UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Neutral Citation Number: [2026] UKUT 00304 (TCC)

Appellants: York SD Limited & Others	**Tribunal Ref: UT/2025/000133**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE

JUDGE JONATHAN CANNAN

Introduction

1. The appellants seek permission to appeal a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 16 July 2025 ("the Decision"). The FTT has granted permission to appeal on various grounds in a decision notice released on 6 November 2025. It refused permission on what was identified as Ground 1. The appellants renewed their applications to the Upper Tribunal and I refused permission to appeal on Ground 1 on paper in a decision released on 5 March 2026. This decision follows an oral hearing of the applications on 9 June 2026 at which Harriet Brown and Rebecca Sheldon of counsel appeared for the applicants and Christopher Stone KC appeared for the respondents.

2. Section 11(1) Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal "… on any point of law arising from a decision made by the First-tier Tribunal…". I should only grant permission to appeal on a particular ground if I am satisfied that it is arguable, with a realistic prospect of success, that there is a material error of law in the Decision.

3. The FTT dismissed the appellants' appeals against decisions of HMRC that shares issued by them were not eligible for enterprise investment scheme relief pursuant to section 234(3)(b) Income Tax Act 2007 and paragraph 1A Schedule 5B Taxation of Chargeable Gains Act 1992. I adopt the same defined terms as appear in the Decision.

4. The FTT found that the appellants failed to satisfy all the conditions and requirements in relation to EIS relief. Ground 1 is concerned with various requirements for EIS relief. The "purpose of the issue" requirement in section 174 ITA 2007, the "trading requirement" in section 181 and the "minimum period requirement" in section 176. These requirements include establishing a qualifying business activity or QBA. A QBA is defined by section 179. Essentially, a QBA is the activity of preparing to carry on a qualifying trade which is begun to be carried on within 2 years of the date on which the relevant shares are issued. That date is described by the FTT as the QBA Deadline. A qualifying trade is defined by section 189 as a trade conducted on a commercial basis and with a view to the realisation of profits.

5. Each appellant installed a single rooftop solar panel in the UK which was intended to "start the EIS clock" and satisfy the requirements of EIS relief relating to commencing a qualifying trade. From the outset, each appellant also planned to establish a wholly owned subsidiary in countries such as Spain and Italy to develop larger, ground-mounted solar projects (see [42]). In the event, the subsidiaries operated in Spain and Portugal, described as the "Iberian solar projects".

6. Much of the FTT's discussion of QBA was in the context of section 174. The appellants argued that they had satisfied the requirement for a 'qualifying trade' to be commenced by the QBA Deadline on two alternative bases:

> (1) The appellants themselves had each, via their respective subsidiaries, taken steps towards the construction of the Iberian solar electricity plants and commenced trading by the QBA Deadline (see [100] and [102]).
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> (2) Alternatively, each appellant and its subsidiary together had commenced a qualifying trade, since:
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>> (a) the legislation permits the activities of each appellant and its subsidiary to be looked at together as a single "*deemed group trade*" (see [108] – [112]); and
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>> (b) by the QBA Deadline each appellant and its subsidiary together had commenced a deemed group trade of generating solar electricity because in addition to the activities of the subsidiaries, each Appellant had installed a single panel on a residential rooftop in the UK (see [120]).

7. The FTT rejected the first of those arguments on the basis that by the QBA Deadline, none of the subsidiaries had commenced trading. They had not completed the essential steps necessary to begin generating electricity and did not have the necessary physical infrastructure in place (see [101], [105] and [106]). That conclusion was made in the context of the purpose of issue requirement. The FTT recorded similar conclusions in relation to the minimum period requirement (at [137]) and the trading requirement (at [145]).

8. The FTT's conclusions on the first argument are challenged under Grounds 2, 3 and 4 on the basis that the FTT applied the wrong test for identifying when a trade has commenced. Ground 2 relates to the purpose of issue requirement, Ground 3 relates to the trading requirement and Ground 4 relates to the minimum period requirement. As to the correct test for the commencement of a trade, the appellants rely on the subsequent Upper Tribunal decision in *Putney Power Limited v HM Revenue & Customs* [2026] UKUT 105 (TCC). The FTT has already given permission to appeal on Grounds 2, 3 and 4.

