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Case Number: TC08683

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2019/02683
TC/2019/0437

ENTERPRISE INVESTMENT SCHEME – refusal of compliance certificates – whether reasonable to conclude objective to grow and develop – yes – whether excluded activities – no – whether disqualifying arrangements – yes – appeal refused

Heard on: 23 - 25 November 2022
Judgment date: 03 January 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

HOOPLA ANIMATION LIMITED
(FORMERLY KNOWN AS DAISY BOO AND MONKEY TOO LIMITED)
Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Andrew Chambers and Mr Adrian Wilkins on behalf of the Appellant

For the Respondents: Miss Ruth Hughes and Mr Tomos Rees of Counsel instructed by HMRC's Solicitor's Office.

DECISION

INTRODUCTION

1. This is an appeal against two decisions of HM Revenue & Customs (**HMRC**) to refuse authority to Daisy Boo and Monkey Too Limited (now known as Hoopla Animation Limited (**Appellant**)) to issue compliance certificates to its shareholders provided in section 204(1) Income Tax Act 2007 (**ITA 2007**) under the Enterprise Investment Scheme (**EIS**) for a series of share issues made between 19 March 2018 and 19 October 2018.

2. All references to a section number in this judgment are to ITA 2007 unless otherwise stated.

3. The EIS, together with the Seed Enterprise Investment Scheme, (**SEIS**) are designed to encourage high risk investment in small, early-stage trading companies where such investment meets relevant statutory criteria. For the EIS these criteria are contained in part 5 ITA. The EIS is highly prescriptive. Some of the criteria define the features and attributes required of the issuing company, others concern the use to which the funds may be put by the issuing company.

4. Under these schemes generous income tax and capital gains tax reliefs are offered to investors who are prepared to lose some or all of their capital when investing in these new ventures. These reliefs are accessible by the investors only where they have received, in respect of each investment/share issue in question, a compliance certificate from the issuing company. Such certificates may only be issued with the authority of HMRC. Where HMRC refuse to grant such authority the issuing company may appeal to this Tribunal.

5. The Appellant sought authority to issue compliance certificates in respect of the issue of a number of tranches of shares. HMRC refused the to give authority to issue the compliance certificates because they considered that the circumstances of the Appellant did not meet the provisions of section 157A - the risk to capital condition (**Risk Capital Condition**). Following correspondence between the parties HMRC further substantiated their refusal by reference to the provisions of 181, 189, 192 and 195 to which I will refer as the Excluded Trading Condition (**Excluded Trading Condition**) and/or the provisions of 257 because the share issues formed part of disqualifying arrangements (**Disqualifying Arrangements**).

PROCEDURAL BACKGROUND

6. On 14 November 2014 the Appellant applied to HMRC for advance assurance that the Appellant was entitled to issue shares qualifying from SEIS/EIS relief. The letter informed HMRC that the Appellant had been incorporated to carry on the trade of developing and producing an animation show, at that time, conceived as "Daisy Boo and Monkey Too". The application stated:

> "If Daisy Boo & Monkey Too" is successful, it is anticipated that the Company will distribute the show's broadcast rights both domestically and internationally and also licence the show's content to toy manufacturers, children's clothes producers and app and video game developers as well as exploring other monetisation options."

7. The letter explained the funding structure proposed (the detail of which is set out in paragraphs [59] – [72] below). It also made clear that "whether directly or indirectly through CHF Entertainment (**Entertainment**) the [Appellant] [would] have to engage various staff, ranging from writers, character animators and concept artists …" and a draft project services agreement for engagement with Entertainment was attached. That draft agreement was not that ultimately used (see paragraphs [79] to [85] below)

8. HMRC gave advance assurance on 11 December 2014 for both SEIS and EIS.

9. Pursuant to that advance assurance HMRC issued compliance certificates for SEIS to the Appellant in respect of 582,290 B Ordinary Shares in the period 24 March 2015 and 19 June 2015, and for EIS in respect of 1,214,627 B Ordinary Shares issued over the period 21 March 2017 and 13 March 2018.

10. On various dates between 19 March 2018 and 18 October 2018 the Appellant issued shares and sought authorisation to issue compliance certificates in respect of the shares issued.

11. By letter dated 20 July 2018 HMRC sought to review the Appellant's activities over the prior three years and the ongoing funding requirements, requesting information in that regard. The information was provided by the Appellant under cover of a letter dated 20 August 2018. HMRC requested further information specifically with a view to assessing whether the Appellant met the Risk Capital Condition (introduced with effect from 19 March 2018). Such information was provided on 30 October 2018.

12. On 30 November 2018 HMRC refused to issue the compliance certificates for the shares issued by the Appellant between 19 March 2018 and 28 August 2018 on the basis that the Appellant did not meet the Risk Capital Condition and that there were Disqualifying Arrangements. Refusal in respect of the shares issued between 5 September 2018 and 19 October 2018 was communicated on 1 March 2019.

13. The Appellant applied for a review of the decisions. Both decisions were upheld on review by letters dated 1 April 2019 and 24 May 2019 respectively and on the same basis as the original decision.

14. HMRC introduced the further reason for refusal that the Appellant was engaged in an excluded trade by way of their statement of case served on 19 September 2019.

PREFACE

15. It is right to note at this very early stage that the present appeal appears to be the third in a trilogy involving CHF Media Group Limited (**Media**) and its subsidiaries and the CHF Media Fund (**Fund**) in respect of which most of the chief characters are the same. The other appeals are those of *CHF Pip! PLC v HMRC* [2021] UKFTT 383 (TC) (***Pip***) and *Coconut Animated Island Ltd v HMRC* [2022] UKFTT 303 (TC) (***Coconut***).

16. In each case, as here, a committee of individuals employed within Entertainment (the Creative Commercial Committee (**CCC**)) had considered "pitches" of creative ideas for animated children's entertainment from individuals who had incepted the idea/concept. It was the role of the CCC to consider concepts and ideas envisioned by employees of Entertainment and from external sources but in the case of both Pip Ahoy! and Coconut Island the ideas had been those of Entertainment employees. The CCC had considered the potential for commercialisation justified investment in each case and had recommended that the concepts be supported to raise external equity funding through the Fund. Paragraphs [59] – [69] below detail the funding infrastructure through which that support was provided as in each case the Information Memorandum (**IM**) referenced was used.

17. Each taxpayer company was incorporated and the intellectual property in the creative concept was transferred from the originator to the issuing company. Pursuant to agreements with Entertainment the concept was then developed, produced and licenced for broadcast. Each of the companies issued shares to independent individual investors through a nominee company and sought venture capital tax reliefs (by way of SEIS and/or EIS as appropriate) in relation to the share issues. In all three cases HMRC authorised the issue of compliance certificates in respect of a number of share issues. However, following the introduction of the Risk Capital

Condition with effect from 19 March 2018, HMRC refused to authorise EIS or SEIS certificates in respect of subsequent issues of shares.

18. Those refusals led to the appeals. The judgments in those appeals are therefore highly relevant. Whilst the determination on issues of law in those judgments are not binding on this Tribunal but they are persuasive. Further, as they arise from very similar factual circumstances the application of the legal conclusions to the facts are also considered to be material.

LEGISLATION

19. The full text of the relevant provisions in this appeal are contained in the Appendix at the end of this judgment. However, set out in the paragraphs immediately below is a brief summary of those provisions.

20. The Risk Capital Condition is contained in section 157A ITA 2007. Pursuant to that section the Tribunal must determine whether, at the time of the share issues for which a compliance certificate was sought, it was "reasonable to conclude" that the Appellant had objectives to "grow and develop" its trade in the long-term and that there was a significant risk that the investors may lose an amount of capital greater than the net investment return. That issue is determined by reference to "all the circumstances" but the statute enumerates a number of circumstances to which regard "may" be had:

> (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.

21. The Excluded Trading Condition arises from interaction and operation of sections 181, 189, 192 and 195 ITA 2007:

> (1) Pursuant to section 181(a) the Appellant must meet the "trading requirement" and to do so must establish that it existed wholly (but ignoring incidental purposes) for the purpose of carrying on or more new "qualifying trades";
>
> (2) in order for the Appellant's trade to have been a "qualifying trade", it must not have consisted wholly or, as to a substantial part, in the carrying on of "excluded activities" (Section 189(1)(b));
>
> (3) for this purpose, "excluded activities" includes receiving royalties or licence fees (Section 192(1)(e)); however,
>
> (4) by virtue of section 195 a trade consisting of the receipt of royalties and licence fees attributable to intangible assets the whole or the greater part in terms of value of

which have been created by the issuing company is brought back within the scope of a qualifying trade.

22. The provisions concerning Disqualifying Arrangements are contained in section 178A. In essence, it provides that EIS relief is not available where the relevant shares have been issued, and/or the money raised by the issues of the relevant shares, has been employed, "in consequence or anticipation of, or otherwise in connection with, disqualifying arrangements".

23. In the present context, and so far as relevant in this appeal, "disqualifying arrangements", are defined in section 178A(2) as arrangements (themselves expansively defined in section 257(1) ITA 2007) the main purpose, or one of the main purposes, of which was to secure that the Appellant carries on a qualifying trade giving entitlement to EIS relief in circumstances where one or both of two conditions are met. Condition A precludes relief where the whole or the majority of the money raised from the share issue to which EIS relief attaches is, as a result of the arrangements, directly or indirectly, paid to or for the benefit of a person party to the arrangements (i.e. a relevant person). Condition B precludes relief where, absent the arrangements, it would have been reasonable to expect that the whole or greater part of the qualifying trade would have been carried on as part of the business of one of the parties to the arrangements.

BURDEN OF PROOF AND ISSUES TO BE PROVEN

24. In this appeal the burden of proof lies with the Appellant. It must establish on the balance of probabilities:

(1) It is reasonable to conclude that it had the objective to grow and develop its trade in the long term; and

(2) The receipt of royalties and licence fees is in respect of an intangible asset the whole or a substantial part of the value of which has been created by it; and

(3) The money raised by the share issues (which was accepted to have been as a consequence of arrangements seeking to secure EIS relief) was not paid to or for the benefit of Entertainment and/or that Entertainment would not have undertaken the exploitation of the Daisy IP but for the arrangements.

EVIDENCE AND FINDINGS OF FACT

25. The evidence available to the Tribunal comprised documentary material contained in a bundle of documents of 2254 pages and the oral testimony of Helen Brown (**HB**).

26. I found HB to be a credible and honest witness. It was clear that she was hugely passionate about what had been achieved in respect of her conception for a successful children's series, Daisy and Ollie (**Daisy**). There were matters on which HB had little knowledge or understanding but she was as helpful as she could be to the Tribunal.

The Appellant company

27. The Appellant is a company which was first incorporated as CHF Project 5 Limited on 3 September 2014 with a single director: Simon Hall, the original shareholder was Media. On 12 November 2014 the company changed its name to Daisy Boo and Monkey Too Limited and on 15 December 2014 Simon Hall was replaced by Caroline Jean Ivory (who appears to be known professionally as Jean Hawkins) (**JH**). JH remained as the sole director of the Appellant until 10 January 2018 when HB was appointed as a director of the Appellant.

28. By special resolution dated 19 February 2015 the Appellant adopted new Articles of Association. These new Articles provided for the application of profits which the directors determined to be distributed as to 50% to A ordinary shares and 50% to B ordinary shares. The assets to be distributed on liquidation and voting rights were similarly split between A and B

ordinary shareholders. On the same date the original ordinary shares were reclassified as A Ordinary Shares and they were transferred from Media to Simon Hall and Adrian Wilkins (both of whom were directors of various of the CHF group of companies).

29. So far as material in this appeal, B Ordinary Shares were issued successively from 24 March 2015 to 19 October 2018 through the Fund (see below for details on the operation of the Fund). Between 24 March 2015 and 19 June 2015, £149,999.95 was raised through the issue of 582,290 shares qualifying for SEIS. Between 21 March 2017 and 13 March 2018 a further £1,323,340 was raised through the issue of 1,214,627 shares qualifying for EIS. The Appellant issued further in the period 19 March 2018 to 19 October 2018 (**Relevant Period**) raising £1,130,907.40. The question at the heart of this appeal is whether those shares qualify for EIS.

