTT were clearly alive to the issue of what financial information was relevantly available to small shareholders. Mr Kay did not identify in what respect the valuation accepted by the FTT had actually relied on accounts or information which only became available after the valuation date.

16. Having considered Mr Kay's application again and despite the points Mr Kay highlighted orally at the hearing, I remain unpersuaded Mr Kay's application has demonstrated the FTT was irrational in not accepting the valuation of 37p per share. There was no other evidence before the FTT which went against the expert's view that the transactions with existing shareholders were not a reliable market price. Nor was there evidence regarding what a prudent purchaser was to make of the NOMAD's view on valuation and how that was derived. In these circumstances the FTT was plainly not dutybound to have made a valuation on the basis of 37p per share. Mr Kay's application has not therefore demonstrated that the only conclusion the FTT could have drawn from the evidence was a valuation of 37p per share.

## **Conclusion**

17. For the reasons set out above, I am not satisfied the grounds disclose any arguable error of law in the FTT Decision.

18. Permission to appeal is therefore refused.

**Signed:**

**SWAMI RAGHAVAN  
JUDGE OF THE UPPER TRIBUNAL**

**Date: 21 October 2024**

**Issued to the parties on: 12 November 2024**