9. The FTT rejected the second argument, holding that the legislation did not incorporate the concept of a deemed group trade (see [113]-[119]). Again, that conclusion applied to each statutory requirement and is the subject of challenge under grounds 2, 3 and 4.

10. The FTT went on to find that even if the legislation did incorporate the concept of a deemed group trade, the appellants and their respective subsidiaries had not commenced a qualifying trade by the QBA deadline. That was for two reasons. Firstly, the activities of the appellants and their subsidiaries were "*fundamentally different in nature*" and could not be viewed as a single trade (see [121]). Secondly, the trade being conducted by the QBA deadline was the UK rooftop solar panel activity which failed to meet the requirement in section 189(1)(a) that it be "*conducted on a commercial basis with a view to the realisation of profits*" (see [122]).

11. There are two aspects to Ground 1 which may be described as follows:

(1) The appellants contend that the FTT made certain findings of fact which it was not entitled to make on the evidence before it ("Ground 1A"); and

(2) That the FTT only considered the factual circumstances of one of the appellants (York) and wrongly based its decision in relation to the other appellants on the facts applicable to York ("Ground 1B").

12. There is a high bar on challenges to the FTT's findings of fact which derives from *Edwards v Bairstow* [1956] AC 14. A party can only challenge findings of fact in very limited circumstances which were summarised by the Upper Tribunal in *HM Revenue & Customs v Anna Cook* [2021] UKUT 15 (TCC) at [18] and [19]. Essentially an error of law in relation to a finding of fact can only arise where there was no evidence to support the finding, where the only evidence available to the FTT contradicted the finding or where the only reasonable conclusion available to the FTT contradicted the finding.

13. In *Georgiou (t/a Marios Chippery) v. Customs and Excise Comrs* [1996] STC 463 at 476, Evans LJ in the Court of Appeal gave guidance as to the approach an appellate tribunal should take where a finding of fact is challenged:

> …the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
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> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong'.

Ground 1A

14. The FTT adopted a Statement of Agreed Facts at [28]. The agreed facts were not controversial and covered such matters as the issue of shares by the appellants, the filing of compliance statements for the purposes of EIS relief, correspondence between HMRC and the appellants concerning the decision to withdraw relief, and the notices issued to withdraw the relief. It did not contain any primary facts relevant to the conditions which had to be satisfied for EIS relief to be available. The appellants say that the agreed facts noted by the FTT contradicted or were inconsistent with its subsequent reasoning. I do not consider it is arguable that there is any such contradiction or inconsistency.

15. The FTT recited some of the evidence from Mr Hughes on behalf of the appellants at [31] – [33], [42] and [67]:

> 31. To initiate trading, each of the six Appellant Companies installed a single rooftop solar panel in the UK. These installations were accompanied by agreements to sell electricity to homeowners, serving as a demonstration of genuine trading activity. This initial step was designed to satisfy the EIS requirement that trading must commence within a specified timeframe.
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> 32. Building on this foundation, the companies expanded their operations by establishing subsidiaries in Spain and Portugal. These subsidiaries were tasked with developing ground-mounted solar plants, marking a significant scale-up in operations. Foresight provided comprehensive support throughout this process, including operational oversight, technical guidance, and financial structuring. Their involvement extended to sourcing viable projects, negotiating engineering, procurement, and construction ('EPC') contracts, and arranging power purchase agreements ('PPAs') with energy buyers.
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> 33. Mr Hughes states that, in 2016, detailed business plans were submitted to HMRC. These plans outlined a phased approach to trading, with modest initial activity followed by substantial revenue generation expected from 2018 onward. HMRC reviewed and accepted these plans, subsequently issuing EIS2 authorisations in 2017, meaning that investors were entitled to claim the associated tax reliefs.
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> …
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> 42. Mr Hughes was questioned regarding this evidence that the primary purpose of the share issues by each of the six companies was to fund investments in solar energy projects, both in the UK and overseas. He explained that the strategy was to begin with rooftop solar panel installations in the UK to initiate trading and satisfy the requirements of the EIS. These installations, while not expected to be profitable on their own, were intended to demonstrate commercial activity and start the EIS clock. From the outset, the companies planned to establish wholly owned subsidiaries in countries such as Spain and Italy to develop larger, ground-mounted solar projects. This approach was consistent with Foresight's standard practice of using subsidiaries for overseas investments.
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> …
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> 67. Between October and December 2016, the Appellants entered into rooftop solar panel agreements with individual UK homeowners. These agreements were not commercially profitable, as the revenue generated was minimal compared to the cost of installation. The purpose of these agreements, as acknowledged by Mr Hughes, was to initiate trading activity to support EIS relief claims rather than to generate meaningful profit.