30. On 22 December 2017 the Appellant granted a charge against the assets (i.e. the intellectual property rights shown as fixed intangible assets in the accounts) in favour of Jean Caroline Hawkins, Nicola Johnston and Adrian Wilkins pursuant to a debenture of that date and in respect of a loan facility granted by those individuals in the Appellant's favour.

31. A further debenture was granted to the same counterparties on 23 October 2018.

Creating Daisy

32. HB has worked in the animation industry for a number of years, in a number of roles, growing in seniority as time passed. At some point prior to the autumn of 2014 she joined Entertainment working as a series producer. She worked in that capacity on Pip Ahoy! Her role at Entertainment also tasked her with the recruitment and expansion of Entertainment's production studio. She was also a member of the CCC. Her employment with Entertainment continued throughout the Relevant Period.

33. Over a period leading up to autumn 2014 HB envisaged a concept for animated entertainment aimed at preschool children centred on her inquisitive daughter. She believed it had strong potential. She worked on developing the characters, colour pallet, possible story lines etc, and on 28 October 2014 she presented the idea to the CCC (recusing her role on the committee for the purposes of considering her idea). The presentation was called "Daisy Boo and Steve Too!". The structure of the animation was conceived as featuring the posing and answering of a single (per episode) question and associated discovery i.e. What makes a rainbow? (You'll never see a rainbow at nighttime). The CCC presentation included: a synopsis, identification of the main and secondary characters, proposed structure, storyline ideas, pilot idea, design and style approach, draft first script and mood boards.

34. Following an initial expression of support from the CCC, on 12 November 2014 HB entered an agreement with the Appellant, the Intellectual Property Assignment (**IPA**), pursuant to which she assigned all current and future rights title and interest in the programme concept together with all future intellectual property rights arising from it to the Appellant in consideration for the sum of £1 plus a share of 10% of the net profits in the Appellant company. Net profits are defined as the net receipts of the Appellant after deduction of all associated production and development costs. Under the IPA HB was: 1) entitled to be appointed as a director of the Appellant, 2) appointed as "the Executive Producer" for the Programme and had the final approval of all storylines and styles" and 3) had the right (subject to broadcaster approval) to a credit "created by Helen Brown". The IPA also provided that the Appellant would have the unlimited right to copy, alter, add to, take from, adapt or translate "the Products" (though there is no definition of Products) and the Programme. HB had an automatic right of reversion in the event that Entertainment, Media or its subsidiaries were to become insolvent or go into administration etc. There is no clause precluding an agency arrangement between the parties.

35. In oral evidence and under cross-examination HB explained that the Daisy concept remained very much her project as creator of it and in her capacity as executive producer of it. HMRC's position, as consistently and repeatedly put to HB, was that her endeavours in respect of Daisy were undertaken in her capacity as an employee of Entertainment. HB explained that an executive producer's role is to have overall say on all decisions of creative staff, assignment of writers, cast members and overall creative direction for the production. HB was clear, and never wavered from her position, that she undertook the executive producer's role in a personal capacity.

36. I find as a fact that HB was the executive producer of Daisy in a personal capacity pursuant to the IPA. She explained her role as an employee of Entertainment and I find that she had a more operational role as an employee, including being line producer (essentially a project manager) on a number of concepts and shows, including Daisy, but that role was to be distinguished from the executive producer role.

Developing Daisy

37. Following the CCC recommendation, and it is understood sometime late in 2014, an investor brochure was produced. It bears Enterprise's corporate logo and is copyright CHF Daisy Boo and Steve Too Ltd 2014. It describes Daisy Boo and Steve Too and the intention to produce 52 x 5-minute animated episodes for children ages 2 to 5 who like to ask questions.

38. The document includes the table excerpted below to highlight potential revenue generated from broadcast licence fees and merchandising minimum guarantees and provides "The figures provided are the expected minimum guarantees generated over the lifecycle of the broadcast and merchandising programme. Assuming good broadcast placement and audience share, Merchandising and DVD sales could grow significantly."

	Broadcast sales		Merchandising		DVD	
	High	Low	High	Low	High	Low
UK & Eire	65,000	26,000	686,500	480,550	39,000	20,800
Europe	622,375	393,575	2,746,000	1,922,200	156,000	83,200
N America	338,000	247,000	3,432,800	2,156,000	78,000	39,000
Rest of World	419,000	263,510	2,059,500	1,441,650	117,000	86,450
	1,444,820	**930,085**	**8,924,800**	**6,000,400**	**390,000**	**229,450**

39. The investor brochure also provided figures for a development budget (circa £150,000) and an estimated series budget of £3,000,000.

40. HB honestly confirmed that she had been responsible for the creative elements of the investor proposal but that she had worked with and relied on the wider team within Entertainment to produce it. She did not know and could provide no explanation for the use of Entertainment's logo on the document or why copyright was CHF Daisy Boo and Steve Too Ltd (a company which had never existed).

41. HB explained that Jenny Johnstone (**JJ**), Entertainment's commercial director, had produced the estimates of minimum and maximum guarantees. HB understood that these figures were used in the brochure for the purposes of informing potential investors as to the possible return and likely risk associated with their investment. HB's evidence was that the real value in a concept or show was derived from the ability to monetise characters etc. through publishing and merchandising rather than directly from the licencing of broadcast rights. However, achieving a successful broadcast deal was an essential first step to monetisation.

Merchandising licences only followed successfully broadcast programmes: children need to be captivated by the programmes in order to then want to play apps, read books, have toys and clothes. HB understood that it was unusual to secure any significant commercialisation or merchandising associated with a concept until at least 52 and often 104 broadcast productions. As such, in HB's view the commercial figures produced by JJ reflected her understanding of how the concept would be commercialised as articulated in the proposal.

42. I find that the investor brochure is evidence that there was an intention to exploit the IP in Daisy through merchandising (provided that a broadcast licence could be agreed). Were that not the case the investor brochure would have been actively and materially misleading.

43. Entertainment entered into the following agreements. They were all signed on behalf of Entertainment by HB. Entertainment is variously defined in the agreements as the Producer:

Date	Nature of agreement	Counterparty
27 March 2015	Voice over services, shout outs and ancillary services in connection with the proposed TV series of Daisy and Ollie	Claire Morgan
27 March 2015	Writers' agreement for the provision of the services of the writer for First Draft Script, Second Draft Script, if requested Revised or further revised Second Draft Script	Gillian Corderoy
27 March 2015	Voice over services, shout outs and ancillary services in connection with the proposed TV series of Dasy and Ollie	Sarah Hadland
27 March 2015	Script Editor services involving the management of the writing team, keeping the writing team to schedule and budget, attendance at weekly production meetings and liaison with Entertainment in its capacity as animation house to carry out physical production	Victoria Wilson
22 April 2015	Writers' agreement for the provision of the services of the writer for First Draft Script, Second Draft Script, if requested Revised or further revised Second Draft Script	Arabella Warner
22 April 2015	Writers' agreement for the provision of the services of the writer for First Draft Script, Second Draft Script, if requested Revised or further revised Second Draft Script	Sam Hill
22 April 2015	Writers' agreement for the provision of the services of the writer for First Draft Script, Second Draft Script, if requested Revised or further revised Second Draft Script	Helena Smee

44. In respect of the voice over services the contracts were in the same form and, in connection with copyright, provided:

> "You hereby unconditionally and irrevocably, transfer, convey and assign to [Entertainment] absolutely and with full title guarantee (a) the entire copyright (including without limitation any rental and lending rights and the right to communicate to the public) and (b) all other rights whatsoever, in all products of your services hereunder, including, without limitation, all performances and literary, dramatic, artistic and musical material contributed by you to [Daisy and Ollie] …"

45. The voice over agreement also recognised for US copyright law the product of the artist's services represented a "work for hire" (see paragraph [181] for discussion). Moral rights are waived under the agreement (see paragraph [184] for discussion).

46. The writer's agreements were in the same form as one another. They provided for the writer to produce the scripts. In respect of the grant of rights the agreements provided as follows:

> "The Writer, with full title guarantee, hereby irrevocably grants and assigns to [Entertainment] the entire copyright and all other rights of whatever nature in and to the Work [product of the Writer's services] … including all vested future and contingent rights to which the righter is now or may in the future be entitled under the law in force in any part of the world TO HOLD the same unto [Entertainment] for the full period of copyright including all reversions renewals revivals and extensions thereof and thereafter (insofar as the Writer is able so to do) in perpetuity.
>
> The Writer hereby confirms that the assignment of rights in the Work … shall include an assignment of all rental and lending rights and cable re-transmission rights in the Writer's original contribution to the Work the Writer confirms that the payments contained herein include full and proper equitable remuneration in respect of any rights … that the Writer may have in relation to the episodes of the Series produced hereunder. …"

47. These agreements too provided that the services constituted a "work of hire" for US copyright law and for moral rights to be waived.

48. The script editor assigned her rights pursuant to the following clause:

> "The Script Editor HEREBY GRANTS AND ASSIGNS to [Entertainment] by way of assignment of present and future copyright the entire copyright and all other rights of whatsoever kind and nature (including, without limitation, rental and lending and all similar rights and satellite broadcasting and cable retransmissions rights which the Script Editor may now be or may become entitled to in the Work [defines as all products of the Script Editor's services] and all other products of the Script Editor's services hereunder in any and all media (whether now known or hereafter invented) throughout the world for the full period of copyright therein including all revisions, reversions, renewals and extensions thereof and thereunder … in perpetuity TO HOLD the same unto [Entertainment] absolutely.
>
> [Entertainment] shall be entitled to use and authorise others to use the Work or any part or parts thereof in such manner as it shall in its sole discretion think fit …"

49. As with the writer and voice over agreements the script writer agreement provided that the services provided under it were works of hire for US copyright purposes and moral rights were waived.

50. In oral evidence HB indicated that she considered that these agreements should probably have been agreements between the Appellant and the writers/cast/editor. She considered that

this may have simply been because at this time it was early days for the Appellant and/or that a decision was taken to use templates prepared by Entertainment without amending them.

51. Plainly, at the point at which these agreements were signed, there was no formal contractual relationship between the Appellant and Entertainment regarding production (this was later remedied in November 2016 when the Production Services Agreement was signed see [79]). However, on the basis that it was envisaged, from the outset, that the Appellant would own the IP assigned under the IPA and exploit it through the outsourcing of production to Entertainment, it likely to have been inevitable that the correct contracting party for the writers' services was Entertainment.

52. It is to be noted that I was not provided with a copy of an agreement for Jason Manford (**JM**) from 2015. In cross-examination HB explained that she had seen JM at a Christmas charity gig (presumably in December 2014). When she saw his show she considered that he had the characteristics and skills which she considered would make him a good fit to be cast as Daddy. She contacted his agent, and they met very shortly after the initial contact. JM really liked the concept and showed a similar passion for the project as she had. She asked him to work on the show and he agreed. She said that in the initial stages that he was not formally contracted. It is, however, plain that he was actively involved from no later than May 2015 as he wrote a script which is dated 15 May 2015 and also agreed to provide the voice over for Daddy.

53. The CCC met on 28 April 2015. By the date of this meeting, the concept had been pitched to Cbeebies (the BBC children's channel) and Channel 5. Channel 5 had passed on it as "too educational", but Cbeebies expressed an interest. Further pitches were proposed to Cartoonito though their agent Turner, and Nick Jr (Nickelodeon).

54. In HB's witness statement she explained that she had attended a toy fair at Olympia. She was cross examined on the timing of that visit and its efficacy. HB did not provide a date of the visit and in cross examination eventually said she could not remember precisely. By reference to all of the evidence it would appear that this trip was certainly after the investor brochure was produced. HB explained that her interaction with potential toy manufacturers and other merchandisers caused her to appreciate that at that stage, the concept's "girl skew" was too great. Prior to the trip Ollie had been a secondary character and (by reference to the artwork in the investor brochure) had a "cuddly" toy fox. Following the trip to Olympia, with a view to introducing more "boy skew" the fox was replaced by "Whizzy" (a robot), and the concept took on the mantle of "Daisy and Ollie".

