Neutral Citation: [2022] UKFTT 182 (TC)

Case Number: TC08507

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2019/09509

INCOME TAX – Seed Enterprise Investment Scheme – whether capital to risk ration met – yes – whether company carries on a qualifying trade – yes – whether disqualifying arrangements – yes – appeal allowed

Heard on: 11 May 2022
Judgment date: 12 June 2022

Before

TRIBUNAL JUDGE AMANDA BROWN QC
DUNCAN MCBRIDE

Between

CRY ME A RIVER LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr William Dingli, director of the Cry Me A River Limited.

For the Respondents: Mr Max Simpson litigator of HM Revenue and Customs' Solicitor's Office.

DECISION

INTRODUCTION

1. The appeal concerns a decision of HMRC issued on 10 October 2019 to refuse Cry Me A River Limited (**Appellant**) authority under section 257EC(3) Income Tax Act 2007 (**ITA**) to issue certificates under section 257(1) ITA in respect of 4,168 Ordinary Class B shares issued on 19 June 2018 for a total investment of £100,000.

2. With the consent of the parties, the form of the hearing was V (video) attended by the parties' representatives together with Mr Mamood, the Appellant's accountant and an observer from HM Revenue & Customs (**HMRC**) using the Tribunal video hearing system. A face-to-face hearing was not held for the convenience of all parties. The documents before the Tribunal were contained in a single bundle of 386 pages, including all legislation and a single authority plus a short witness statement from Mr Mamood.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

4. On 26 January 2015 the Appellant requested advance assurance that it was a qualifying company for the purposes of the Seed Enterprise Investment Scheme (**SEIS**) and the Enterprise Investment Scheme (**EIS**) (both provided for in ITA) and that any shares to be allotted were qualifying shares. On 5 March 2015 advance assurance was granted.

5. 1666 B shares were issued to Clifford Grantham on 5 May 2017. Mr Grantham's investment at that time was £39,984.

6. The Appellant issued 2084 B shares to each of Catherine Morgan and Victor Scalzo on 19 June 2018 their respective investments were in the same amount £50,016.

7. A further 521 B shares were also issued to Mr Grantham on 15 August 2018 in consideration for him writing off a loan of £10,000 previously granted by him to the Appellant on 23 February 2017.

8. By application dated 17 July 2019 (but received on 20 July 2019) the Appellant sought authority to issue SEIS certificates in respect of the investments set out in paragraphs 5 and 6 above. On 25 September 2018 HMRC granted authority in respect of the shares issued to Mr Grantham and on 10 October 2019 denied authority in respect of the shares issued to Ms Morgan and Mr Scalzo.

9. HMRC rejected the application for the shares issued to Ms Morgan and Mr Scalzo on the basis that it failed to meet three of the numerous conditions which must be met as detailed below in paragraphs [72] to [74] below.

SUMMARY FINDINGS

10. The Tribunal has determined, by reference to all the circumstances and taking account of the submissions made, that HMRC were wrong to refuse to issue compliance certificates pursuant to section 257EC ITA in respect of the shares issued to Ms Morgan and Mr Scalzo. This is on the basis that, for the reasons set out below, the Tribunal has determined that:

(1) It is reasonable to conclude that the Appellant had the requisite intention to grow and develop the trade of film production/co-production

(2) The qualifying business activity of the Appellant is that of production/co-production and as such, the role of SLine does not constitute a failure on the part of the Appellant to be conducting the qualifying business activity itself

(3) There are no disqualifying arrangements.

APPROACH TO EVIDENCE

11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.

12. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:

> "26. …
>
> - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
> - the process of … litigation … subjects the memories of witnesses to powerful bias …
> - witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist…."

13. The judgments summarised by Judge Brooks conclude that:

> "The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

14. This approach is particularly relevant in the present appeal.

DOCUMENTARY EVIDENCE

15. As set out below, entitlement to SEIS in respect of the share issues to Ms Morgan and Mr Scalzo, is determined at the point of issue. The various rules which determine entitlement are therefore generally to be assessed by reference to the evidence as at that date. The review of documentary evidence is therefore broadly limited to documents in existence or with purported effect as of 19 June 2018.

Secret Channel Films Equity Offer

16. In a document prepared in 2016 it is apparent that Secret Channel Films Ltd (**SCF**) was originally established to undertake "the initial work needed for the producers [of a number of script ideas] to effectively package each project, including script writing fees, filming a teaser, the production of marketing materials and sales estimates/projections of revenue returns". At the time the document was produced SCF was the owner of all intellectual property rights to 6 script ideas. It is apparent, by reference to the terms of the document, that it was not intended that SCF would produce any of the titles for which they were able to garner sufficient interest to justify the title moving to the pre-production phase. Rather, production would be undertaken by special purpose vehicles established for each project or film with SCF selling the rights to the films to the special purpose vehicles.

17. The business opportunity articulated to potential investors by SCF was that a return could be achieved on the sale of the developed film ideas which would be sold for a small fixed initial fee and a 10% contingency on the profits made by the special purpose vehicles.

18. It is also apparent that it was intended that SCF would raise equity utilising the SEIS for that activity with the stated intention of development of at least one film within the 3-year period required for SEIS investment. In fact no funds were raised by SCF.

Heads of terms/coproduction agreement

19. On 1 September 2017 the Appellant entered an agreement with Storyline NOR AS (**SLine**) pursuant to which it was confirmed that the Appellant controlled the underlying rights to the film script for Cry Me A River. SLine was appointed as the joint producer on the project with the Appellant for a period of 1 year with equal credit for the film's production. SLine contracted to attend all meetings with the writer, director, other producers and financiers and provide general services as producer including "attaching cast, a sales agent and obtaining and facilitating third party offers of development, production, financing and Norwegian distribution".

20. It was contractually envisaged that both the Appellant and SLine would jointly make all financial, creative and technical decisions in relation to the film, including film locations, cast crew, schedule and budget. Any major change to the budget was required to be agreed between SLine and the Appellant.

21. SLine's participation was on a favoured nation basis with all residuals, revenues, production fees and any backend to be shared accordingly with the producers' fee also shared equally.

22. SLine also jointly shared responsibility and cost for the delivery of the "final print" to film festivals.

23. The heads of terms were formalised into a co-production agreement dated 28 January 2019 effective from 1 September 2017. The heads of terms were repeated and supplemented. Of relevance in the appeal the co-production agreement provided:

(1) The Appellant and SLine were entitled to recoup their respective investments.

(2) The Appellant and SLine would share all backend participations from the distribution of the film in the same ratio as their investment calculated on a favoured nation basis.

(3) It was agreed that the Appellant would hold the entire copyright in the film including any rights which were deemed vested in SLine. All rights of exploitation were reserved to the Appellant.

(4) SLine accepted that any breach of the agreement would give rise only to a right in damages.

Production contract

24. Pursuant to an agreement dated 19 September 2017 between the Appellant and SCF, SCF contracted to provide the services of Mr Dingli as producer throughout the period of production and post-production until delivery of the film. The fee for these services was stated to be £10,000 deferred until one year after the film's release together with "one third (i.e. an equal share alongside each of Rik Hall and Trond Eliassen) of the Producers' Net Share of Net Profits". The definition of Net Profit is provided as that "in the applicable agreements entered into by [the Appellant] in relation to the exploitation of the Work and the Rights after deduction of all broadcaster, deficit and other financier(s) shares and distribution and finances

commissions and costs … calculated and paid on a favoured nations basis with all other participants" (it being noted that Work and Rights are not defined in the production contract) and Producers' Net Share of Profits being defined as the "Net Profits remaining after deduction of any talent/crew backend participations".