16. In relation to the appellants' witness evidence, including that of Mr Hughes, the FTT stated as follows at [61] under a sub-heading "*Comments on the witness evidence*":

> 61 Having considered the detailed written and oral evidence given by the witnesses, it is our finding that Mr Hughes and Mr Rey were both in a position to give reliable testimony as to the actions taken by the Appellants and the decisions the Appellants made in relation to their activities. We found the evidence given by both witnesses to be clear, comprehensive, honest and credible, and we therefore place significant weight on that evidence in arriving at our findings of fact at [76] below. We are grateful to both witnesses for assisting in our understanding of the Appellants' operations.

17. The appellants say that given these observations, it would be irrational for the FTT to make a finding of fact inconsistent with the evidence of Mr Hughes and Mr Rey. Further, the appellants contend that it is proper to infer that all the evidence of the appellants' witnesses which was recited by the FTT was found as fact. I do not accept those submissions. It is clear that the FTT at [61] is only placing significant weight on the evidence, rather than accepting it as fact.

18. The FTT's principal findings of fact were set out at [76] in various sub-paragraphs under a heading "Findings of Fact". For present purposes it is sufficient to quote the opening sentence of that paragraph and sub-paragraph (3):

> 76. Having considered evidence, including the witness evidence and the documents set out at [3] and at [62] to [75] above, we make the following findings on the facts:
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> (3) UK residential rooftop panels were not installed with a view to profit and were materially different from Iberian solar plant activity.
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>> (a) We make this finding on the basis that, between October and December 2016, the Appellants entered into rooftop solar panel agreements with individuals in the UK which were not initially profitable. The agreement entered into by York was for a monthly charge of £9.20 (subject to adjustment) and their accounts for the year ending 31 December 2018 show fixed assets, being the rooftop panel equipment, at £3,650. We find that each of the Appellant Companies entered into rooftop solar panel agreements not with the intention of generating profit, but rather to initiate trading activity in order to accelerate the process of obtaining EIS relief. Mr Hughes gave evidence that the rooftop panels were installed to "kickstart the business of the group" and to begin generating income, albeit modest. He acknowledged that one of the primary motivations was to meet the requirements for EIS relief and to align with investor expectations.
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>> (b) Despite the use of solar panels in both the UK rooftop installations and the Iberian ground-mounted solar projects, the two activities were fundamentally different. Mr Hughes and Mr Rey both accepted that the scale and cost of the UK rooftop installations were significantly lower, and Mr Rey further described the execution of the two types of projects as "materially different". He also noted that Foresight's expertise was not necessary for the relatively simple task of installing a few panels on residential rooftops.
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>> (c) Mr Hughes conceded that the installation of a single rooftop panel in the UK

did not contribute to or support the subsidiaries' later ventures in Iberia. This was further evidenced by the fact that the rooftop activity was not mentioned in Foresight's offer letter to Ansasol concerning the Al Andalus portfolio of Iberian solar projects, indicating that the rooftop installations were not considered relevant to the broader commercial strategy.