55. Whizzy appears for the first time in the documents before me in a script written by Helena Smee dated 13 May 2015. I therefore find that the trip to Olympia must have been between the time when the investor brochure was produced and 13 May 2015. I find that the trip demonstrates an intention to develop the potential for merchandising from at least spring 2015.

56. On 15 May 2015 HB provided an updated "bible" for the Daisy concept to the CCC. By this stage, the concept had been developed further and included what were referred to as "episodic songs" which had been written. Two full "polished" scripts were available one from each of Helen Smee and JM. The bible included particularisation of the characters for Daisy, Ollie, Boo (Daisy's purple toy monkey), Whizzy (Ollie's toy robot), Daddy and the secondary characters. Suggested storylines and additional potential questions were outlined together with location and prop drawings.

57. In oral evidence HB explained that all design work for the characters, house etc had been undertaken so that they could be translated into toys. I find that this was a key aspect influencing the design and development of Daisy.

58. By August 2015 the concept had further progressed and an animatic (a string of storyboard images edited together with sound to illustrate how a sequence will flow in motion) had been produced. The CCC development status spreadsheet shows that the date for a pitch to Turner Productions (owners/operators of Cartoonito) was awaited.

59. In or around 1 Match 2016 an Information Memorandum (**IM**) was issued on behalf of the CHF Media Fund (**Fund**). It provides an historical narrative to the formation of Entertainment as the production arm of Cosgrove Hall producing high quality imaginative and trusted family entertainment for children and their families across the globe. It appears from the IM that the Fund had been established specifically with a view to using the opportunity offered through EIS and the SEIS to fund and monetise new animation productions and concepts through broadcast, digital and organic media.

60. The IM invites investment from investors wishing to make venture capital investments in SEIS and EIS qualifying companies through a fund manager (Sapia Partners LLP) who were in turn advised by CHF Enterprises Limited (**Enterprises**). Such advice is provided by way of a recommendation, but the IM is clear that the decision as to which companies in which to invest was taken at the sole discretion of the Manger. All recommendations were stated to be made by reference to the most useful deployment of the funds which was explained as directing the funds to concepts closest to achieving broadcast production. Sapia held all monies invested by investors in a client account until the decision to invest is made. The Fund was administered by City Partnership LLP.

61. I note that the intention to recommend the allocation of investment to investee companies by refence to the concepts closest to achieving broadcast production is consistent with HB's evidence that broadcasting is an essential first step to monetising/commercialising a concept and thereby for the investors to achieve a return on their investment.

62. Investments by investors in the investee companies are made through a nominee company, CHF Nominees Limited (**Nominee**); however, Nominee is the legal title holder of any investment only, beneficial ownership is with the investor.

63. The investment strategy of the Fund is narrated as:

> "The [Fund] may invest in companies which individually own the intellectual property rights to a new family entertainment concept or show, either originated or developed by CHF. The capital raised will be used to develop, produce and monetise the shows or concepts.
>
> The [Fund] aims to invest in a selection of shows or concepts, both those in development and/or in production. … The success of investee companies will derive from all revenue inflows relating to their intellectual property rights such as broadcasting, licencing and merchandising sales. The potential returns to investors are not capped …
>
> [Media] will typically hold 50% of each investee company's voting rights with Investors holding the balance. On a sale of any investee company, sale proceeds will be distributed pro rata to their shareholding.
>
> The [CCC] is at the heart of the [Fund] and is key to its success. It is responsible for identifying prospective shows or concepts that not only offer excellent family entertainment but also offer the potential to generate significant commercial returns to investors."

64. The IM makes plain that Entertainment encourages its "creatives" to come up with ideas for development through the CCC but also that the role of the CCC is to consider proposals from any source. The CCC chooses the best ideas "those with potential for critical acclaim and commercial success" for development and production. Once the CCC determines to back a

concept the intellectual property in that concept is transferred to an investee company. All such investee companies have at least one independent director to act as the shareholders' champion and for monitoring the affairs of the investee company.

65. The IM envisaged that SEIS funding would be used to support the initial development of a CCC recommended concept and EIS for its production. It explains that each investee company will have access to the full range of CHF's in-house expertise and that "where applicable [Entertainment] will take each concept from the brainstorming and storyboard stage through to production of a full series: devising plots, scripts and commercially attractive characters, advising on colour pallets and appropriate animation …". It is recognised that Entertainment may be a sole or co-producer as appropriate.

66. The IM advises investors that Enterprises will assist investee companies with their applications to the Fund and for further funding as and when required. Investors invest in the Fund first and foremost with the Manager reserving the right (on the recommendation of Enterprises) to switch the flow of investment funds from one investee company to another according to the CCC's perception of which shows, or concepts are more likely than others to attract interest from broadcasters or other media platforms.

67. The CCC is described as "being well placed to rigorously screen potential shows or concepts, including the stress test of commercialisation avenues, before such shows or concepts are transferred to investee companies and recommended to the Manager by [Enterprises]."

68. How monetisation of a show/concept is envisaged is clearly set out in the IM which states: "once a show or concept has been produced and an initial broadcast contract has been entered into with a broadcaster or digital media platform, an investee company will aim to generate revenue initially by licencing the broadcast rights to its show or concept on a worldwide basis and by exploiting ancillary rights." A diverse set of revenue streams are identified as:

(1) Distribution – broadcast is stated to lay the foundation for exploitation of merchandising and licencing. The IM notes that the CHF Media Group will "source the best global opportunities for investee companies".

(2) Licensing and merchandising – the IM states that the CHF licensing team will source commercial avenues for exploitation of the intellectual property rights held by the investee companies.

(3) Traditional and e-publishing – taking a show and generating revenue from books, comics and magazines.

(4) Mobile and internet content – monetisation of supporting internet content through audio, games etc.

(5) Music – monetisation through licensing of theme tunes and the use of music within games and toys is noted through engagement with CHF Music (**Music**).

(6) Live shows – concepts aimed at the pre-school market are noted as offering the potential for the licensing and production of live events.

(7) Theme parks – some shows or concepts represent "ideal spin offs" to licence to theme parks.

69. There is substantial material within the IM setting out the potential for return through the various means of monetising the intellectual property rights of a successfully broadcast concept/show.

70. As with the investor brochure, I find that it would have been materially misleading if each of the investor companies within the Fund did not have an intention to commercialise and monetise the IP held by it initially through granting a broadcast licence from which to then springboard the opportunity to commercialise and benefit from "pester power".

71. These factors provide objective evidence of the Appellant's intention to monetise its rights in Daisy in the long term.

72. The investor agreement provided in the IM clearly provides that the investor appoints the Manager to manage their portfolio as one of a series of portfolios which together constitute the Fund. Authority is provided by the investor to the Manager to enter into investments of the kind set out in the IM at the Manager's sole discretion.

73. The first accounts of the Appellant were produced to 30 September 2015 and showed fixed assets of £137,600. The second set produced to 30 September 2016 showed an increase in the value of the intangible fixed assets of £379,856 (by reference to "additions") bringing the total value to £517,456.

74. HB really could offer no evidence as to the basis of the accounts. She recognised that it was likely that the additions represented development costs incurred in connection with the production as she believed the value of the rights she had granted under the IPA were fairly assessed at that time as £1. She explained that until a concept is produced and broadcast it will have very little if any value, the value would ultimately be derived from how much the concept can earn in distribution, broadcast, licencing and merchandising.

75. The accounts were unaudited but accounting standards, in simple terms, provide for the fair value of an intangible asset under development (other than in house) to be recognised at cost. It therefore seems, through the contract with Entertainment, reasonable that the costs incurred by the Appellant in the development of the IP rights acquired should have been recorded at cost in the Appellant's balance sheet.

76. On 1 November 2016 the Appellant appointed Entertainment as its broadcast representative. Under that agreement the Appellant granted "an exclusive licence [for a period of 5 years from delivery of the first 52 episodes of Daisy and Ollie] to exploit [the 52 episodes] in all languages worldwide in all forms of media without exception including: television, video on demand, home entertainment … mobile, wireless, non-theatrical/captive audiences, clips and non-theatrical, SVOD, AVOD, VOD and all other digital platforms currently known or made available in the future". Such license being subject to the requirement that Entertainment "keep [the Appellant] fully informed of the principal terms of any agreements that it wishes to enter into with third parties … and agrees not to enter into any such agreements without first receiving the written approval of the [Appellant] which shall not be unreasonably withheld." The commission payable for these services is stated to be 30% of all revenue in connection with the exploitation of the rights plus 5% in respect of certain specified costs. It was further agreed that Entertainment could appoint a distributor or subagent subject to approval by the Appellant. This agreement as signed by HB purportedly as a director of the Appellant – however, at the time of its signature she was not an appointed director (despite her right under the IPA to have been so appointed).

77. HB's evidence was that a representation agreement of this type was standard and ensured that a single representative was coordinating and pitching the show. The agreement secured the skills of JJ who was very experienced in securing broadcasters and then monetising once the broadcast was successful.

78. I find that the terms of the broadcast representative agreement are clear. Entertainment was appointed as an agent for the Appellant with the Appellant retaining full control of the

contracts entered on its behalf through, and having to provide, written approval before any such contract was entered.

79. On the same day the Appellant entered the Production Services Agreement (**PSA**) pursuant to which, in consideration for the sum set out in the agreed budget, the Appellant appointed Entertainment to deliver production services in connection with the creation and delivery (in industry standard format) of 52 episodes of Daisy and Ollie and such add on services as were agreed between them (as it turned out a Christmas special and 22 nursery rhymes). The intellectual property rights in the 52 episodes and add on services were stated to be owned by the Appellant. However, the agreement also provided:

> "In consideration of the provision of the Budget … but subject to the provisions of clause 9.1 [which provided that the Appellant shall own all rights in and to the Production (52 episodes of Daisy and Ollie)] … [Entertainment] hereby assigns to the Client all present and future copyright … and all other Intellectual Property Rights … for the purposes of enabling [the Appellant] to have and exploit all worldwide rights of production … in perpetuity."

80. The agreement also provides that for the purposes of US copyright law the 52 episodes are treated as "works made for hire" with the consequence that the Appellant owns all rights, title and interest in them throughout the world without exception.

81. The Budget, attached as Schedule 4 to the PSA, provided a detailed list of costs including a cost for each of the human and technical resources anticipated to be utilised on the production. The Budget totalled £3,944,669. It included all aspects of production and overheads together with a 5% production fee and 5% contingency. The contract provided for all sums due under the budget to be paid by the Appellant to Entertainment.

82. Entertainment warranted under the agreement that it was the "sole, absolute and unencumbered legal and beneficial owner" of the 52 episodes, Christmas special and nursery rhymes and that it had acquired all rights to third party material "except to the extent that the same consist of or incorporate" the "trademarks, copyrights, characters, designs, logos, artwork, and other creative elements utilised in connection with the Production and approved and controlled by [the Appellant]".

83. Entertainment further warranted that all costs were included within the budget and that it represented an accurate and bona fide estimate of the total costs of production.

84. Clause 21.1 provided that there was no relationship of partnership, joint venture, employment or agency between the parties.

85. The PSA was signed by HB on behalf of the Appellant as Director of Production.

86. HB's gave oral evidence in respect of the PSA. She accepted the terms of the agreement as read to her by HMRC and that it was a comprehensive agreement which outsourced the whole of the production to Entertainment thereby avoiding the need to take on production employees or contractors themselves.

87. HB explained that Entertainment was paid monthly by reference to the work undertaken in that month against the budget. Payments in respect of Entertainment staff and resources were paid to Entertainment and to the designated bank account. However, in respect of some subcontractors engaged by Entertainment pursuant to the PSA, payments were made directly by the Appellant to the subcontractors. She fairly accepted that there was no direct obligation between those subcontractors and the Appellant which required payment but that direct payments were made as evidenced by handwritten comments on invoices from such subcontractors which read "paid from Daisy".

88. HB confirmed that she had prepared the budget in her capacity as an employee of Entertainment. The PSA provided for all services to be delivered against and in consideration for the sums set out in the budget and as such all costs needed to be covered. It was put to HB that the budget anticipated that the Appellant was to be charged for her time as executive producer. HB acknowledged that the budget had been prepared on that basis, but she was adamant that the Appellant had not been charged for her contribution she forcefully maintained that her remuneration for her role as executive producer was the 10% share she would take from net profits (i.e. under the IPA).