25. The terms and conditions set out in the agreement provide the detailed basis on which SCF/Mr Dingli will perform the relevant duties as producer. They further provide that any interest of SCF in the copyright of Cry Me A River shall be assigned to the Appellant throughout the universe and for the full period of copyright including renewals and all rights of exploitation.

26. The production contract is signed by Mr Dingli on behalf of both the Appellant and SCF.

Assignment agreement/assignment of rights

27. On 30 May 2018 Mr Dingli signed a short document entitled assignment of rights which confirms that he was the original writer of the screenplay for Cry Me A River and that the Appellant and Storyline NOR had acquired the necessary rights to produce and distribute the film with no further rights claimed by Mr Dingli save for budgeted fees.

28. On 30 June 2018 (and thus after the relevant share issue – but by reference to the oral evidence from Mr Dingli contemplated at the time of the issue) the Appellant entered an agreement with Mr Dingli pursuant to which Mr Dingli (as Author) assigned all rights of use and exploitation in the original, unpublished screenplay of Cry Me A River to the Appellant.

29. Mr Dingli described the effect of this assignment as establishing the chain of title for the benefit of the Appellant.

Offering Memorandum

30. The offering memorandum for the relevant share issue is dated June 2018

31. The executive summary provides:

> "Seeking Equity for high-quality low-budget feature film – Cry Mr A River
>
> The Directors of Secret Channel Films Limited (SCF) William Dingli and Rik Hall, a film production company engaged in the development and production of motion picture films, are seeking to raise £240,000 from private investors to finance, produce and exploit a full-length British feature Cry Me A River. Cry Me A River represents an exciting opportunity for those interested in getting involved in the British film industry and earning a potentially highly significant return. The film will be co-produced in Norway with Trond Eliassen and Tom Vidar Karsen.
>
> - Cry Me A River Ltd (CMRL) will be the sole income-generating company for this project and all future projects from the SCF slate. Cry Me A River will have a production budget of £640,000 …
> - Cry Me A River Ltd offers attractive tax breaks for equity investors – an income tax rebate of up to 50 per cent of the amount invested under SEIS (Seed Enterprise Investment Scheme) …
> - Equity Investors will be entitled to 50 percent of the profits generated by the film.
> - …
> - Equity investors will be entitled to an Executive Producer credit on the film. In addition, they will have the opportunity to be in the movie.
>
> …

> Investment Opportunity and Financial Highlights: The directors are seeking to raise £150,000 of equity investment under the Seed Enterprise Investment Scheme (SEIS). The SEIS is a government scheme to assist businesses by providing investors with tax breaks (of 50 per cent) which lower risk and increase their upside for rewards. The final £90,000-worth of investment will be raised via the Enterprise Investment Scheme (EIS). …"

32. The Appellant company is described in section 2 of the Offer Memorandum as the production company set up to produce the movie and all future SCF projects. The Appellant is stated to have wholly created and own the intellectual property and exclusive right to the screenplay including the film, the right to exploit the film and all merchandising rights, remake rights, prequel rights, DVD and Blue-ray rights, novelization rights, television rights, stage rights and radio rights, worldwide. The offer is also described in section 2 in which the entitlement to 50 percent of the profits generated by the film accruing to the equity investors is repeated with it further being noted that such entitlement accrues proportionately to their investment. Potential investors are further informed that "the remaining profits of the film will be distributed to the company director (50 per cent)". Further funding for Cry Me A River is noted as having been negotiated from advance sales, two Norwegian regions (where the film was to be shot) with deferred costs making up the reminder of the shortfall meaning "that little or none of these funding streams (who will not receive a profit share) will remain to be paid out of the actual sales of the film to the market".

33. Other contributors are noted in section 2 as including advance sales secured through an experiences Sales Agent (Moviehouse).

34. The investment exit strategy is set out:

> "In order to maximise returns to investors, the directors' exit strategy will take account of the fact that the shares must be held for a period of three years as any capital gains tax (CGT) relief for SEIS and EIS investors can only be realised once the shares have been held for this period …"

35. The offer is stated to be open from 1 September 2017 to 1 September 2018 (despite the Offering Memorandum being dated June 2018).

36. The Offering Memorandum provides considerable detail regarding Cry Me A River including its synopsis, production timeline (running from development commencing in September 2017 through to distribution starting in September 2019), casting, why the cast will appeal to the target audience, creative biographies, the director's creative vision, detail and photos of the Norwegian filming location.

37. In the finance section of the document it is stated that the Appellant is the sole income generating company for the project and all future SCF projects is repeated. It is expressly noted that 50% of the profits will be distributed to the equity investors with the remaining 50 percent being divided between the producers (William Dingli, Rik Hall, Trond Eliassen and Tom Vidar Karlsen). The reward from investment is anticipated as in excess of 230 percent of the initial equity investment if the film does modestly and 570 per cent if the film is very successful.

38. The benefits of SEIS investments are articulated.

39. Sales estimates for Cry Me A River are set out with comparable data. The budget information is set out under a heading "Secret Channel Films Ltd – Cry Me A River".

Sales Agreement

40. The Tribunal were provided with an undated copy of a Sales Agreement pursuant to which Moviehouse Entertainment Limited agreed to represent the film Cry Me A River across the World. The rights granted to Moviehouse concern the licensing and disposal all media

rights subject to SCF (and not the Appellant) having a right of prior approval with respect of sales of the film. Moviehouse were entitled to a £5000 fee on securing £50,000 advance sales for the film.

41. As indicated in paragraph [33] above Moviehouse were referenced as having been appointed by June 2018, however, in correspondence dated September 2019 it was stated that, as at that date, the agreement remained unsigned and in draft form but that it was intended that the counterparty would be the Appellant and not SCF.

List of subcontractors and associated agreements

42. The Tribunal was provided with a list of subcontractors engaged in respect of Cry Me A River (the film). This list names and identifies the roles of each of the subcontractors who were engaged in the period from 1 June 2018.

43. It is clear from this list that from producer and director, through cast and including matters such as green screen studio, camera men, London and Norwegian location charges etc were all by way of subcontract.

44. The Tribunal also had access to what are termed "Casting Advice Notes" the agreements between the Appellant and the actors. These are variously dated in June 2018 for shooting of the film during June and July.

Articles of Association of the Appellant

45. The Articles of Association are in reasonably standard form. Of relevance to the present appeal, it is noted that the articles provide that the directors may capitalise any profits which are not required to pay a preferential dividend.

Financial information

46. A cash flow forecast was included within the bundle. It was undated but is a document which appears to have been prepared consistent with the terms of the Offering Memorandum. It envisages that Cry Me A River will be produced in 2018/19 carrying a negative cost of £640,000 (representing the agreed budget). Revenue is forecast for Cry Me A River from 2020 achieving a gross profit of £317,957 from box office receipts of £1.45m together with other income from aftermarket activities.

47. The cash flow forecast also envisages the production of a second film The King of Notting Hill to be produced in 2020 with a budget of £9m and released in 2021. Profits from the two films by the end of year 3 are forecast to be in excess of £2.7m.

48. The document further states:

> Please note that Cry Me A River Ltd will be one of three production companies raising money for The King of Notting Hill whereas all the income generated by Cry Me A River was handled by that company.
>
> I anticipate CMAR Ltd will raise 10pc of the revenue for the second feature. I am also assuming a 50/50 revenue split to equity investors for both movies. I anticipate approximately 60pc of the revenue from aftermarket sales will be achieved in the first year following production of each film and this is reflected in the figures.

49. The finance plan included in the bundle does not match completely the other documentation as it envisages a budget of £710,000 for Cry Me A River.