19. The FTT made further findings when it came to consider whether the various statutory requirements were satisfied. In the context of the "purpose of the issue" its most significant findings for present purposes were summarised at [121] and [122]:

> 121. We have found that the activities of York and its subsidiary were fundamentally different in nature. While both involved converting sunlight into electricity using solar panels, the similarities ended there. The two operations did not interconnect or rely on each other in any meaningful way. York's rooftop solar panel activity could have ceased without affecting the subsidiary's solar power plant operations, and vice versa. Moreover, the scale, infrastructure, location, and technical expertise required for each activity were so distinct that they could not reasonably be considered parts of a single trade. There was also no evidence that the solar power plant operations evolved organically from the rooftop panel activity.
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> 122. Specifically, by the QBA deadline, the trade was not being conducted on a commercial basis with a view to profit, as required by section 189(1)(a). The installation of a single rooftop solar panel on a private residence was not a commercially viable activity, and the Appellants have not demonstrated that any serious commercial operator would pursue such a model. In fact, the evidence suggested that the installation was done solely to meet the formal requirements for EIS relief, rather than to initiate a genuine profit-making enterprise. Even if the activities of both companies were treated as a single trade, we consider the group still fails to meet the statutory requirements.

20. There were similar findings that the rooftop solar panel installations were not conducted on a commercial basis or with a view to profit | in the context of the minimum period requirement (at [136]) and in the context of the trading requirement (at [144]).

21. The appellants challenge the following findings of fact by the FTT in these paragraphs:

(1) By the QBA deadline, the trade was not being conducted on a commercial basis with a view to profit.

(2) The installation of a single rooftop solar panel on a private residence was not a commercially viable activity.

(3) The installation was done solely to meet the formal requirements for EIS relief, rather than to initiate a genuine profit-making enterprise.

(4) The rooftop solar panel installations were not conducted on a commercial basis or with a view to profit.

22. I accept that these findings were significant in relation to the FTT's conclusion that there was no QBA by the QBA deadline.

23. The appellants describe the evidence relevant to these findings as follows:

> … the evidence on which this was based appears to have been threefold, namely (i) installation of a single rooftop solar panel on a private residence was not a commercially viable activity;

> (ii) the Appellants had not demonstrated that any serious commercial operator would pursue such a model; and (iii) installation was done solely to meet the formal requirements for EIS relief, rather than to initiate a genuine profitmaking enterprise.

24. It does not appear to me that this was the evidence on which the FTT made its findings. Rather, these are some of the findings of fact from which the FTT drew an inference that the trade was not being conducted on a commercial basis with a view to profit. The application does not actually identify the oral and documentary evidence which was relevant to the FTT's findings of fact. It appears to me that the appellants are seeking to challenge both primary findings of fact and the inferences drawn from those primary findings of fact. In order to do so, they must identify all the relevant evidence and explain why the FTT was not entitled to make those primary findings of fact or draw the relevant inferences.

25. Mr Stone KC for HMRC did set out the evidence relevant to the four findings of fact being challenged. Some of the evidence was specifically recorded by the FTT at [31], [42] and [67]. In addition, the transcripts show that Mr Hughes in his oral evidence acknowledged that it would be difficult to argue that setting up one rooftop panel was done to generate a profit. The intention was that each appellant and its subsidiary would make significant profits. The rooftop panels generated small amounts of revenue but were not done with a view to profit.

26. The appellants say that it is not appropriate to look at the transcripts at the permission stage. I do not agree. The question of whether a challenge to the FTT's findings of fact is realistically arguable may require reference to the oral evidence given by witnesses which, for whatever reason, has not been identified in the FTT's decision.

27. The appellants say that the FTT was clearly not entitled to find that the trade was not being conducted on a commercial basis with a view to profit It is said that factors beyond the appellants' control may have resulted in no further installations being made. However, the appellants have not set out what evidence there was, if any, as to why no further installations were made.

28. The appellants rely on aspects of the FTT's findings at [76(3)(a)] quoted above:

> (1) The appellants say that their primary motivation of meeting the EIS relief requirements is consistent with conducting a trade on a commercial basis with a view to profit.
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> (2) Further, if Mr Hughes' motivation was to meet the requirements for EIS relief, then the appellants must have intended to conduct the trade on such a basis because that was one of the requirements.

29. I accept the first proposition. However, the fact that some evidence is consistent with the findings the appellants sought is not sufficient in the context of an Edwards v Bairstow challenge. Nor is it the case, if that is the appellants' suggestion, that the motivation was irrelevant to whether the trade was carried on on a commercial basis. The significance of the appellants' motivation was a matter for the FTT.