89. On the basis that I have found that HB was performing as an executive producer pursuant to the IPA and, as is clear by reference to the evidence at paragraph [121] below, the production was delivered what appears to have been more than 15% under the budget provided at Schedule 4, I find that the Appellant did not pay Entertainment for HB's services.

90. In response to cross-examination on the 5% production fee and 5% contingency HB maintained that Entertainment had not been paid either sum. Regarding the contingency HB stated, and I accept, that a contingency is precisely that – contingent on there being an error or overrun against the budget. There is nothing in the contract to indicate, as HMRC sought to assert, that Entertainment was entitled to be paid the contingency whether there was an overrun against the budget or not. Again, by reference to the evidence at [121] I find a contingency was not paid as the production was under budget.

91. The position on the 5% production fee is more difficult to determine. It is clearly calculated as an uplift against costs incurred. The costs are detailed and specific, they include national insurance costs and all overheads. I therefore find that the 5% production fee was intended, as would be expected in an arms' length transaction, to be taken as a profit by Entertainment on the costs incurred.

92. Whether it was, or was not, paid is, unclear. HB's evidence was that the production had been bought in under budget; she also stated that HMRC's decision to refuse EIS certificates for the share issues in the Relevant Period had the effect of cutting off the flow of funds that the Appellant could access necessitating a restructuring of the Appellant and its relationship with Entertainment. The budget underspend is confirmed by the evidence identified in paragraph [121] below which shows that to August 2018 costs incurred had been lower than budgeted for and despite a significant sum left to be spent total spend would be materially under the original budget. In the end however, the total budget, certainly as far as the Appellant and Entertainment was concerned, was probably never calculated as the production was completed during 2019 and after the creatives etc formerly employed by Entertainment were made redundant from Entertainment and, in at least some instances, reemployed or re-contracted to the Appellant. It is not therefore possible to determine anything other than there was a contractual entitlement for Entertainment to charge and be paid a profit uplift on costs for its services.

93. However, I find that monthly payments were made by the Appellant to Entertainment for the production services delivered. I further find, that to extent payments were made directly to subcontractors (such as Dock 10) they were made as a matter of convenience. The subcontractor was contractually entitled to payment from Entertainment which, in turn, was entitled to payment from the Appellant and, as such, the payments by the Appellant were on behalf of Entertainment and in settlement of amounts which would otherwise have been due by the Appellant to Entertainment.

94. On 25 February 2017 the Appellant entered an agreement with Pluto Entertainment Limited for musical compositions for the first 26 episodes of Daisy and Ollie. The agreement provided that all compositions and sound recordings commissioned under the agreement were

to constitute a work made for hire from the inception of the creation and as such "as the party making all arrangements necessary for the recording … and as commissioner of the [sound recordings and compositions] all right, title and interest in and to [them] from inception of their creation]" was the sole property of the Appellant. To the extent that it was to be determined that the works were not works for hire all copyright of the composer was exclusively assigned to the Appellant.

95. JM formally contracted with Entertainment pursuant to a contract dated 9 March 2017 to provide voice over services. The agreement is in the same terms as the voice over agreements referenced in paragraphs [43] and [44] above, and as with the others was signed by HB on behalf of Entertainment. From the documents provided he was never formally contracted either in his capacity as a writer or as an executive producer, though he was regularly recognised as both in media communications (see paragraphs [111] etc below)

96. A further writer's agreement in the same form as those in were entered by Entertainment as paragraphs [43] and [45] on 9 March 2017 with Gerald Dean.

97. As these contracts postdate the PSA it is no surprise that they were between Entertainment and each of JM and Mr Dean. As such, I do not consider it significant that HB could not explain why they were not with the Appellant.

98. The first broadcast agreement was signed on 15 March 2017 by HB (as creator/producer) between the Appellant and Turner Broadcasting System Europe Limited. Pursuant to the agreement the Appellant granted an exclusive licence to broadcast on Boing, Boomerang, Cartoon Network and Cartoonito, 52 episodes of Daisy throughout UK (and dependant territories), Eire and Malta and a non-exclusive licence for use on digital devices by way of digital transmission for a period of 3 years. The licence fee payable was $130,000 payable in tranches as the episodes were delivered. The Appellant warranted that it owned all rights in connection with the 52 episodes.

99. Media marketed the broadcast agreement in July 2017. In the press announcement the quote from HB stated: "Creating and developing [Daisy] with the immensely talented team at CHF has been a pleasure and I am thrilled to be managing the project through the studio pipeline." Press statements at the time referenced Cartoonito "having picked [Entertainment's] …[Daisy]", that Daisy was "produced by UK prodco [Entertainment]", that Daisy had been "developed by CHF" and that Daisy had been "produced by using Toon Boom technology at the CHF Studios." Entertainment was described as having "expanded its animation slate" through the deal with Cartoonito.

100. An Investor Update was produced under Entertainment's brand in July 2017. It confirmed that Cartoonito had commissioned Daisy with an anticipated consumer launch in September 2017. The update referenced that "the show" was still raising EIS funding. Press coverage links were provided within the document. The update narrated:

> "Cartoon Network are also in the process of creating EPK (electronic press kit) which will be followed by a press junket in Autumn, whereby the press will have direct access to interview the cast in advance of a full-scale consumer launch.
>
> The Studio is also in the process of finalising a raft of promotional materials, trailers, karaoke videos and nursery rhymes, which we will be able to share soon….
>
> The voice of a new character was recorded this month, that of Grandad with Brendan O'Carroll (or Mrs Brown as he is better known) … This could be invaluable, particularly in capturing the Irish market. We are planning to announce his involvement officially in October alongside the consumer

> launch to ensure maximum coverage. … The costumes for Daisy and Ollie are now complete and look very true to the characters in the show. …
>
> The full website is currently under construction … we are aiming to launch the full website at the end of August …
>
> We are now in the final stages of putting a budget together for Daisy and Ollie to star in a large-scale live event throughout December 2017 and early January 2018. As the episodes will be being broadcast regularly by this stage, it will be a [sic] provide a further opportunity to attract additional press interest and continue to build a fan base.
>
> We are continuing to pursue interest in broadcast and distribution following out attendance at the Asia Content market. No deals have been formalised at this stage.
>
> There is also interest in the series from the Chinese market and we are currently discussing potential distribution arrangements. Our Commercial Director will travel out to China in the coming weeks, with additional content and 13 episodes, with a view to securing distribution for pan-Asia and South America. The deal will be based on typical 30% commission arrangement for the agent.
>
> Following on from the trade press release, we have been approached by a number of international broadcasters for further information on the series and we are now following up on these enquiries."

101. I find that this press coverage and the investor update correctly articulated that Entertainment was the producer of Daisy through its studio and animators. Consistent with the representation agreement Entertainment was the face of the Appellant for all promotional purposes. As a consequence however, the role of the Appellant in the exploitation of the Daisy IP was publicly masked.

102. The Daisy investor pack was updated in 2017. It was produced under copyright CHF Daisy Boo and Monkey Too Limited 2017 and under the Entertainment logo. The cover shows Daisy and Ollie (in contrast to the 2014 brochure which showed only Daisy and Steve (renamed as Boo) the monkey). This version of the brochure provides substantially more detail than its 2014 counterpart. Information is provided on the concept, the cast, the "CHF Team" (which includes HB described as the creator and producer of Daisy and who states: "I've worked with the incredibly talented team of artists and animators at CHF to develop a beautiful and unique style that I think will appeal to parents and children alike"), and the studio (noted as that of CHF). The commercial statement is provided by Jenny Johnstone (Commercial Director at Entertainment) who states:

> "It is always our objective to first engage a lead broadcast partner in the UK ahead of full series production, and we are pleased to announce Turner Broadcasting has acquired to series for its pre-school platform Cartoonito. … the ideal partner for Daisy and Ollie. …
>
> Supported by an extensive marketing and advertising campaign, Daisy and Ollie will debut on the channel in September 2017. A broadcast partner such as Cartoonito will undoubtedly drive both European placement and Licencing and Merchandising sales.
>
> Daisy and Ollie has significant licencing and merchandising appeal, reaching across all product categories including but not limited to Plush, Toys and Games, Apparel, Mobile Applications (Apps) and Publishing. Our emphasis will be on Plush, Toys and Apps in the first phase: these key categories will lead any pre-school programme and are often multi-territory licences.

> Our expectation is to present Daisy and Ollie at the major TV and Toy markets including MIPCOM, Kidscreen and Toy Fair; these events provide the ideal environment to meet with key decision makers both nationally and internationally.
>
> The following table is provided to highlight potential revenue generated from broadcast licence fees and merchandising minimum guarantees. ”

103. The table then set out is identical to that at paragraph [38] above save that the header for the final column is “SVOD, DVD/VOD”.

104. HMRC sought to make much of the fact that the minimum and maximum guarantees had not altered in terms of quantum despite the fact that the Cartoonito agreement had been signed and the change in the market from dvd to video on demand and streaming.

105. As indicated above HB confirmed that JJ had been responsible for the commercial aspects of the investor update, and she could add little more though she did observe that whilst the landscape for access to content had moved away from dvd to video on demand and streamed services that did not preclude an assessment of the value of non-broadcast viewing or alter the total value of the non-broadcast viewing market.

106. HMRC want me to conclude that the projections in the investor update were just cut and pasted across from the 2014 investor brochure, and they did not in 2014 and certainly did not by 2017 reflect a reasonably held intention to achieve the turnover set out. I find the opposite. The figures in both documents estimated that the broadcast rights for UK and Eire were to be valued at between £26,000 and £65,000 with non-broadcast viewing (DVD/VOD etc) valued between £20,800 and £39,000. The consideration payable under the Turner broadcast agreement which included a non-exclusive distribution right for non-broadcast viewing for UK, Eire (and the UK dependant territories) was agreed at $130,000 or (using HMRC’s exchange rate for the date of signature of the agreement) £104,392 i.e. exactly the maximum anticipated guarantee for those territories. There is therefore nothing to indicate that the estimates for merchandising or other territories was wrong.

107. As I concluded in respect of the 2014 investor brochure I find that the estimates provided were realistically viewed to be achievable by JJ when she put the update together as to have included inaccurate estimates would have been to mislead potential investors.

108. As of 30 September 2017 the Appellant’s intangible assets (the rights in Daisy) were shown in the accounts as valued at £1,656,332 in consequence of additions of £1,138,876. As with the prior accounts HB could add little insight as to the basis of valuation.

109. However, by 30 September 2017 there was a broadcast contract in place, but broadcasting had not yet begun. It was an asset the value of which was about to be tested. I consider, in the circumstances there was no basis on which to determine that the fair value determined by cost had been impaired but there was still no basis on which to determine a market value exceeding cost. The accounts therefore appear to have been prepared on a wholly reasonable basis.

110. The first episodes of Daisy were broadcast on Cartoonito in October 2017.

111. Following the broadcast launch a Licencing and Merchandising Brochure (**L&MB**) for Daisy was produced. It bore the Entertainment logo and copyright CHF Daisy Boo & Steve too Ltd 2014. The L&MB identifies the cast, including Jason Manford (also joint executive producer, script writer and voice of Daddy and Whizzy the Robot), Claire Morgan, Sarah Hadland and Brendan O’Carroll. It notes that the concept is “based on an original idea by Helen Brown and developed by [Entertainment]”. There is an episode synopsis. A Stop Press page identifies that various publications are referencing the series (by then showing on Cartoonito) and claiming a total trade and consumer media reach of 5 million. The social media campaign

is evidenced: it is states that there had been a 342% increase in fans and followers and 10,110% increase in messages across all platforms. Creative assets are demonstrated including recipes, games, educational activities etc. The document provides "There is a substantial catalogue of creative assets with a style guide currently in development. A separate Guide will also be developed specifically for publishing … there is also a library of supporting content in the form of activity and fact sheets."

112. I find that the L&MB is actively promoting the successful broadcast launch of the first 26 episodes. It announces the broadcast launch of a further 26 episodes anticipated to be screened from March 2018.

113. In light of HB's evidence that meaningful commercialisation by way of toy, apparel, app etc merchandising was unlikely until 52 episodes had been broadcast and a clear following established I find that pursuant to the broadcast representation agreement Entertainment was activity laying the foundation for the growth and development of the IP rights which would follow in due course as the first 52 episodes were broadcast.

