[2016] UKFTT 183 (TC)

TC04969

Appeal number: TC/2015/03886

INCOME TAX – EIS Relief – Whether conditions in s 169 Income Tax Act 2007 have been satisfied – No – Discovery assessment – Whether HMRC have established discovery assessment valid – No - Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIGEL BELL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
Dr CHRISTINA HILL WILLIAMS

Sitting in public at Fox Court, Brooke Street, London EC1 on 11 March 2016

The Appellant in person

Simon Foxwell of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Nigel Bell was appointed as a paid director of Applied Design and Engineering Limited trading as Adande Refrigeration (the "Company") on 1 February 2008. It is not disputed that on 25 January 2008, before he became a director, Mr Bell had made a qualifying investment in the Company under the Enterprise Investment Scheme ("EIS") acquiring ordinary shares (meeting the requirements of s 173 of the Income Tax Act 2007). Subsequent to his becoming a director he made further qualifying investments in the Company in July 2008 and August 2010 respectively, acquiring more ordinary shares. On 20 April 2011 and 7 February 2013 Mr Bell again invested in the Company in return for ordinary shares. He claimed EIS relief on these investments in his 2010-11, 2011-12 and 2012-13 self-assessment tax returns.

2. HM Revenue and Customs ("HMRC") opened an enquiry into Mr Bell's 2011-12 return and on 4 November 2013 and into his 2012-13 return on 2 May 2014. Closure notices, under s 28A of the Taxes Management Act 1970 ("TMA"), were issued for 2011-12 and 2012-13 on 2 May 2014. In addition on 7 October 2014 a discovery assessment, made under s 29 TMA, was issued in for 2010-11. The purpose of the closure notices and discovery assessment were to deny Mr Bell the EIS relief that he had claimed.

3. It is clear from the decision of the Tax and Chancery Chamber of the Upper Tribunal in *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC) that it is for HMRC to establish that the relevant conditions for the issue of a discovery assessment have been met. However, as in *Burgess & Brimheath*, HMRC failed to advance a positive, or indeed any, case in relation to the discovery assessment. It must therefore follow, as Mr Simon Foxwell (who appeared for HMRC) recognised, that the appeal against the discovery assessment succeeds.

4. With regard to the closure notices, it is not disputed that the Company meets the EIS qualifying criteria for an issuing company under the Income Tax Act 2007 ("ITA") and that Mr Bell as a director is "connected" to the Company and cannot therefore qualify for EIS relief (see ss 162, 163, 166 and 167 ITA) unless s 169 ITA applies.

5. Insofar as applicable to the present case s 169 ITA provides:

> **169 Directors qualifying for relief despite connection**
>
> (1) Section 163(1) does not prevent the investor from being a qualifying investor despite the investor's connection with the issuing company at any time in period A relating to the relevant shares if—
>
> (a) the investor is connected with that company merely because of the investor, or the investor's associate—
>
> (i) being a director of, or of a company which is a partner of, the issuing company or a subsidiary of the issuing company, and

(ii) being in receipt of, or entitled to receive, remuneration as such, and

(b) conditions A and B and (where applicable) condition C are met.

(2) Condition A is that, in relation to the director ("D"), whether D is the investor or an associate of the investor—

(a) D's remuneration, or

(b) the remuneration to which D is entitled,

consists only of remuneration which is reasonable remuneration for services rendered to the company of which D is a director in D's capacity as such.

(3) Condition B is that the investor was issued with the relevant shares, or a previous issue of shares in the issuing company which meet the requirements of section 173(2), at a time when the investor had never been—

(a) connected with the issuing company, or

(b) involved in carrying on (whether on the investor's own account or as a partner, director or employee) the whole or any part of the trade, business or profession carried on by the issuing company or a subsidiary of that company.

(4) Condition C is that, if the issue of the relevant shares did not meet condition B, they were issued before—

(a) the termination date relating to the latest issue of shares which met that condition, or

(b) …

(5) For the purposes of condition A any necessary and reasonable remuneration falling within section 168(2)(f) is to be left out of account.

(6) In this section "remuneration" includes any benefit or facility.

6. Mr Foxwell, for HMRC, accepts that Conditions A and B have been met and it is therefore necessary to consider Condition C. He submits as the "relevant shares" were those issued in April 2011 and February 2013 at a time when Mr Bell was clearly connected to the Company, Condition B would not be met in relation to those "relevant shares" and the "latest issue of shares" to meet Condition B were those issued on 25 January 2008, before Mr Bell became a director of the Company and connected with it. The termination date of these shares, as defined by s 256(1)(a) ITA, is the "third anniversary of the issue date" which is 25 January 2011. Accordingly the shares issued in April 2011 and February 2013 cannot be within Condition C and Mr Bell is not entitled to EIS relief.

7. Mr Bell contends that as he had been issued with "a previous issue of shares" in the Company which met the requirements of s 173(2) ITA at a time when he had "never been connected" to the Company, Condition B has been met and therefore Condition C is not applicable. As such, Mr Bell says he is entitled to the EIS relief.

8. It is not disputed that Conditions A and B have been met. However, we consider that Condition C, which requires "the issue of the **relevant shares** to meet Condition B" (emphasis added) does apply. Although the legislation could have been drafted more clearly it would appear that Condition B applies to the "investor" (in this case Mr Bell) and Condition C to the "relevant shares" (ie those issued in April 2011 and February 2013) which were issued after Mr Bell became a director of the Company and therefore do not meet Condition B. As the relevant shares were not issued before the termination date relating to the latest issue of shares which met that condition, which was 25 January 2011, Condition C has not been met.

9. Mr Bell accepted that if we found that condition C did apply his appeal could not succeed. Therefore, other than in respect of the 2010-11 discovery assessment, which we allow, we dismiss the appeal against the 2011-12 and 2012-13 closure notices.

10. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 14 MARCH 2016