50. Also included was a document dated 22 October 2018 setting out an "ownership report". The document illustrates that the producers together were entitled to 42% distribution (William Dingli 32%, Rik Hall 5% and Trond Eliassen 5%), 8% to the actors and 50% to the equity

shareholders of whom the UK SEIS investors represented of the order of 23%. Also dated 22 October 2018 is a "recoupment participants hierarchy" which sets a waterfall for payments. Stage 4 of 7 is a payment to SLine of $200,000. Stage 7 represents the distribution by way of profit participation which reflects the ownership report. The particularisation of payments arising, by reference to the forecast revenues shows receipts remaining $0. On the cash flow chart equity investors are warned "their money is not returned before the film is released, but once the move has had time in the market to generate revenue returns". In all of the Cry Me A River financial information SEIS investment is shown as £150,000.

DOCUMENTS CONCERNING KING OF NOTTING HILL

51. The Tribunal were also provided various documents regarding the King of Notting Hill.

52. A shopping/attachment agreement was entered between SCF and the producer (Bryan O'Connell) on 10 October 2017.

53. Financial reports similar to those referred to at paragraph 49 and 50 above dated 14 July 2017 show "No capital investors" and no SEIS or EIS investment/investors. The waterfall payments show the final stage of distribution by way of profit participation to the various anticipated investors and full distribution of all receipts with 50% being distributed to SCF. There is no anticipated distribution to SEIS investors (as none were anticipated).

54. SCF were offered a completion bond in respect of the film on 21 August 2018 by Guaranteed Completions.

55. The co-production agreements for the King of Notting Hill were entered between the Appellant and Kimball Entertainment and Randy Jackson Company on 19 April 2019 and 9 May 2019. The Tribunal were not provided with any documentation which transferred the rights implicitly owned by SCF in 2017 and the Appellant in order for the Appellant to produce the film.

56. An investor pack (undated but including a financial plan dated December 2017) sought to raise $2-3m in equity. There is no mention of SEIS or EIS funding or the associated tax benefits for investor.

MR DINGLI'S EVIDENCE

57. The Tribunal was provided with a document entitled statement of case for the Appellant. The Appellant's accountant also produced a witness statement that corroborated but added little to the information and evidence provided by Mr Dingli. HMRC disputed some of Mr Mahmood's evidence but as it largely duplicated that of Mr Dingli and was not information within his direct knowledge it was agreed that the evidence to be considered by the Tribunal should be limited to the documentary evidence and Mr Dingli's presentation of the case in which he provided further explanation and information.

58. Mr Dingli was at pains to ensure that the Tribunal was given a sufficient understanding of the uniqueness of the film industry and how it operates in order that the requirement for equity be fully understood.

59. It was explained that in the film industry success is achieved on a project-by-project basis and operates with little or no substantive infrastructure other than producible scripts, relationships and reputation. Capital (including equity) is used to fund pre-production, production and post-production of individual projects which, if successful, provide the reputation from which to embark on the next project with a larger budget which in turn leads to the next. With a track record it may be possible to have multiple projects (at different states) running in tandem and for the production company to take on employees to manage the back office. However, it will never (or certainly rarely outside the giant production studios) be the

case that equipment, crew, performers etc. will be on the books – all aspects of a production are generally contracted on an as needed basis. At the start of a production company's life therefore, it was to be expected that there would be no employees, premises etc. but that was no indication of a lack of intention to develop and grow a successful business.

60. From the outset Mr Dingli had intended for the Appellant, assuming the anticipated success of Cry Me a River (ultimately released as Dark Corners), to employ a development director and an administrator. That had now been achieved with the role of the head of development (working 20 hours per week) to source new projects not written by Mr Dingli.

61. Mr Dingli said that it is common practice for the film industry to use special purpose vehicles for each film or project with a view to ring fencing the income and costs of the production. He explained that in 2016 when SCF first contemplated seeking equity investment the proposal was to follow the industry norm and that such a model did not adversely affect the ability of the special purpose vehicle from accessing SEIS or EIS funding. However, it was claimed by Mr Dingli that, as the controlling shareholder of both SCF and the Appellant, by the time he was seeking equity investment for Cry Me A River in 2018 he intended for the Appellant to be the sole income generating production company. This was, he said, the case despite the fact SCF was the owner of the intellectual property rights to the slate of films. He reinforced that intention the was for SCF to develop the ideas and for the Appellant to produce the films once the market for them had been developed.

62. The potential for production and distribution of the Cry Me a River Film had gained traction and the pre-production work was advancing so Mr Dingli looked to find equity investment to fund the production phase. This was done under the Appellant. Whilst the offering memorandum was focused on Cry Me a River the document also referenced that this was a first proposed film from the slate of other titles. Mr Dingli accepted that the language of offering memoranda could be misleading in its reference to SCF but he also confirmed that the Appellant has now changed its name to become Secret Channel Films Ltd and the original company with that name has been liquidated.

63. As regards Ms Morgan and Mr Scalzo's involvement it was stated that they had indicated an intention to invest some time prior to June 2018 having been identified as potential investors by a broker appointed by the Appellant during 2017. The investment had been made at the point at which shooting had started and there was a real need for the cash injection which came with their investment. Both Ms Morgan and Mr Scalzo were actively engaged with the business and driving its success, and both were now appointed as directors of the company confirming their long-term commitment to the business.

64. Mr Dingli admitted that he had been unaware of the legislative change to the SEIS in March 2018 when the risk to capital requirement had been introduced. He also stated that had he been aware of it being made he would have sought to ensure that Mr Morgan and Mr Scalzo were bought on board before the change was made but, by March 2018, he was actively engaged in the pre-production phase of the film. He explained that over a period of about 12 months the full process of producing a film is all consuming. In pre-production it is essential to get all the contracts and resources in place so that the filming of the production itself can happen as efficiently as possible. Production, in this case, required him to be on set in both London and in Norway and then post-production the artistic process of editing and finalising a distributable film starts. All he was focused on was the act of making the film.

65. It was stated that all R&D and prep work was carried on and financed by the Appellant but, in order to film in Norway a co-producer needed to be appointed. Based on SLine's relationships and reputation in Norway suitable filing locations would be located and the right to film at them secured together with the other resources necessary to cost efficiently undertake

the on-location production in Norway. In this regard SLine were the "practical producer on the ground" acting as a subcontractor to the Appellant. Mr Dingli claimed that the Appellant was responsible for all funding and creative aspects of the production. Mr Dingli firmly disavowed that the Appellant and SLine represented a joint venture for the production of Cry Me A River it being pointed out that it was the Appellant alone to which the rights to exploit the title had been granted.

66. Mr Dingli explained that co-production of this type was common in film production. He recognised that this practical explanation of how the relationship with SLine operated did not fully reflect the detailed terms of the co-production agreement. This, he said, was due to the use of an "off the shelf" template agreement despite it being contractually inappropriate.

67. The financial forecasts for productions were prepared so as to distribute the forecast budget but that any excess income over budget was to represent profit which would be used by the Appellant as the basis on which to drive further investment in a subsequent project. Mr Dingli considered the approach to the distribution of profit to be entirely consistent with the development and growth of a successful film production company, with the principal effect of a successful production being the relationships and reputation that it drives, facilitating growth in opportunity and profitability of larger productions. He stated that the producer's distribution was always intended to be reinvested into the next production and that he intended to encourage that the equity investors do not take their distribution such that it could be used to develop and grow the trade in the long term.