114. I was also provided with press coverage produced on behalf of Dock 10, the external third party which produced the soundtrack for the Daisy series. The material correctly states that it was Entertainment that "turned to" Dock 10 for audio postproduction. It also establishes Dock 10's credentials by reference to a number of productions entirely unrelated to the Appellant or Entertainment on which it worked including Blue Peter, Happy Valley and Match of the Day. This material confirms to me, and I so find, that production of any TV show is a blend of various skill sets which will not usually be found in one place. In essence careful project management is required to bring together thew necessary the diverse skill sets.

115. The second distribution agreement was entered by the Appellant on 1 November 2017 with LLC Comprehensive Licencing Solutions (**LLC**). Pursuant to that agreement the Appellant granted to LLC the sole and exclusive right to distribute and exploit Daisy and Ollie in Russia, Abkhazia, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan, Ukraine, South Ossetia, Latvia, Lithuania and Estonia until 30 October 2021. The rights of exploitation included cinematic, home video, pay tv, free tv, pay-per-view, closed net IPTV, Video on Demand, ancillary and other rights (including merchandising, publishing and toy distribution. The licence fee and royalties were calculated on a split of gross receipts basis (with different splits for each category of right). Under the agreement such fees were directed to be paid into Entertainment's bank account.

116. LLC was entitled to produce at its own expense dubbed, subtitled or voice over content in Russian. All copyright and author's rights to the dubbing vested initially in LLC but once LLC had recovered the costs of providing the dubbing all rights vested automatically in the Appellant. This agreement was signed by Jenny Johnstone on behalf of the Appellant.

117. A Programme Acquisition Agreement dated 12 December 2017 was entered between the Appellant (through Entertainment as its agent for invoicing and collecting purposes) and Yleisradio Oy (**Yle**) pursuant to which the Appellant licensed the right to broadcast and other digital distribution rights for 52 episodes of Daisy. The licence fee under this agreement was €20,000. As with the Russian agreement Yle had the right to subtitle or dub and to translate the title; however, IP rights and copyright to the dub was retained by Yle but subject to further agreement with the Appellant. The agreement was signed by HB on behalf of the Appellant on 8 January 2018.

118. On or around 1 April 2018 version 5 of the Information Memorandum was issued in respect of the Fund. The document was in substantively the same form as version 4 subject to some changes that appear to have been driven by regulatory requirements.

119. There were a number of invoices included in the bundle from suppliers to Entertainment in connection with the production of Daisy, for example an invoice from Dock10 dated 28 June 2018. Dock10 are shown on the budget forming part of the production services agreement as providing External Post Production services. Their invoice is addressed to the Appellant, shown as approved by HB and "paid from Daisy 1/8/18".

120. The annual accounts for the 6 months to 31 March 2018 show intangible assets of £2,506,647 as a result of additions valued at £850,315.

121. In or about March 2018 the budget to the production services agreement was reviewed and a cost to completion estimated. Expenditure to March 2018 had been £2,313,638 (this confirms the value of the asset in the accounts which will have included the pre-production spend of £149,999) and it was estimated that cost to complete was £869,108.07 subject to a £100,000 contingency. By reference to the revised budget it was clear that the total cost, and hence amount that Entertainment was likely to be paid was lower than expected, the original budget (including contingency) having been scoped at £3,944,669.

122. As previously indicated HB's evidence was that the production was substantially under budget. She confirmed that for under £3.5m all 52 episodes, 22 nursery rhymes and the Christmas special were produced.

123. There was no documentary evidence which demonstrated an intention to take on employees. HB explained that she was trying to secure the necessary contracts working alongside JJ (under the distribution agreement), but it would always be difficult until at least 52 episodes were broadcast. HB stated that it was the Appellant's intention to employ staff focussed on merchandising when the time was right.

124. In this regard I consider that HB's passion for the project influenced her answer. I do not consider that she in any way intended to mislead the Tribunal, but I do not consider that it was reasonable in the circumstances to conclude that there was an intention to take on employees. Once a distribution agent is contracted to make the market there is no need for employees. The Appellant had appointed Entertainment so as to access the talents of JJ and her commercial team and therefore, during the term of that contract the Appellant had no need to employ its own staff. I find there was no such intention.

125. I was also provided a press announcement for a live show of Daisy to run as part of "Winter Wonderland Manchester". Winter Wonderland, described as "a sparkling seasonal extravaganza featuring more than 50 family rides and attractions" was held at EventCity over the period 9 December 2017 – 1 January 2018. No oral evidence was given and the contract for the show was not included in the bundle. However, I find that although run after the Relevant Period it is inconceivable that the terms on which the live show was to be performed was initiated, if not concluded, prior to the end of the Relevant Period. It is a further indication, within the Relevant Period of increasing the profile of the Daisy brand with a view to merchandising it.

126. Similarly for the press announcement on 19 November 2018 of a partnership between the "brand owners of Daisy" and KITE a leading technology provider of global print-on demand solutions, to launch an online shop for Daisy "shop.daisyandollie.com". The quote from the representative of KITE states: "The print on demand model is one that is increasingly being used by brand owners as a flexible and risk-free way to get product to fans quickly". The merchandise was available to purchase from that date.

127. Further beyond the end of the Relevant Period but conceivably having been initiated within it in January 2019 a further licencing strategy agreement was announced for Daisy with Nimbus Nine.

Restructuring the Appellant

128. Following HMRC's refusal to grant EIS compliance certificates the Appellant's access to equity funding was significantly impaired. HB described the flow of funding having been cut off, significantly affecting the Appellant's ability to complete production of further episodes essential to the strategy of getting the concept broadcast so as to then access the merchandising opportunities.

129. This forced the Appellant to identify how it could restructure so as to satisfy HMRC they were compliance for EIS purposes.

130. HB noted that HMRC had been willing to work with the Appellant, slowly providing guidance and reassurance on what structural changes were required in order for HMRC to be comfortable that the terms of EIS were met.

131. This process led to the termination of the broadcast representation agreement on 8 August 2018.

132. New writer's agreements were signed between the Appellant and Andrew Viner on 24 August 2018, Miranda Larson on 25 August 2018 and each of Samantha Hill, Gillian Corderoy, Danny Stack and Chris Parker on 11 September 2018. Terms are substantially identical to those previously entered by Entertainment regarding the appointment of writers.

133. The Appellant appointed Jetpack on 4 September 2018 as its sole and exclusive agent in respect of the exploitation of Daisy through broadcast, distribution, licensing and merchandising on a worldwide basis but excluding the territories which were subject to the agreements with Turner, LLC and Yle for a period of 2 years. Such appointment required the grant of a licence to Jetpack in respect of such rights. Jetpack were required to pay to the Appellant the gross receipts derived from exploitation of Daisy through the agency relationship less the agent's fee (calculated at 25% of gross receipts) and expenses (not to exceed 5% of gross receipts).

134. The business plan accepted by HMRC as establishing the necessary requirements for EIS provided:

> "Daisy Boo & Monkey Too Limited, to be renamed Hoopla Animation Limited, (the Company) owns, develops, produces and licenses family media content, primarily children's TV animation shows and entertainment concepts.
>
> …
>
> To date the Company has successfully raised over £3 million of EIS investment which has been used to produce 52 x 6-minute episodes of the animated TV show 'Daisy & Ollie', a 22-minute Christmas Special starring Gary Barlow and 22 short Nursery Rhymes. Daisy & Ollie, created by Helen Brown, launched on Cartoonito (Turner Broadcasting) in November 2017 and quickly became its number one rated show.
>
> Since then the Company has licensed Daisy & Ollie to television broadcasters in Finland (YLE), Russia (CLS) and the Middle East (Discovery) and has appointed a TV distribution agent, Jetpack, to continue its growth by distributing the show globally. In addition, the Company has launched its own online shop selling a selection of apparel and soft furnishings and has a range of online games and nursery rhymes which can be accessed via either Cartoonito's or Daisy & Ollie's own website.

Having previously outsourced production services to a third party, it is now the intention of the Company to restructure and employ or engage all its production staff directly in order to produce new content…

…

With over a quarter of all products bought for children up to the age of 14 carrying an animation character or brand, pre-school and character-led content is a highly competitive market. However, with this product market representing 48% of all global licensing revenues and generating £8 billion in retail sales in the UK alone, it can be hugely rewarding, particularly if the Company produces a series or a number of series that resonate with its core audience.

The Company aims to develop and design largely character-led projects and products with associated spin-off merchandising opportunities. PR should be generated around these IP concepts to ensure full social media coverage to enable the brands to drive forward into their specific marketplace. Additional outlets for the branded market to increase revenue will include licensing videos, music rights, toys, plush, celebration parties with mascot characters in costume and live mascot costume shows/events.

The success of Daisy & Ollie, the Company's flagship show, since its launch at the end of 2017 and the full support it has received from its broadcast partners demonstrates that Daisy & Ollie has all the qualities needed to be a major licensing success.

Contrary to popular belief and due to the advent of digital platforms, there is little income to be gained from selling broadcast rights to a show alone. In fact, a good number of traditional broadcasters no longer offer any form of remuneration to license a show for 3 or more years. The upside however is the exposure a broadcaster can bring, which effectively makes each show broadcast an advert for the toys and merchandise ranges associated with the show's characters, hence the more shows, the more exposure and the more merchandise sold.

One of the requirements in the new digital world from both broadcaster and L&M partners is for a continuing supply of new content. Licensees are no longer happy to support just a 1 or 2 series show, they require additional content, more series, more spin offs, more games, more of everything. The greater the amount of content that can be produced the greater the chance of success. It is perhaps no coincidence that Peppa Pig has had the licensing success it has enjoyed to date, having launched in May 2004 with 52 episodes it has now grown to have 264 episodes with a further 117 currently in production. To attract the bigger L&M deals and expand into the lucrative US market, it is widely accepted that a children's television show needs at least 104 x 6-minute episodes.

To reach this threshold with Daisy & Ollie, the Company intends to produce at least a further two series of the show. Once complete, the board expects the Company's L&M revenues to significantly increase, and this is highlighted in the Company's financial projections which can be found on page 10 of this plan. It is forecast that L&M revenue will jump from £125k for YE 2020 to £1,250,000 for CY 2021 and then to £2,250,000, 4,000,000 and £4,455,000 for subsequent CYs 2022, 2023 and 2024 respectively.

…

> The Company, as one of the few independent animation studios in the UK, would also look to generate employment for the scores of graduates and artists who struggle to find long term employment in the animation field.
>
> …
>
> As an example, the Company has been invited to Guangzhou in 1Q 2019 to discuss a broad partnership with a major IP Rights development partner for China and SE Asia. Guangzhou is a major centre for animation development in China and this partnership will extend to co-development of new IP suitable for both markets.
>
> Initial estimates from the Chinese partner for a 5-year Daisy & Ollie exploitation would underwrite the estimates the Company has given in its financial plan on page 10. The Company is already in discussions to accelerate this partnership.
>
> The Company's current network of broadcasters, licensees and partners have confirmed that the development of another 52 episodes of D&O would move the overall IP into a longer term, 5 to 10-year relationship, as the Company would have reached a critical mass that reduces repetition and so increases engagement with young families.
>
> With critical mass the Company will be in a position to negotiate much larger, multi-territory agreements through its licensing agents and its own contacts. Firstly, the Company would do this with its own in-house executive team and look to strike an international representation agreement in 2020."

135. Following the restructuring the Appellant now owns the rights to more than the Daisy concept. It no longer outsources production but has appointed Jetpack as its distribution agent.

SETTLED/AGREED ISSUES

136. As set out in the preface above a number of the legal issues relevant to this appeal have previously been considered by the FTT in *Pip!* and *Coconut*. The relevant provisions have also been considered in *Inferno Films Ltd v HMRC* [2022] UKFTT 141 (TC) (**Inferno**) and *Cry Me a River Limited v HMRC* [2022] UKFTT 182 (TC) (**CMAR**).

137. As indicated to both parties during the hearing I consider the legal issues determined in those appeals to have been correctly determined. I therefore apply those determinations to the facts of the present appeal. As a consequence I reject a number of submissions made by both parties, that on various points, those decisions were wrong.