30. As to the second proposition, the appellants rely by way of analogy on a well-known observation of Lord Upjohn in *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 at p30 F to the effect that where there are two routes to carry out a transaction and one route involves paying less tax, no commercial business person would carry out the transaction other than in the way which involved paying less tax. As I understand the submission, it is that if the

appellants were aware that they were required to be carrying on a trade on a commercial basis with a view to profit then there is no reason to think that they would not have met that requirement. I do not accept that submission. It does not necessarily follow that just because the appellants intended to meet the requirements of EIS relief, the FTT was bound to find that was the case.

31. The appellants say that the inability to profit from a single rooftop panel was irrelevant because the trade was not installing rooftop panels. The FTT failed to consider the nature of the whole trade, and that the installation of a rooftop panel was the starting point of a wider trade. I do not accept that is a realistic criticism of the FTT. The FTT found at [121] that the two activities were so distinct that they could not reasonably be considered part of a single trade. It is not realistically arguable that the FTT was not entitled to make that finding.

32. The appellants also say that the FTT was led into error in its consideration of the evidence by its consideration of the approach of the FTT in *Putney Power*, which has now been overturned by the Upper Tribunal. I do not accept that is realistically arguable. The FTT made its primary findings of fact at [76] before coming on to consider the question of when a trade commences. The test applied by the FTT in determining when a trade commences is challenged under Grounds 2, 3 and 4. There is no suggestion that the FTT's findings of primary fact were somehow tainted by the test it was applying as to when a trade commences.

33. The appellants contend that it was irrelevant that they had failed to demonstrate that any serious commercial operator would pursue the model which they pursued. This was not a requirement of EIS relief. I am satisfied that when the FTT made that observation at [122] it was not suggesting that this was a requirement of the relief. It simply had in mind that the burden was on the appellants to demonstrate that the trade was being conducted on a commercial basis with a view to profit. One way to satisfy that burden might be to demonstrate that it was a viable model. That is in the context of its finding at [76(3)(a)] that York obtained an income of £9.20 per month on its rooftop installation on a capital investment in fixed assets of £3,650. It seems clear that the FTT was not satisfied that this was a viable commercial business model. I have seen nothing to suggest that the FTT was not entitled to reach that conclusion.

34. I am satisfied that on the basis of the evidence before it, the FTT was entitled to make the findings of fact which the appellants now seek to challenge. In the circumstances, I am not satisfied that Ground 1A identifies any arguable errors of law with a realistic prospect of success.

Ground 1B

35. The appellants other than York contend that the FTT failed to consider the different factual circumstances applicable to their appeals in finding that there was no QBA prior to the QBA deadline. It is said that the FTT wrongly focussed solely on the circumstances of York and in particular:

(1) The FTT drew conclusions in relation to all the appellants on the basis of the factual matrix applicable to York.

(2) The FTT failed to distinguish between the legal principles, which were the same for all the appellants, and the evidence and facts, which were unique to each appellant. It

therefore failed to consider the evidence and circumstances of any appellant other than York; and

(3) The FTT erroneously made findings of fact, and drew inferences of fact, that it was not entitled to make in relation to the appellants other than York.

36. There are certainly indications in the Decision that the FTT did separately consider the different facts applicable to the other appellants. However, the position is not as clear as it might have been. For example, the FTT does not appear to deal with the fact that Warwick and Cardiff had entered into EPC contracts before the QBA Deadline. That may have been because the FTT did not consider it was material to the legal test it was applying as to when the trades commenced. To that extent, there is an overlap with Grounds 2, 3 and 4 which challenge the legal test being applied. Mr Stone also acknowledged that the separate consideration of the other appellants "does not jump out" from the Decision.

37. On balance, I am persuaded that Ground 1B is realistically arguable and I grant permission to appeal on that ground.

Conclusion

38. For the reasons given above, I refuse permission to appeal on Ground 1A but grant permission to appeal on Ground 1B to the appellants other than York.

Jonathan Cannan **Upper Tribunal Judge**
Issued to the parties on: 7 August 2026