68. Mr Dingli considered that what was happening with King of Notting Hill was testament to how a small production company grows. The budget for Cry Me A River was below £1m but due to its success the budget for King of Notting Hill is $5m. No SEIS investment is or would be sought for that production because a successful first film carries with it the potential to secure alternative investment, including by way of equity which did not need the tax advantages offered by way of SEIS and/or EIS and that is precisely what is happening with King of Notting Hill.

LEGISLATION

69. The SEIS is provided for in ITA. It provides relief to encourage investment by individuals in small, high risk, early stage, trading companies. The scheme provides for generous income and capital gains tax reliefs. Subject to the conditions of the scheme investors may claim relief against income tax up to an annual investment of £100,000 for funds used to subscribe for new ordinary shares issued by qualifying companies. Income tax liability on the sum invested is reduced by 50% provided the shares are held for 3 years.

70. Where a share issue by a company meets a series of complex rules/conditions the issuing company may apply to HMRC, pursuant to section 257EC ITA, for authority to issue a certificate of compliance in respect of the identified share issue

71. There was no dispute in this appeal that the Appellant met many of requirements to be authorised to issue the certificate of compliance. In particular, it was accepted by HMRC that the activity of film production was a qualifying new trade and thereby a qualifying business activity for the purposes of section 257HG ITA. However, HMRC contend that there is no entitlement to SEIS in respect of the share issued to Ms Morgan and Mr Scalzo by virtue of the Appellant failing to meet any one of three of the conditions for entitlement.

72. Since inception, the scheme has required, pursuant to section 257DC ITA that the issuing company must be carrying on a qualifying business activity rather than any other person (**Own Qualifying Business Activity Condition**).

73. It has also been a requirement since inception of SEIS that the shares not be issued in connection with disqualifying arrangements as defined in section 257CF ITA as any arrangement the main purpose or one of the main purposes of which is to secure that a qualifying business activity is or will be carried on by the issuing company, or one or more persons may obtain SEIS relief, in circumstances in which (so far as relevant to this appeal) in the absence of the arrangements it would have been reasonable to expect that the whole or a greater part of the relevant qualifying business activities would have been carried on by another business or person (**Disqualifying Arrangements Requirement**).

74. With effect from 15 March 2018 section 257AAA ITA introduced what is known as the risk to capital condition. In summary, the risk to capital condition is a principles-based test to determine if, at the time of the investment, the company is a genuine entrepreneurial company with an objective to grow and develop, and whether there is a significant risk to the individual of loss of capital (**Risk to Capital Condition**)

75. The relevant provisions are replicated in Appendix 1.

THE PARTIES' SUBMISSIONS

76. Both Mr Dingli and Mr Simpson assisted the Tribunal with detailed submissions in writing and orally. All the submissions made were noted in the Tribunal's record of proceedings and together with all the evidence, have been taken into account in reaching the conclusion in this matter. This decision is necessarily a summary of the arguments and evidence, but all matters argued and bought to the Tribunal's attention have been taken into account in reaching the determination in this appeal.

77. There was no dispute between the parties as to the correct interpretation of the relevant legislative provisions. The dispute lay as to whether the Appellant met each of the conditions identified in paragraphs [72] to [74] above.

78. Set out below are HMRC's submissions on each of the conditions/requirements and a more composite articulation of the Appellant's submissions.

Risk to Capital Condition

79. The Risk to Capital Condition requires that the Appellant demonstrate, as at the date of the share issue i.e. 19 June 2018, that it had an objective to grow and develop the trade of film production for the long term.

80. HMRC contended that absent a statutory definition of the words "grow", "develop" and "long-term" the words were to be given their ordinary meaning. In particular, regarding long term, HMRC contended that the three-year minimum holding period required under the scheme indicated that the intention as to longevity of the business should exceed and not be equated with a three-year period.

81. As the intention is to be determined at the date of the issue of the shares and in a statutory context of it being "reasonable to conclude" that the requisite intention is held, HMRC contended that it was not simply a case of determining the subjective intention of Mr Dingli (as the guiding mind of the Appellant business), particularly as such intention was articulated a number of years after the shares had been issued. In HMRC's submission the subjective intention of the business was to be determined objectively by reference, in particular, to the contemporaneous documentary evidence.

82. In this regard, section 257AAA(3) ITA provides a non-exhaustive list of factors to be taken into account none of which are determinative in the multi factorial exercise of considering all of the circumstances.

83. HMRC made the following observations in respect of the six matters listed in section 257AAA(3):

(a) The extent to which the company's objectives included an intention to increase the number of employees or the turnover of the trade – as of 19 June 2018, and 4 years after incorporation the Appellant company had no employees and only Mr Dingli as a director but whose services were provided to the Appellant pursuant to a contract with SCF. HMRC did not accept that the nature of the film industry precluded an intention to increase the number of employees. HMRC also considered that there was no objectively discernible intention to increase turnover. The Appellant, it was said, was incorporated with the sole intention of producing initially King of Notting Hill but subsequently Cry Me A River. They contended, by refence to the documents available that SCF was the entity tasked with developing titles to the point of production at which point special purpose vehicles would be incorporated for the purposes of producing individual films, the profits of which would be fully distributed, and the special purpose vehicle wound up. As such there was no demonstrated intention to increase either the number of employees or the turnover of the Appellant. There was an intention to produce a single film.

(b) The nature of the company's sources of income including the extent to which there was a significant risk of the company not receiving some or all of the income – HMRC made no submission regarding this factor.

(c) the extent to which the company has or is likely to have assets, or is or could become a party to arrangements for acquiring assets, that could be used to secure financing from any person – HMRC made no submission regarding this factor.

(d) the extent to which the activities of the company are sub-contracted to persons who are not connected with it – HMRC submitted that most, if not all of the substantive work, including decision making, on the production of Cry Me A River had been subcontracted, including Mr Dingli as producer, co-production with SLine and all operational roles and equipment. HMRC accepted that this may be a normal feature of film production but considered that to be irrelevant for the purposes of considering this factor.

(e) the nature of the company's ownership structure or management structure, including the extent to which others participate in or devise the structure – HMRC relied on the relationship between SCF and the Appellant as indicating that it was SCF which represented the long term vehicle for the development of the slate of film titles through the model set out in the 2016 SCF Equity Offer i.e. by means of single use special purpose vehicles for each developed project. It was averred that the Appellant company had no expertise or infrastructure independent of SCF from which to develop or grow a trade for the long term.

(f) how the opportunity for investment in the company is marketed – HMRC pointed to the 2016 SCF Equity Offer and the 2018 Offer Memorandum as together confirming that the equity offer in the Appellant related to a single film. HMRC considered that the reference to the Appellant producing all films on the SCF slate to bear little weight in the context of the remainder of the document which pertained exclusively to the single film, Cry Me A River. HMRC sought to demonstrate that as marketed there was no intention to retain profits from Cry Me A River in order to fund production of future films. It was said that the investor's return was not marketed or intended to be derived from an intended increase in the

value of the company and its ongoing trading profits but solely from the success of Cry Me A River. HMRC also noted that the 2018 Offering Memorandum SCF was stated to be the owner of the intellectual property of the remaining slate countermanding any purported intent that the Appellant represent the principal trading entity.

(g) the extent to which arrangements are in place under which opportunities for investment in the company are or may be marketed with, or otherwise associated with, opportunities for investment in other companies or entities – no formal submissions were made in respect of this factor. However, in oral submissions HMRC (and in respect of the Disqualifying Arrangement Condition) HMRC contended that it had clearly been intended that SCF attract both SEIS and Enterprise Investment Scheme (**EIS**) investment. As set out below, HMRC contended that the Appellant had been used as a vehicle to permit SEIS funding for each film produced thereby exceeding the £150,000 limit per trade (in this case that of SCF – albeit that SCF had not, in fact, received investment under either SEIS or EIS.