138. However, HMRC did introduce new arguments not previously advanced in any of the cases to date which would, if correct, give rise to an alternative conclusion for the outcome in this appeal. These are the arguments outlined in paragraphs [140] – [153] below.

139. The principles which the Tribunal accepts or are agreed are as follows:

(1) Risk to Capital Condition

(a) The issue to be determined is whether, in the light of all the circumstances existing in the Relevant Period it would be reasonable to conclude that the Appellant had objectives to grow and develop its trade.

(b) There was no dispute that investors were at significant risk that there will be a loss of capital greater than the net investment return.

(c) The test requires there to be an objective assessment of the Appellant's subjective intention as to growth and development of its trade. (I note that I do not read the judgement in *Coconut*, when read as a whole or even paragraph 48(5), in

isolation, as requiring a different approach. At paragraph 48(5) Judge Beare simply acknowledges that where the financial projections of an issuing company are wildly optimistic but genuinely believed that belief and its objective optimism are factors to be taken into account).

(d) The requirement to grow and develop are conjunctive and not alternative (I do not consider that the single us of "or" in paragraph 47(2) of *Coconut* when referring to the Risk Capital Condition indicates that Judge Beare considered otherwise. I consider it more likely that it was a typographical error).

(e) This is essentially a question of fact (*Coconut* paragraph 39).

(f) The circumstances listed in section 157A are some of the factors to be considered but the list is not exhaustive. Some the circumstances may be relevant (or at least more relevant to the question of growth and development) and others of may not. Particularly as the circumstances are relevant to the whole of the section 157A(1) assessment and not only the "grow and develop" requirement in subsection 157A(1)(a). This is to be contrasted with the factors listed in subsection 157A(2) which apply exclusively to subsection 157A(1)(b).

(g) The listed factors should be considered to have "special significance" (*Coconut* paragraph 39 and 47(1) and (2)).

(h) When considering the Risk Capital Condition it is relevant to consider the actual business carried on by the Appellant and the particular features of the industry in which they operate, in this case the exploitation of intellectual property rights (*Coconut* paragraph 48(2) and (5)).

(i) It is only the Appellant's objectives which are to be determined/relevant when considering the Risk Capital Condition and any collateral benefit to another entity does not preclude reasonable conclusion that the Appellant had the necessary objective to grow and develop (*Coconut* paragraph 50 – 55)

(2) Excluded Trade Condition

(a) During the relevant period the Appellant was engaged in a trade the whole of which involved the receipt of royalties or licence fees.

(3) Disqualifying arrangements:

(a) The statutory definition of "arrangements" is very wide and, consistently with the approach taken in *Coconut* (see paragraphs 88 and 89) will include inter alia: the incorporation of the Appellant, the IPA, the raising of funds by the issue of B Ordinary shares, the broadcast representation agreement and PSA.

(b) Entertainment was party to the arrangements either directly as a contractual counterparty (as in the case of the PSA and broadcast representation agreement) or, perhaps more indirectly, through the CCC and its recommendation to the Fund that Daisy be funded through share issues arranged and managed by the Fund advised by Enterprises.

(c) To the extent that it is relevant Entertainment and Enterprises are connected to one another because they meet the statutory definition provided in section 993 (for the reasons identified in *Coconut* paragraph 47(4) but on the basis that, contrary to the observation of Judge Beare that section 257(2) excludes the definition of section 993 for EIS but not SEIS, the exclusion in 257(2) applies to a different part of the EIS regime).

(d) The main purpose of the Appellant in entering into the arrangements was accepted to be with a view to ensuring SEIS and EIS relief on the share issues. The availability of such relief was an inherent part of ensuring a flow of equity capital for the Appellant's business.

(e) Subject to the Tribunal's determination on the Excluded Trading Condition the Appellant was engaged in a qualifying trade.

UNSETTLED LEGAL ISSUES

140. There were a number of regards in which both HMRC and the Appellants sought to modify the legal argument in respect of key legal issues which have not therefore been considered by the FTT previously. These are summarised in this section and dealt with fully in the discussion of the relevant condition.

Connected or non-connected subcontractors

141. Section 157A(3)(d) provides that one of the circumstances to be considered in connection with the Risk Capital Condition is "the extent to which the activities of the company are subcontracted to persons who are not connected with it.

142. This was an issue which troubled Judge Beare in *Coconut*. In *Coconut* the taxpayer had submitted that the circumstances described here (and the others set out in (e) to (g)) were aimed at identifying whether the objective of the relevant company was to grow the trade of some other company or group rather than its own. The submission was that subcontracting to a connected party was an adverse indication of an intention to grow and develop in the long term. As there was no connection in statutory terms between the taxpayer and the rest of the Media group the subcontracts were not relevant to the consideration arising from the circumstance set out in (d). HMRC contended that connection between subcontracting parties was a positive indication as the use of a connected party would be likely to result in lower charges than with an unconnected subcontractor.

143. Judge Beare wrestled with whether or not the parties were connected in the circumstance in which a nominee company (within the CHF group of companies) held the legal title to more than 50% of the shares but the beneficial interest in those shares lay outside the group. But he ultimately concluded that there was no connection as the nominee should be disregarded with at least the implicit consequence that the circumstance enunciated under section 157A(3)(d) was not relevant to his consideration of the wider question as to whether it was reasonable to conclude the taxpayer had an objective to grow and develop.

144. In the present case HMRC contended that the statute envisaged that outsourcing to connected companies was inoffensive. This was because, they say, that subcontracting within a corporate group builds the infrastructure for future growth at a group level supporting growth in the long term at group level. That this was permissible was as a consequence of section 157A(4) which provides that where the issuing company is a parent company any reference to the issuing company's trade is to the trade of the group. In such a circumstance it was appropriate that EIS funding be pushed down by an issuing parent to the trading subsidiaries.

145. HMRC submitted that this was not an argument considered in *Coconut* when dismissing the relevance of section 157A(3)(d) and the Risk Capital Condition.

Created

146. In both *Coconut* and *Pip!* the Tribunals concluded that the taxpayers in question were engaged in a qualifying and not an excluded trade on the basis that the royalties and licence fees expected to be received were attributable to intangible assets "the whole or greater part in terms of value of which had been created by" the taxpayers.

147. Judge Popplewell in *Pip!* justified that conclusion on the basis that Pip! reserved to itself all intellectual property rights in Pip Ahoy! including its development and production. Whilst it subcontracted out the practical aspects of doing so to Entertainment all Entertainment's activities were as agent for and on behalf of Pip! who paid for the increased value in the asset and who was shown as the owner of it.

148. In *Coconut* Judge Beare considered that at the point at which the relevant assets were acquired from their creator they had substantively no value (as here they had been acquired for £1). The accounts produced in accordance with generally accepted accounting principles recorded a growth in the value of the assets year on year by reference to the development costs and those assets represented the substantive value of the business such that the royalties and licence fees were attributable to those assets. Judge Beare accepted that:

> "the process of commissioning a sub-contractor to carry out work the product of which was the vesting of an intangible asset in the person commissioning the work or an increase in the value of an intangible asset already held by the person commissioning the work, can properly be described as "creating" the intangible asset or value in question. There is, in our view, certainly no need for a person to carry out work itself through its own employees before it can be said to have "created" the product of that work."

149. Support was then drawn from the language of section 195(5) which states:

> "(5) In the case of an intangible asset that is intellectual property, references to the creation of an asset by a company are to its creation in circumstances in which the right to exploit it vests in the company (whether alone or jointly with others)."

Which Judge Beare considered suggested that it was where the right to developed work vested that was relevant and not who performed the work.

150. Further support was drawn from the terms of Part 8 Corporation Tax Act 2009 which draws a distinction between the "creation" and the "acquisition" of an intangible asset.

151. HMRC contend before me that both Tribunals were wrong to conclude that *Pip!* and *Coconut* had created the intangible assets which had been produced and developed, in each case, by Entertainment. In summary, they contend that the word create should be given its ordinary dictionary meaning and/or be informed by the provisions of Copyright, Designs and Patents Act 1988 (**CDPA**). When correctly interpreted they say that it is plain that it was Entertainment which created the value in Daisy and not the Appellant.

Paid

152. The final unresolved legal issue concerns the meaning of the word "paid" in condition A (section 178A(4)). The Appellant contends that the requirement of Condition A precluding "an amount representing the whole or the majority of the amounts raised … in the course of the arrangements, [being] paid to or for the benefit of a relevant person" does not prevent sums being used by the Appellant in defraying legitimate expenditure on goods and services needed for its business whoever is the recipient of those payments.

153. HMRC say that "paid" is to be given its ordinary meaning. HMRC referred to the judgments in *MacNiven v Westmorland Investments Limited* [2001] UKHL 6 in which Lord Nicholls in the context of section 338 Income and Corporation Taxes Act 1988 concerning "payment of interest" considered that payment bore its normal meaning and connoted "satisfaction of the obligation to pay". Lord Hoffman considered "payment of a debt … means an act, such as the transfer of money, which discharges a debt".

RISK CAPITAL CONDITION

154. I must determine whether it is reasonable to conclude that the Appellant had the objective to grow and develop its trade in the long term. This exercise is undertaken by reference to the facts as they stood in the Relevant Period. That may be informed by what has gone before.

Submissions

Appellant's submissions

155. The Appellant submitted that:

(1) The Appellant had an intention to grow and develop its trade i.e. the trade of exploiting the IP asset assigned to it by HB. That was distinct from Entertainment's trade as a production studio. Given the marked difference in trading activity the evidenced exploitation of Daisy supported the obvious conclusion that the Appellant had an objective of growing and developing the trade.

(2) It cannot be a requirement for a company to want to carry on multiple different trades in order to show an objective to grow and develop.

(3) The involvement of Entertainment and Enterprises in connection with production services and fund raising respectively is not evidence that it is not reasonable to conclude that there was no objective to grow and develop. The fact that Entertainment's production business might grow as a consequence of its appointment by the Appellant was not relevant to the question of the Appellant's objectives.

(4) There was an objective to take the Daisy concept through production, secure a broadcast partner, enter distribution agreements and merchandise the concept thereby growing the turnover progressively and developing the complexity of the business to revenue streams from different sources. By the Relevant Period the Appellant had achieved and thereby demonstrated some of its ambition though broadcast and distribution licences.

(5) With regard to the section 157A(3) factors:

(a) (Increasing turnover/employees) - Turnover had increased throughout the period since incorporation and the potential customer base (directly by way of licensees and indirectly via the fan base) was also increasing as evidenced by the growth on social media hits etc. There was also an intention to take on employees when the broadcasting began to get the traction necessary to justify further staff.

(b) (Sources of income) - Sources of income would be derived initially from broadcast, and progressively from distribution rights and merchandising rights.

(c) (Assets for security) - The Appellant had a strong balance sheet based on the value of the Daisy asset.

(d) (Subcontractors) - Non-connected subcontractors rather than connected subcontractors had been used and this was industry standard for production.

(e) (Ownership/management) - The structure by reference to which the Fund operates was to create IP exploitation companies to monetise concepts. The Appellant was an independent company not controlled or owned by the Media group. It had a standalone board of directors and in particular JH appointed as an independent board member for the benefit of external equity investors. There was no intention for the business to be folded into the Media group, despite the IM referencing exit strategies which were relevant and potentially significant to

investors who wanted to understand how they may individually or collectively make a return on their investment in the medium term.

(f) (Marketing) - The marketing footprint of the company was not limited to that provided by Entertainment. Whilst it was acknowledged that the website referenced Entertainment each of the broadcast episodes was made credited to the Appellant. Alignment with the reputation of Entertainment made business sense but was not indicative that it was not engaged fully with the growth and development of its own trade.

(g) (Association) – the Appellant contended that each of Entertainment, Enterprises and the Appellant had specific trading activities, operating on an arm's length basis and were not therefore associated in a relevant sense.

HMRC's submission

156. HMRC contend that the words "objective", "grow", "develop" and "long term" are to be given their ordinary meaning. They contend that an objective is an actively and strategically pursued target and not a simply a hope. The objective required to meet the Risk Capital Condition is one to expand the business over time so that the business evolves and becomes more complex.

157. I agree that this is the correct approach.

158. By reference to the evidence however, they assert that as the Appellant was entirely reliant on Entertainment and the Media group more generally the Appellant did not have an objective to grow and develop its own business. Further, as in the Relevant Period the Appellant was the owner of only Daisy the business could not evolve or become more complex.

159. In respect of the criteria identified in section 157A(3)(a) – (g) which have special significance HMRC contend:

(a) "Increasing the number of employees or turnover of its trade" – section 157A(3)(a)

(i) HMRC note the complete absence of employees or any concrete plans to employ anyone and total reliance on the staff (employed or subcontracted to) Entertainment. There was a mutual dependency between Entertainment and the Appellant and the Appellant's entitlement to EIS relief which secured funding through the Appellant for Entertainment's production trade. HMRC conclude that it cannot be reasonable to conclude there was an objective to grow and develop.

(ii) Persistently, from statement of case to amended statement of case and in their skeleton argument HMRC contended that there had been a reduction in turnover. As the Appellant equally persistently maintained, that was factually inaccurate as HMRC were comparing the turnover for the last 6-month period to full year figures for the prior periods.

(b) "sources of income and risk to income" – section 157A(3)(b)

(i) HMRC contended that the Appellant received licence fees "so that Entertainment could produce and distribute the programme. Any income or increase in the value of the intellectual property was a consequence of the work done by Entertainment".

(ii) This is essentially the same argument as HMRC advance in respect of the Excluded Trading Condition.

(c) "having or obtaining assets that could be used as security" – section 157A(3)(c)

HMRC note that the Appellant holds only a single asset – the IP rights assigned under the IPA in Daisy, made no attempt to obtain further assets and that the increase in value was attributable to the PSA and work performed by Entertainment under it.

(d) "subcontracting of activities to non-connected persons" – section 157A(3)(d)

HMRC contended that the Appellant essentially did nothing, it had outsourced not only the production of the initial 52 episodes, nursery rhymes and Christmas special, but also the activities necessary to secure broadcast and any other distribution of exploitation licence. The Appellant had "completely offlaid all activities" which was "redolent of complete want of an intention to grow and develop as it was the subcontractor and not the Appellant that benefited from any growth.

(e) "ownership and management structure" – section 157A(3)(e)

That there can have been no objective to grow and develop the trade of the Appellant is also substantiated, so HMRC say, by reference to the fact that:

(i) HB was, in the Relevant Period, a director of both the Appellant and Entertainment.

(ii) JH was the independent director for a number of investee companies funded through the Fund.

(a) Investments into the Appellant were made on the recommendation of the CCC/Enterprises

(f) "marketing of investment in the company" – section 157A(3)(f)

HMRC contend that the IM makes it clear that the Appellant was a special purpose single project vehicle which was entirely dependent on the resources available to it through Entertainment. As such it could not therefore have had an objective to grow and develop in the long term.

(g) "association with other entities" – section 157A(3)(g)

The relationship between the Media group including Entertainment and Enterprises was made clear to all investors, it was objectively clear that the Appellant could not have existed without the support of the group with the consequence that it could not grow and develop independently.

Discussion

160. I take the circumstances set out in section 157A(3) first and then consider all of the circumstances.

161. Employees or turnover.

(1) At the hearing I put to HMRC that in some industry sectors itinerant or subcontracted labour would be entirely normal and to exclude such companies from access to SEIS/EIS was unlikely to have been intended by Parliament. HMRC's response was that some industries may never meet the requirements for SEIS/EIS but that did not mean that the legislation should be interpreted so as to accommodate them. I consider that the industry in which a taxpayer operates will be a relevant consideration to be taken into account together with the normal basis on which a trade in that industry will be carried out.

(2) I consider it highly significant that the provisions of section 157A(3)(a) reference the extent to which the company's objectives include increasing the number of its employees or the turnover of the trade. This is not conjunctive but alternative. In my view Parliament must have had in mind that a business may have the capacity to increase its turnover without increasing the number of employees. There is further no inference that a company needs any employees at all. What a company needs is access to the human and technical resources necessary to facilitate the realistic potential to increase its turnover.

(3) The Appellant did not have employees. However, under the IPA HB was appointed as executive producer for Daisy. Through that agreement the Appellant derived the services of HB as creator of the Daisy concept, shrewdly the Appellant remunerated her effort contingently and only by reference to successfully increasing profitable turnover but requiring such turnover to be profitable. HB's entitlement to the fruits of her labour coming before any decision by the directors (who in the Relevant Period also included HB) to declare a dividend.

(4) The Appellants resourced both production and distribution agency services by way of subcontracts with Entertainment and more latterly within the Relevant Period, Jetpack and, in the case of at least some of the writers, directly under contract.

(5) Consistently with my own judgment in *CMAR* and that of Judge Beare in *Coconut* the Appellant accessed all necessary resources without the need to employ them. In my view the absence of employment is not the trump card HMRC appear to consider and/or would like it to be.

(6) I have found that there is evidence of an objective to increase turnover. The Appellant had acquired the rights in Daisy on the recommendation of the CCC. Enterprises made a recommendation to the Fund that the prospects for Daisy justified external equity investment. The investor proposals set out projected maximum and minimum guarantees for projected turnover. The projections for merchandising were predicated on the successful broadcast of at least 52 episodes. The projections of income were remarkably accurate and not fanciful or optimistic (certainly as far as the UK/Eire broadcast deal was concerned).

(7) When considering colour pallet and designing the characters and set HB had in mind how they would translate into toys and other merchandise. She took on board discussions she had at the Olympia toy fair regarding girl and boy skew so as to maximise the attractiveness of the programme to its target market and thereby to potential distributors and licensees.

(8) The period from conception of an idea to production was stated to be a minimum of three years, broadcast opportunities can, and need to be secured. Securing a production deal is important once production has commenced as without a broadcast deal or at least a substantial interest in one, it is barely worth completing the production. But the evidence was plain that without the target audience taking to the programme once broadcast there is no material prospect of merchandising licences being successfully offered to the market. Prudently taking one step at a time does not preclude a conclusion that there is an intention to increase turnover in the long term. On the contrary it indicates sensible business planning for the long term.

(9) By reference to the evidence there was not only a reasonable basis but a clear one that the Appellant had an intention to increase turnover.

(10) For the reasons set out at [124] above however, I do not consider that there is evidence of an intention to take on employees.

162. Sources of income and risk to income.

(1) HMRC's position on this factor was weakly put and for good reason. Quite plainly the sources of income: broadcast licences, distribution licences and merchandising licences, were risky.

(2) The Appellant company started with an IP licence which all parties recognised was essentially valueless at the point it was assigned. It was no more than a good idea ripe for exploration and development. Progressing the concept through the production pipeline did not guarantee success. A well-produced series, would, in all likelihood increase the prospects of a broadcast deal but then it was down to the reception that the broadcast received and whether the necessary minimum of 52 episodes were aired for any prospect of merchandising to be likely to materialise.

(3) There was a risk to the sources of income.

163. Having or obtaining assets as security

(1) At the commencement of its trade the Appellant acquired the IP rights in Daisy. That asset increased in value by reference to the work done on it to progress it to production and broadcast and the value was held on the Appellant's balance sheet. In accounting terms it had an asset that was appreciating in value.

(2) That asset was available and in fact used as security as the Appellant granted two debentures as identified in paragraphs [30] and [31] above. Whilst the value of the facility is unknown the security taken was explicitly against the IP rights in Daisy.

(3) Accordingly, the Appellant had assets offered as security.

164. Use of non-connected subcontracting

(1) It was accepted by the parties that Entertainment and the Appellant were not connected and as such all subcontracting was with a non-connected party.

(2) Judge Beare appeared to conclude that on the understanding that the parties were non-connected the subcontracting between Entertainment and the issuing company was not a factor which had bearing on the Risk Capital Condition but not by reference to the arguments that were run before me.

(3) As HMRC note Section 157A(4) provides for the activities of a group of companies to be taken together where the issuing company is a parent company then provides "any reference in subsection (3)(a) to (e) to the company is to any group company."

(4) It is therefore apparent, where an issuing company is a parent company (d) would be rewritten so as to read "the extent to which the activities of any group company are subcontracted to persons who are not connected with it". By reference to the definition of connection any company in a group will always be connected to another member of the group.

(5) In a scenario where the focus is on the collective group (because the issuing parent has no trade or otherwise trades through its subsidiaries) it would be right that intragroup contracting would be irrelevant. But that conclusion does not tell us much if anything as to whether connected subcontracting is a good or a bad thing more generally when considering the Risk Capital Condition.

(6) On balance I have decided that non-connected subcontracting is a feature considered by Parliament to represent a positive attribute when compared to connected subcontracting. It is most unlikely absent a connection that an issuing company will look to prosper the growth and development of a third party. However, supporting a connected company to grow and develop is far more likely and therefore a relevant factor when considering the Risk Capital Condition.

(7) This analysis is supported by reference to the provisions concerning Disqualifying Arrangements which are specifically focused on catching and excluding relief in respect of shares issues in respect of which the majority of the funds raised do benefit parties which are unconnected with the issuing company (though they may be connected with one another).

(8) If extensive non-connected subcontracting breached the Risk Capital Condition it is somewhat hard to understand the purpose of the Disqualifying Arrangements provisions.

165. Ownership and management structure,

(1) In *Coconut* the Tribunal rejected HMRC's submissions on the relevance and importance of the same features in the Coconut arrangements as are asserted here. The Tribunal notes (at paragraphs 49 – 55) that HMRC made two conceptual errors. Firstly, that HMRC did not distinguish the objectives of the Appellant from the objectives, of the shareholders (in that case and in this A Ordinary shareholders (individuals who were connected to Media) and B Ordinary shareholders being the investors into the Fund whose investments were allocated to the Appellant by, and at the sole discretion of, an independent manager on the recommendation of Enterprises). Secondly, that there was a dichotomy between the Appellant having an objective to grow and develop its trade in the long term and Entertainment having a similar objective for itself.

(2) As noted by the Tribunal in *Coconut* at paragraph 55 HMRC's position in that appeal and this is that the Appellant's separation from the Media group was synthesised in order to secure EIS relief and, as a consequence they cannot demonstrate the necessary objective to grow and develop.

(3) These concerns, however, are relevant when considering whether there are Disqualifying Arrangements.

(4) Throughout the Relevant Period the Appellant had two directors. HB created the Daisy concept; she was passionate about its potential and was incentivised personally were it to succeed. JH was appointed as an independent director to protect the interests of the B Ordinary Shareholders thereby ensuring effective corporate governance and that their investment was protected. The fiduciary duties of both directors required them to ensure that the Appellant was as successful as it could be.

(5) The Appellant's trade was that of exploiting the Daisy IP asset. It was not, in the Relevant Period, a producer of animated programmes. The Appellant had a need to appoint a reputable production studio which would develop and enhance the IP asset so that the Appellant could exploit it through broadcast and distribution and ultimately through merchandising (where the potential big money lay).

(6) That symbiotic relationship would have been the same whether the Appellant had appointed Entertainment or any other production studio.

(7) A similarly symbiotic relationship existed in relation to the representation agreement. The Appellant wanted to appoint a representative with a reputation to broker

broadcasting and distribution deals. Entertainment, through JJ had that reputation. As with any commission arrangement both parties benefit from securing successful deals. In any event Entertainment was replaced by Jetpack with effect from August 2018 such that the shares issued from that date to 19 October 2018 cannot have been "tainted" by what HMRC asserts is the fatal relationship between the Appellant and the Media group of companies.

166. Marketing the investment

(1) I take the view that in connection with the marketing of the investment itself (through the investor proposal and the two IMs) the relationship between the Appellant and Media and its subsidiaries was not as clear as it could have been, and this was made worse by the wider marketing material which made little distinction between the Appellant and members of the Media group/Entertainment.

(2) The investor proposals both referenced CHF and much of the marketing material was predominantly focused on Entertainment's production activities which certainly might have given the impression that the companies were connected or at least that their growth objectives were aligned.

(3) However, for the reasons outlined in paragraph [165] I do not think the symbiotic relationship for growth is fatal and the IM was very clear as to the relationships between the parties.