84. Considerable emphasis was placed by HMRC more broadly on the financial projections which anticipated that all profits from Cry Me A River would be distributed to the various participants. They contended that this confirmed that there was no long-term intention to develop and grow the trade but rather to produce films one by one staying the same size i.e. only ever producing a single film at a time. It was contended, by reference to the model articulated in the 2018 Offering Memorandum the financial position of the Appellant in respect of any subsequent film produced would be the same as for Cry Me A River i.e. investment and capital raising would have to start all over again. HMRC contended that SEIS was intended to provide the initial equity injection for high-risk businesses such that they gain autonomy and can secure future capital without the tax advantages offered by SEIS.

85. It was HMRC's view that the statement in the 2018 Offering Memorandum which stated that the Appellant was to be the sole income generating vehicle was not a sufficient statement of intent to counteract the plethora of evidence (specifically, the reference to a single film, full distribution of profits, the articulation of an exit strategy after the film had been produced and distributed).

86. HMRC contended on the evidence and by reference to the factors it could not be reasonably concluded that the Appellant had demonstrated an intention to grow and develop in the long term with the consequence that the share issues to Ms Morgan and Mr Scalzo were not eligible under SEIS.

Own Qualifying Activity Condition

87. Sections 257DC and 257HG ITA have the effect of providing that the Appellant must demonstrate that in the period from 19 June 2018 to 19 June 2021 the qualifying trade of film production was not carried out by anyone other than the Appellant. HMRC contend that it was not the Appellant (or not the Appellant alone) which produced Cry Me A River as it was co-produced by SLine which, by reference to the Heads of Terms Agreement and Co-Production agreement, was jointly responsible for all financial, creative and technical decision making in respect of the production. They contended that where the trade is even partially carried on by someone other than the Appellant section 257DC ITA precluded the Appellant from issuing shares benefiting for the tax advantages of SEIS.

88. When the nature and extent of SLine's involvement in the production was considered HMRC contended that they must be considered to have been carrying on part of the trade purportedly carried on by the Appellant. It was noted that two thirds to three quarters of the

filming was undertaken in Norway. HMRC contended that the Mr Dingli's articulation that SLine were the "producers on the ground" in Norway led to the irrefutable conclusion that Cry Me A River was a trading venture shared between the Appellant and SLine each with their respective autonomy and the need to collaborate, sharing the benefits of success and the cost of failure. It was contended that without SLine the Appellant simply did not have the capacity to undertake the trade they purported to be engaged in.

89. HMRC rejected the Appellants argument that the contractual arrangements with SLine did not reflect the reality of the relationship between them. HMRC considered that the Appellant's assertion that the co-production agreement in these terms had been chosen as off the shelf and/or because such terms were required in order to secure the participation of SLine in a more limited scope could not be accepted.

90. HMRC considered it immaterial that the Appellant bore the costs incurred on their behalf by SLine in connection with accessing the resources necessary for filming in Norway or that the revenues were all said to be returned to the Appellant on the basis that the legislative test was who carried on the qualifying trade and not who funds it.

Disqualifying Arrangements Requirement

91. HMRC contend that the Appellant was party to arrangements the main or one of the main purposes of which (and in accordance with section 257CF ITA) was to secure that it rather than SCF carried out the qualifying activity of film production.

92. The evidence, they say, supports a conclusion that in 2016 SCF sought to raise funds for the development of Cry Me A River, King of Notting Hill and other films on its slate. By reference to the SCF website both Cry Me A River and King of Notting Hill were stated to be SCF projects and Mr Dingli's involvement in SCF and the Appellant together indicated that it was SCF intended to have Cry Me A River produced by SCF.

93. HMRC contend that the object of the Disqualifying Arrangements Requirement is that it prevents arrangements intended to provide tax-advantaged money to another company which could not qualify and/or which did not want to relinquish equity. In HMRC's view, and in accordance with the terms of section 257CF ITA it was reasonable to conclude that it had originally been intended that SCF produce Cry Me A River, that in practice, through the auspices of Mr Dingli (and SCF employee under subcontract to the Appellant), it was SCF, that produced the film and that the use of the Appellant provided SCF with the opportunity to access SEIS on a per film basis and thereby the ability to exceed the £150,000 per qualifying trade/entity cap on relieved equity investment.

The Appellant's submissions

94. Mr Dingli was not represented (despite the attendance at the hearing of his accountant). He had produced expansive grounds of appeal and what was described as a statement of case. He also gave an oral presentation. The Tribunal has done its best to piece together his case and arguments though, at times what was said and/or written contained inconstancies.

95. The Appellant made much of the statutory purpose of SEIS as encouraging investment in high-risk ventures. Mr Dingli expressed the view that if HMRC's position were correct then SEIS funding would simply never be available to the film/television production industry, a sector that needed it the most, particularly post covid.

96. It was the Appellant's case that it had objectives to grow and develop its trade in the long term and that it was reasonable to reach such a conclusion on the basis of the evidence available and by reference to the unique operations of the film production industry as outlined above. In particular, Mr Dingli contended that in order to grow and develop a film production company every penny of investment, including equity investment, had to be spent "on screen". To have

appointed employees or purchased expensive equipment (where crew, actors, and equipment is readily sourced on an as needed basis by reference to the requirements of the production) would have diverted unnecessarily investment away from the production which, once successful, drives the potential for further and larger productions. Despite this he contended that there was always an intention to recruit a Head of Development.

97. Mr Dingli placed great emphasis on the provision of the 2018 Offering Memorandum in which it was specifically stated that by the issue of that document it was his intention that the Appellant be the sole income generator for the SCF slate on a go forward basis. He explained that it was normal to raise investment by reference to an individual production project. Grant and other funding would always be project specific. However, for equity investment, whilst the draw was the attractiveness of the first production project the intention was nevertheless to retain the equity investment in the long term for the growth and development of future productions. This was his maintained position despite the financial information indicating that the equity investors would have at least their stake returned from the profits of Cry Me A River and that there is an articulated intention to fully distribute the all the profits. Mr Dingli explained that the arrangement with the investors certainly now,was that the profits would not be fully distributed and were to be retained as initial investment in King of Notting Hill.

98. It was contended that the SCF slate of titles (as set out in the 2016 SCF Equity Offer) was evidence that there were other titles in development which could progress to production stage (indeed King of Notting Hill could have reached production first) such that the trade of the Appellant grow and develop over a considerable period, with increasing budgets for the productions and thereby a growth in trade. As was apparent within the period to 19 June 2021 King of Notting Hill had progressed closer to production with a significantly greater budget than Cry Me A River, to be produced by the Appellant and not either SCF or any other company.

99. On the role of SLine, Mr Dingli submitted that SLine were required both as necessity (the Appellant would not have been permitted to film in Norway without the involvement of a Norwegian Co-Production partner) and because of expedience (as SLine had the relationships and reputation in Norway to secure the necessary production resources to facilitate filming on location in Norway). However, that was not, in his submission, to be interpreted as SLine carrying on any part of the trade carried on and intended to be carried on by the Appellant who was solely responsible for financing and production of Cry Me A River.

100. The Appellant did not consider that the relationship between SCF and itself was such that there was any intention that the Appellant carry on the trade of film production in place of SCF. They contended that there had been no fragmentation of the business with a view to securing more relievable SEIS funding it being noted that SCF had not raised any SEIS funding.

101. The Appellant also contended that because the arrangements for investment had been put in place prior to the legislative changes made from 15 March 2018 SEIS should be permitted without reference to the legislative change and despite the actual investment being made after the legislative change. It was stated that "retrospective" steps had been taken to ensure that the post 2018 SEIS conditions would be met by the Appellant in respect of the investments under consideration by the Tribunal. Mr Dingli contended that to refuse SEIS to the investments made by Catherine Morgan and Victor Scalzo would be to run contrary to the spirit and purpose for the SEIS benefits.

102. It was also contended that as SCF, on HMRC's case would have been entitled to SEIS there could never be a situation of disqualifying investments.

FINDINGS OF FACT AND DISCUSSION

103. Difficulties inevitably arise where two legal entitles are substantively owned and controlled by the same individual who acts as the guiding mind for both.

104. The Tribunal found Mr Dingli's evidence somewhat contradictory both internally and in connection with the documentary evidence. It was apparent to the Tribunal that Mr Dingli believed that Ms Morgan and Mr Scalzo should be entitled to SEIS relief in respect of their respective investments on that basis that each had made a high-risk investment much needed to facilitate the production of Cry Me A River. Both individuals had remained committed to the Appellant's business which, despite the difficulties for the creative industries has produced and marketed Cry Me A River and has now moved on to the pre-production phase for a second film. He was passionate about what the Appellant had achieved and continued to achieve. The Tribunal considered that his exposition of the intentions of the Appellant to have been honestly held but not, by reference to the contemporaneous documents, always an accurate reflection of the evidence. It was clear that there had been some considerable "retrofitting" of the facts and, in some cases, the legal agreements, with a view addressing HMRC's case the Tribunal has predominantly focused on the documentary evidence.

Risk to Capital Condition

105. Section 257AAA requires consideration of all the circumstances and that the circumstances to which regard may (not must) be had include those listed in subsection (3).

106. Mr Dingli contended that it was unfair that this condition should apply to him but contended that it was demonstrably reasonable to conclude that the Appellant had an intention to grow and develop the trade in the long term.

107. HMRC contend that the circumstances particularised in (a), (d), (e) and (f) are particularly relevant and they rely heavily on what they contend was the demonstrated intent that the Appellant was a special purpose vehicle intended for use for a single film.

108. There is a conflict of evidence regarding the objectively discernible intention of SCF and Mr Dingli regarding the use of special purpose vehicles to produce each film on the SCF slate. The 2016 Equity Offer scoped the business of SCF as the development of scripts to the point where investment could be secured at which point the developed rights would be sold to individual special purpose vehicles which would then produce the film and exploit the rights. To that end the Appellant company was initially registered as King of Notting Hill Limited with a view to producing the film of the same name. However, when it became apparent that Cry Me A River had better short-term prospects than King of Notting Hill the company changed its name to Cry Me A River Limited.

109. Mr Dingli's case wavered between wanting to say that he had always had the intention to use the Appellant as a vehicle to exploit all the scripts on the SCF slate and accepting that such an intention was retrofitted because of the changes to the SEIS legislation.

110. It is apparent that the use of special purpose vehicles for each production is a structure commonly adopted by the film industry. That model is understandable in the context of the risks associated with film production, it ringfences profitable projects from unprofitable ones. It is also clear, as stated by Mr Dingli, that often it is driven by the requirement for such vehicles to claim tax benefits (such as film tax credit) both in the UK and in other jurisdictions. Prior to the legislative change there was no need for an alternative model to be adopted.

111. Mr Dingli accepted that he had not become aware of the tax changes until sometime after the share issue; that acknowledgement, taken alone would indicate that there was an intention to use the Appellant business as a special purpose vehicle as of June 2018.

112. However, the 2018 Offering Memorandum stated that the Appellant was intended as the sole income generating vehicle for the SCF slate. Taken alone that statement would indicate that by June 2018 there was a broader intent for continuity and a wider purpose for the Appellant's trade.

113. The Tribunal considers the use of SCF branding and reference to their ownership of the slate titles to be neutral in the context of determining whether it was intended that the Appellant be used as a special purpose vehicle for the production of Cry Me A River only. SCF held the title to each of the scripts and its trade, as stated in the 2016 Equity Offer, was the development of scripts to the point at which they could be produced. It is therefore legally and practically the case that the scripts were those of SCF up to the point at which the right to produce was granted to a production company. No other films on the slate had reached the point of production and hence all rights were retained by SCF as such it tells nothing of to whom the rights would be granted once developed. The use of branding does not resolve the conflict between the 2016 stated intention to use special purpose vehicles and the 2018 stated intention to that the Appellant would be the sole income generating vehicle.

114. Similarly in relation to the focus of the 2018 Offering Memorandum on Cry Me A River. At that time SCF had only developed one film to the point of production and thereby only granted production rights in that film. However, there was no inhibit on the granting of further productions once developed. Whilst Mr Dingli said he was not aware of the legislative change this document clearly stated that the Appellant was to be the sole income generating vehicle.

115. On balance and taking account of all the evidence the Tribunal finds that as of 19 June 2018 it is reasonable to conclude that to the extent that further scripts were developed to a point where the production process could be initiated the rights to produce would be granted to the Appellant who would then act as the sole income generating entity. As such the Tribunal considers that it was reasonable to conclude that there was intention to increase turnover.

116. In the context of the peculiarities of the film production/co-production industry the Tribunal does not consider that an absence of intention to increase employees and/or the use of sub-contractors is of any particular concern. Even since 2018 there has been a substantial growth in the gig economy, zero hours contracts and a more itinerant workforce generally. However, as explained by Mr Dingli the use of sub-contracting is standard in the modern film industry where the cast will be specific to a particular production and different crew members will be used for short periods at each of the pre-production, production and post-production phases. It would be economically irrational to employ all those needed for a single identified production, even where the production of other films was certain. The very nature of the industry requires that the individuals have flexibility to work on multiple projects for different production companies on an ad hoc basis. It is relevant that the business has the knowledge and relationships to know where and how to source the resources it needs. However, the Tribunal finds that through the production contract and by reference to the list of subcontractors it is clear that the Appellant had the necessary access to resource it needed to initiate and thereby to grow and develop its trade. The position may well be different in different sectors.

117. The Tribunal's conclusion in this regard is consistent with the position taken by Judge Popplewell in *CHF Pip! Plc* [2021] UKFTT 383 (TC) and recently adopted by Judge Poole in *Inferno Films Limited* [2022] UKFTT 141 (a judgment not referred to by either party and only very recently released).

118. The relationship between SCF and the Appellant and Mr Dingli's as sole director in each company is materially relevant in determining an intention to grow and develop in the long term. However, as set out above in 2016 the business/trade stated to be carried on by SCF was the development of film scripts to the point of production then to be carried on by others. The

trade of the Appellant is film production/co-production. The Tribunal finds that whilst development and production could be carried on by the same entity it need not necessarily be so, and both are capable of representing independent qualifying trades which can be developed and grown in the long term. There was (and prior to the merger of SCF with the Appellant) remained a connection between the businesses but not sufficient in the view of the Appellant to preclude it being reasonably concluded that there was an intention for the Appellant, as distinct from SCF to grow and develop a film production/co-production trade.

119. The Tribunal has reflected hard on HMRC's submission that it was particularly significant that the financial forecasts produced and part of the 2018 Offering Memorandum envisaged that the profits from the film would be fully distributed and that the effect of distribution would be that even were it the case that Cry Me A River was a block buster success the Appellant would not have grown or developed and would be back to square one when raising investment for any subsequent film. However, the Tribunal has concluded that the financial forecasts are no more than an articulation of the anticipated profitability of the film once produced. The 2018 Offering Memorandum did not give rise to a right on the part of the equity investors to call for full distribution of any profits and ultimately the Appellant company would have been entitled to determine what proportion of profit to distribute, particularly if the film's success exceeded expectation and as permitted in the Articled of Association.

120. The Tribunal accepts and finds as a fact that the Appellant did have an intention to leverage the hoped-for success of Cry Me A River with a view to then producing further films from the slate of titles under the ownership and subject to development by SCF. That in the film industry success breeds success and it was not unreasonable for the Appellant to consider that a successful low budget production would result in the opportunity to secure a larger budget (and hence turnover) from the next production. The fact that there was only capacity, certainly at the embryonic stages of the business, to produce one film at a time cannot preclude a reasonable conclusion that there was an intention to grow and develop the trade in the long term.

121. This conclusion is consistent with that of Judge Poole in *Inferno*. In that appeal there was a much clearer articulation by the taxpayer of an intention to use any profits from the first production as investment for the next production. Faced with a very similar argument from HMRC as that presented in this case, that a film production company operates on a project by project basis Judge Poole noted:

> "… There was a perfectly natural focus in the fundraising document on the immediate project which the Appellant was seeking to bring to fruition, but it is perfectly clear to me that this focus did not detract from the Appellant's intended long term objectives to grow and develop its film production trade by making and releasing a series of further films, as finance allowed …"

122. The present case is not as clear as that faced in *Inferno*. However, there was a series of titles held by SCF capable, with development by SCF, of moving into production. It was always SCF's intention to continue to develop the slate titles and for production of those additional titles to be undertaken by another entity. By reference to the 2018 Offering Memorandum that single entity was to be the Appellant.

123. The Tribunal considers that the Appellant, on the evidence, met the Risk to Capital Condition.

Own Qualifying Business Activity Condition

124. This condition requires that it is the Appellant which carries on the new qualifying trade.

125. It is therefore important, in the first instance, to identify the relevant trade which was intended to be carried on.

126. The Tribunal is entitled to take judicial notice of the fact that many film and television productions are co-produced. Anyone sitting in the cinema at the start of a film will see the logos and introductions of multiple co-producers in respect of each and every film, it is indeed rare for box office hits to be the work of a single production company. Particularly films requiring multiple location filming and/or particular skills associated with special effects. The mid pandemic release of the James Bond film No Time to Die was co-produced by Eon, MGM and Universal Pictures. The recently released Top Gun Maverick the work of Skydance Media, Din Simpson/Jerry and Bruckheimer Films.

127. In those circumstances the Tribunal considers it reasonable to conclude that the Appellant's trade one of co-producing films. In this regard the Tribunal is entirely satisfied that the activities of a co-producer are sufficient to constitute a discrete trading activity. The Appellant was granted the right to produce and exploit the intellectual property rights associated with the script of Cry Me A River. Acting as a co-producer maximised the opportunity to fully exploit and commercialise those rights. It is inconceivable that Skydance Media or any of the other production companies who co-produce would not be considered to trade only because of the fact that modern films are often (perhaps exclusively) co-produced.

128. The evidence regarding the role of SLine is to be found in the Heads of Terms Agreement and the Co-Production Agreement together with information provided in the Cry Me A River Project report and in the oral evidence of Mr Dingli. HMRC sought to establish that SLine performed part of the Appellant's trade. Mr Dingli sought to minimise SLine's role as subservient to that of the Appellant, certainly in terms of the creative and technical input, whilst also acknowledging the importance and contribution made to the production of the film by reference to identifying locations for filming and securing the local resources.

129. On the evidence the Tribunal finds that SLine was formally and practically a co-producer of Cry Me A River. They were so appointed in the various contractual documents. They contributed 23.81% by way of "non-recouping production capital" which was anticipated to be recoverable at stage 4 of the waterfall with Trond Eliasson also being entitled to participate in a profit distribution of 5% at stage 7.

130. Assessing all the evidence the Tribunal does not consider that it is reasonable to conclude that the Appellant's role in production was so limited as to preclude a conclusion that it alone was responsible for carrying on the trade of production/co-production. In respect of Cry Me A River its role was more significant than that of SLine and in any event the role of co-producer was not shared (overall production responsibility was but not to the exclusion of the Appellant carrying on its own trade). Accordingly, the Appellant does not fall foul of the Own Qualifying Activity Condition.

Disqualifying Arrangements Requirement

131. HMRC contend that the arrangements pursuant to which the rights to produce were transferred to the Appellant by SCF fall foul of the requirements of Condition B as set out in section 257CF(4) ITA i.e. they contend that "in the absence of the arrangements, it would have been reasonable to expect that the whole or a greater part of the component activities of the relevant qualifying business activity would have been carried on by [SCF]" and that the main or one of the main purposes of the assignment of the production rights to the Appellant was for the Appellant to raise equity investment benefitting from SEIS relief to which SCF would not have been entitled/to a greater extent than SCF would have been entitled.

132. In the first instance it is to be identified that it does not ever seem to have been the intent of SCF to produce the films on its slate. The 2016 Equity Offer envisages only that SCF would develop the rights to the point at which they could move into production at which point the rights would be assigned or licenced to a production company. In 2016 it was envisaged that there would be a special purpose vehicle for each film. Given that SEIS has a limit of £150,000 for the issuing entity the Tribunal can see that had it been the case that there were multiple special purpose vehicles created upon the creation of the second and subsequent production HMRC may have had a justifiable objection that use of that second vehicle rather than the first fell foul of section 257CF. However, on the basis that development of intellectual property rights represents a qualifying business activity (as defined in section 257HG(2)(a)/(b)) and requires discrete skills and resources from production which is capable of representing a different qualifying business activity the Tribunal does not consider that the separation of development of the intellectual property rights from production of films following the assignment of those rights falls foul of condition B.

133. It is to be noted that the provisions of section 257CF ITA were introduced in 2012 when the scheme was first legislated. Though there was an amendment in 2017 it did not substantively amend the main purpose and condition B requirements. It has thus had relevant force of law throughout the period 2016 (when the 2016 Equity Offer was prepared) and 2018. Despite this HMRC granted authority to SCF and the Appellant in respect of the pre-March 2018 share issues. Whilst of course, HMRC may have done so in error, it is at least evidence that they did not consider with regard to those earlier shares for which authority was given that the use of the Appellant as a production company in respect of titles owned and developed by SCF represented a disqualifying arrangement. That is particularly pertinent in respect of the share issue to Mr Grantham which was initially considered conterminously with the disputed share issue.

134. Finally, and in this regard given that SCF did not issue any shares with the benefit of SEIS it is difficult to see that the purpose or main purpose of the arrangements pursuant to which the Appellant co-produced Cry Me A River was to obtain SEIS relief exceeding that to which SCF might otherwise have been entitled.

135. The Tribunal therefore determines that there were no disqualifying arrangements which would preclude SEIS authorisation for the shares issued to Ms Morgan and Mr Scalzo.

DISPOSITION

136. Having considered all the evidence and submissions made, and for the reasons set out above, the Tribunal has determined that:

(1) The Appellant meets the Risk to Capital Condition as prescribed in section 257AAA ITA as it is reasonable to conclude (taking account of all of the circumstances including the matters listed in section 257AAA(3) ITA) that the Appellant had the necessary intention to grow and develop the business in the long term;

(2) The qualifying business activity as manifested in connection with the production of Cry Me A River was that of co-production. Whilst SLine was a second co-producer in respect of the production of the film, SLine's involvement does not fall foul of the Own Qualifying Business Activity Condition required under section 257DC ITA;

(3) There are not disqualifying arrangement meeting the definition provided for the Disqualifying Arrangements Requirement in section 257DC ITA.

137. As a consequence HMRC were wrong to issue a compliance certificate pursuant to section 257EC ITA in respect of the shares issued to Ms Morgan and Mr Scalzo on 19 June 2018.

138. The appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

139. 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.

AMANDA BROWN QC
TRIBUNAL JUDGE

Release date: 13 JUNE 2022

APPENDIX 1

257EC Compliance Certificates

257EC(1) A "compliance certificate" is a certificate which–

(a) is issued by the issuing company in respect of the relevant shares,

(b) states that, except so far as they fall to be met by or in relation to the investor, the requirements for SEIS relief (see section 257AA) are for the time being met in relation to those shares, and

(c) is in such form as the Commissioners for Her Majesty's Revenue and Customs may direct.

257EC(2) Before issuing a compliance certificate in respect of the relevant shares, the issuing company must provide an officer of Revenue and Customs with a compliance statement in respect of the issue of shares which includes the relevant shares.

257EC(3) The issuing company must not issue a compliance certificate without the authority of an officer of Revenue and Customs.

257EC(4) If the issuing company, or a person connected with the issuing company, has given notice to an officer of Revenue and Customs under section 257GF, a compliance certificate must not be issued unless the authority is given or renewed after the receipt of the notice.

257EC(5) If an officer of Revenue and Customs–

(a) has been requested to give or renew an authority to issue a compliance certificate, and
(b) has decided whether or not to do so,

the officer must give notice of the officer's decision to the issuing company.

257AAA Risk-to-capital condition

257AAA(1) The risk-to-capital condition is met if, having regard to all the circumstances existing at the time of the issue of the shares, it would be reasonable to conclude that–

(a) the issuing company has objectives to grow and develop its trade in the long-term, and

(b) there is a significant risk that there will be a loss of capital of an amount greater than the net investment return.

257AAA(2) For the purposes of subsection (1)(b)–

(a) the risk is to be determined by reference to a loss of capital, and the net investment return, for the investors generally,

(b) the reference to a loss of capital is to a loss of some or all of the amounts subscribed for the shares by the investors, and

(c) the reference to the net investment return is to the net investment return to the investors (whether by way of income or capital growth) taking into account the value of SEIS relief.

257AAA(3) For the purposes of subsection (1) the circumstances to which regard may be had include–

(a) the extent to which the company's objectives include increasing the number of its employees or the turnover of its trade,

(b) the nature of the company's sources of income, including the extent to which there is a significant risk of the company not receiving some or all of the income,

(c) the extent to which the company has or is likely to have assets, or is or could become a party to arrangements for acquiring assets, that could be used to secure financing from any person,

(d) the extent to which the activities of the company are sub-contracted to persons who are not connected with it,

(e) the nature of the company's ownership structure or management structure, including the extent to which others participate in or devise the structure,

(f) how any opportunity for investment in the company is marketed, and

(g) the extent to which arrangements are in place under which opportunities for investments in the company are or may be marketed with, or otherwise associated with, opportunities for investments in other companies or entities.

257AAA(4) If the issuing company is a parent company–

(a) any reference in this section to the company's trade is to what would be the trade of the group if the activities of the group companies taken together were regarded as one trade, and

(b)any reference in subsection (3)(a) to (e) to the company is to any group company.

257DC The issuing company to carry on the qualifying business activity

257DC(1) The requirement of this section is met in relation to the issuing company if, at no time in period B, is any of the following–

(a) the relevant new qualifying trade,

(b) relevant preparation work (if any), and

(c) relevant research and development (if any),

carried on by a person other than the issuing company or a qualifying 90% subsidiary of that company.

257DC(2) Subsection (3) has effect for the purpose of determining whether the requirement of this section is met in relation to the issuing company in a case where relevant preparation work is carried out by that company or a qualifying 90% subsidiary of that company.

257DC(3) The carrying on of the relevant new qualifying trade by a company other than the issuing company or a subsidiary of that company is to be ignored if it takes place at any time in period B before the issuing company or any qualifying 90% subsidiary of that company begins to carry on that trade.

257DC(4) The requirement of this section is not regarded as failing to be met in relation to the issuing company if, merely because of any act or event within subsection (5), the relevant new qualifying trade–

(a) ceases to be carried on in period B by the issuing company or any qualifying 90% subsidiary of that company, and

(b) is subsequently carried on in that period by a person who is not at any time in period A connected with the issuing company.

257DC(5) The following are acts and events within this subsection–

(a) anything done as a consequence of the issuing company or any other company being in administration or receivership, and

(b) the issuing company or any other company being wound up, or dissolved without being wound up.

257DC(6) Subsection (4) applies only if–

(a) the entry into administration or receivership, and everything done as a consequence of the company concerned being in administration or receivership, or

(b) the winding up or dissolution,

is for genuine commercial reasons, and is not part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.

257DC(7) In this section–

"the relevant new qualifying trade" means the new qualifying trade which is the subject of that qualifying business activity;

"relevant preparation work" means preparations within section 257HG(2)(b) which are the subject of the qualifying business activity mentioned in section 257CB;

"relevant research and development" means–

(a) research and development within section 257HG(3) which is the subject of that qualifying business activity, and

(b) any other preparations for the carrying on of the new qualifying trade which is the subject of that activity.

257HG Meaning of "qualifying business activity"

257HG(1) In this Part "qualifying business activity" , in relation to the issuing company, means–

(a) activity A, or

(b) activity B,

if it is carried on by the company or a qualifying 90% subsidiary of the company.

This is subject to subsection (3).

257HG(2) Activity A is–

(a) the carrying on of a new qualifying trade which, on the date the relevant shares are issued, the company or a qualifying 90% subsidiary of the company is carrying on, or

(b) the activity of preparing to carry on (or preparing to carry on and then carrying on) a new qualifying trade–

(i) which, on that date, is intended to be carried on by the company or such a subsidiary, and

(ii) which is begun to be carried on by the company or such a subsidiary.

257HG(3) Activity B is the carrying on of research and development–

(a) which, on the date the relevant shares are issued, the company or a qualifying 90% subsidiary of the company is carrying on, or which the company or such a subsidiary begins to carry on immediately afterwards, and

(b) from which, on that date, it is intended–

(i) that a new qualifying trade which the company or such a subsidiary will carry on will be derived, or

(ii) that a new qualifying trade which the company or such a subsidiary is carrying on, or will carry on, will benefit.

257HG(4) For the purposes of subsection (3)(a), when research and development is begun to be carried on by a qualifying 90% subsidiary of the issuing company, any carrying on of the research and development by it before it became such a subsidiary is ignored.

257HG(5) References in subsection (2)(b)(i) or (3)(b) to a qualifying 90% subsidiary of the issuing company include references to any existing or future company which will be such a subsidiary at any future time.

257CF The no disqualifying arrangements requirement

257CF(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.

257CF(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.

257CF(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.

257CF(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.

257CF(5) For the purposes of this section it is immaterial whether the issuing company is a party to the arrangements.

257CF(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) EIS relief in respect of the shares;
(b) EIS relief in respect of the shares;
(ba) SI relief under Part 5B in respect of the shares;
(c) relief under Chapter 6 of Part 4 (losses on disposal of shares) in respect of the shares;
(d) relief under section 150A or 150E of TCGA 1992 (enterprise investment scheme) in respect of the shares;
(e) relief under Schedule 5B to that Act (enterprise investment scheme: re-investment) in consequence of which deferral relief is attributable to the shares (see paragraph 19(2) of that Schedule);
(f) relief under Schedule 5BB to that Act (seed enterprise investment scheme: re-investment) in consequence of which SEIS re-investment relief is attributable to the shares (see paragraph 4 of that Schedule).