167. Association with other entities

It is clear that the Appellant was contracted to parties within the Media group of companies but there was no evidence that such contracts were not on an arm's length basis (in the main there was evidence that the contracts were on such a basis). As such the Tribunal agrees that there was no "association" for the purposes of determining whether it is reasonable to conclude that the Appellant had an objective to grow and develop the trade in the long term.

168. It is somewhat implicit in the analysis set out above in respect of the specific circumstances that I consider that the exercise when considering the Risk Capital Condition is one which will be specific and unique to each issuing company and at the point in time at which needs to be carried out.

169. The Appellant is a company which had the sole stated aim of exploiting the IP it held. It appointed a highly reputable production studio to produce a high-quality product which would be attractive to broadcasters. The quality of the production was critical to the Appellant in order for it to maximise the potential for exploitation.

170. By reference to the Jetpack and Yle agreements the Appellant entered an industry standard arrangement, initially with Entertainment, by which it would be represented and introduced to potential licencees of Daisy. Through these relationships it secured a broadcasting deal which had been signed by the start of the Relevant Period. The value of that deal met the minimum guarantee for UK/Eire across both broadcast and non-broadcast distribution. In the Relevant Period the Appellant knew that it had a product that was going to sell. 52 episodes had been commissioned the first 26 had already been aired and the potential to exploit was gaining momentum. Publicity and social media presence was growing, building a fan base. Resources and materials for apps, online games etc were being developed.

171. In the Relevant Period the Appellant had finally established the basis on which the potential for growth and development from broadcasting to wider exploitation was firmly established.

Conclusion

172. For the reasons stated I consider that there is a reasonable basis to conclude that in the Relevant Period the Appellant had the objective to grow and develop its trade in the long term.

EXCLUDED TRADING CONDITION

Submissions

173. As indicated above Judge Popplewell and Judge Beare both considered, in all but identical situations, that it was the relevant investee company which created the majority of the value in the intangible asset associated with the animated productions.

174. HMRC say they were both wrong to do so.

175. HMRC focus on the statutory requirement under section 195(4) that to be saved from the exclusion provided for in section 192(1)(e) for royalties and licence fees, the whole or the greater part of the rights in Daisy must have been "created" by the Appellant.

176. There is no dispute that the Appellant's trade in the Relevant Period was wholly that of receiving royalties and licence fees pursuant to the Cartoonito broadcast agreement and the licence agreements with LLC and Yle. The only question therefore is whether the Appellant is saved by the provisions of section 195(4) as having created the asset in respect of which the royalties and licence fees are received.

177. HMRC say the Appellant did not create the IP assets in Daisy. They rely on the Oxford English Dictionary definition of "created": "to make form, constitute or bring into legal existence". They draw a distinction between creation and causation and rely on the requirement in section 9(1) CDPA and the Court of Appeal's conclusion in *Kogan v Martin* [2019] EWCA Civ 1645 (at paragraph 41) that "creation" is determined by "the skill and effort involved".

178. HMRC contend that it was Entertainment that created value in Daisy as is apparent from the fact that the value placed on the asset each year in the annual accounts was limited to the amount spent by the Appellant under the PSA and that all the effort and skill was that of Entertainment, the Appellant merely funded the effort carried on by someone else.

179. The Appellant's relied on the conclusion of the Tribunals in *Pip!* and *Coconut* that the investee companies in each case had created the relevant IP rights and that in each case were not engaged in excluded activities.

Discussion

180. Section 9 CDPA provides that the author of a work is the person who creates it. It goes on to provide that in the case of a film the author is the producer or the principal producer. In the case of a literary, dramatic or musical work the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken (and this is reinforced in connection with film by the definition of production in section 178 CDPA). Section 11 CDPA then provides that the author of the work is the first owner of any copyright in it. However, where the work is literary, dramatic, musical or a film and the author is an employee who produces the work in the course of their employment the employer is the first owner of the copyright.

181. Under US copyright law any work made for hire carries with it the same consequence as under section 9(2)(b) CDPA and is treated in the same way as if it were made by an employee and thereby that the author and first owner is the party commissioning the services in question.

182. These rules on first ownership are what require a person commissioning works (to which the copyright rules apply) to ensure that there is an effective contractual assignment of the copyright.

183. Moral rights are identified under CDPA in sections 77 – 85. They concern matters such as the right to be identified, the right to object to derogatory treatment, the right not to suffer false attribution and a right to privacy. They apply to literary, dramatic, musical or artistic works and films and not other forms of copyright, they also do not apply to works where the first right of ownership accrues to an employer. They are personal rights. They cannot be assigned but may be waived.

184. What we have in relation to Daisy is a whole collection of works, scripts, voice recordings, character designs etc which come together in the form of 52 episodes of Daisy. The author and owner of the scripts will be the writers, the author and first owner of the voice recordings will be the various cast voice providers who provide their services to Entertainment. Pursuant to those agreements they assign any copyright and other intellectual property rights and waive their moral rights to Entertainment.

185. In turn Entertainment produced the episodes but, and as I have found, subject to the creative direction of HB as executive producer.

186. In *Stephen Slater v Per Wimmer* [2012] EWPCC 7 HHJ Birss QC considered who constituted the producer or principal producer of a film determining that the principal director was the person who had creative control of the making of the film i.e. the person who decides what film to make and how to make it.

187. On the basis of the evidence I consider that, whether or not JM was contracted as, or de facto acted as, an executive producer, HB was the individual who made the arrangements necessary for the creation of the work and therefore the principal producer under CDPA. This is the natural consequence of her description of her role and her articulation of the role of executive producer generally (see paragraph [35] above). She was not an employee of the Appellant. However, she was contracted as the executive producer under an agreement which did not preclude her from acting as the Appellant's agent.

188. In *Cryprotex Discovery Ltd v The University of Sheffield* [2004] EWCA Civ 380 the Court of Appeal resolved a copyright ownership issue by relying on the law of agency determining that an employee of one of the sponsors of university research was an agent of the university under the terms of the agreement between the university and all the sponsors pursuant to which the intellectual property asset was developed and thereby created. Through that agency relationship the Court determined that any work carried on by individual gave rise to intellectual property owned by the University.

189. On balance I consider that whatever the rights, as first owner, of the creators of the individual components of each episode it is the Appellant that is the first owner of each episode of Daisy produced and of the series as a whole.

190. In light of the assignment clauses in each of the writers, editors and cast contracts and under the PSA it is also clear that all copyright vested in and was owned by the Appellant, particularly having regard to the fact that the assignments were in place even prior to the creation (under CDPA) terms.

191. On that basis HMRC's argument is not made out on the facts even were it to be correct.

192. However, I am not satisfied it is even correct. The objective of the CPDA is to establish the first owner of IP rights subject to copyright. Once the first owner is identified it is then possible to transfer/assign the identified and created right by contract and thereby trace ownership for the purposes of copyright protection.

193. By contrast section 195(4)(b) is focused on where the rights are vested or owned in order to determine where the whole or the greater part of the value in those rights has been created.

The provision is not looking at who "created" the work to which copyright attaches but who "created" the value from which the royalties of licence fees are derived.

194. For the reasons given by the Tribunal in *Coconut* (and *Pip!*) there is nothing to preclude value creation through outsourcing or the commissioning of development from representing the creation of value/the intangible asset itself (see paragraphs 66 - 72 of *Coconut* and 125 of *Pip!*).

195. The Appellant's accounts show that the value of the rights in Daisy were increasing. That increase, by reference to generally accepted accounting standards was valued by reference to the costs incurred in the development of the asset. HB confirmed that there was no other practical basis for determining any other valuation until a broadcast agreement had been signed and even then valuation would not be easy to establish until the series had in fact been broadcast. A minimum of 52 episodes and preferably more would be required before real potential for merchandising could be established.

196. All of that value had been funded by the Appellant though the PSA. HB had monitored and controlled the budget to ensure the quality of the 52 episodes of Daisy from which broadcast and distribution commission could then be earned by the Appellant.

Conclusion

197. For the reasons set out above, I find that the Appellant was engaged in a qualifying trade.

DISQUALIFYING ARRANGEMENTS

198. The only issue in dispute between the parties in connection with determining whether there were Disqualifying Arrangements was whether either Condition A or B were met.

Condition A

199. As a reminder Condition A is that a directly or indirectly the whole or a substantial proportion of the money raised by the relevant share issue is "paid to or for the benefit of" one of the parties to the arrangements.

200. The Appellant never challenged that there were arrangements (within the wide definition provided in section 257) or that the main purpose of those arrangements was to secure EIS relief. By the grounds of appeal however, they challenged that Entertainment and other members of the Media Group were "relevant persons".

201. I do not understand how such a submission was to be maintained given that there was an acceptance that the arrangements included the PSA and broadcast representation agreement in respect of which Entertainment was a counterparty and therefore (whether connected to the Appellant or not – and for the reasons stated (by reference to the analysis of Judge Beare in *Coconut*) Entertainment and the Appellant are not connected) a relevant person.

202. Before me, and on the basis that I indicated that I accepted the analysis and conclusions in *Coconut*, the only legal argument advanced by the Appellant was that no amount raised had been "paid to or for the benefit of" Entertainment because the Appellant had received full value in exchange.

203. This argument is not so very different to the one put to the FTT in *Coconut* at paragraph 93 and on which the Tribunal concluded as follows:

> "Ms Brown suggested that the payments so made were not made "in the course of the arrangements" but were instead made pursuant to the production services agreements. We do not understand the reasoning underlying that submission. The fact that the production services agreements gave rise to the legal obligation to make the payments (and were therefore the immediate cause of those payments) and that those agreements were on arm's length,

> industry-standard, terms does not mean that those agreements (and the payments to which they gave rise) did not form part of the "arrangements" which we have described above. On the contrary, the services provided under the production services agreement and the amounts expended by the Appellant in order to obtain those services were at the very heart of the "arrangements". After all, the work in question was central to the Appellant's ability to carry on its "qualifying trade"."

204. HMRC's position (as set out above at [152] and [153]) is that paid means no more or less than used to satisfy a debt.

205. I do not think "paid" can be so limited. Were I to make a payment to a charity by way of a donation such that I had paid them I would not be settling a debt I owed to them I would be making a gift. The payment I made would nevertheless have been paid to the charity. Similarly, if I attended a charitable cake sale and paid over the odds for a cake on the understanding that the payment I made to the person running the cake sale was to be donated the amount I paid for the cake would be for the benefit of the charity. I consider paid must mean at least the payment of a debt but in the context of section 178A(3) it is more simply the transfer of money which pursuant to that section may be direct or indirect and to or for the benefit of a relevant party.

206. HB accepted that on a monthly basis the amount Entertainment spent against the budget was determined and the Appellant made payment (i.e. transferred sums to Entertainment's bank account) or otherwise paid the invoices of subcontractors, including Dock 10, who were contractually owed sums by Entertainment and therefore sums were paid both to and for the benefit of Entertainment.

207. In the relevant period the Appellant had limited income from the Cartoonito broadcast agreement, but the Appellant was only able to meet the majority of its obligation to Entertainment in respect of the PSA from the sums raised by the relevant share issues.

208. The position is otherwise in respect of the sums due under the broadcast representation agreement in respect of which Entertainment's commission was deductible from the amounts secured by its actions and the Appellant was paid net of the commission.

209. As a consequence there is an inescapable conclusion, which is entirely consistent with the approach and conclusion reached in *Coconut*, that pursuant to the PSA sums raised through the share issues was paid to and for the benefit of Entertainment who, by virtue of both it being a counterparty to the PSA and as a consequence of the role of the CCC in recommending the ideas justifying investment (albeit that the final decision was that of the Manager) that Entertainment is a relevant person.

210. The Appellant is not therefore entitled to EIS on the relevant share issues as there are Disqualifying Arrangements.

211. I challenged HMRC as to whether it was reasonable for me to reach that conclusion given (and distinguishing it from *Coconut*) that they had already authorised the Appellant to issue compliance certificates both under s257CF (for SEIS) and for a number of share issues providing for EIS relief. They simply said that they had got it wrong previously.

212. I am concerned that HMRC have leveraged an unsuccessful challenge arising from the introduction of the Risk Capital Condition to deny relief that they had previously considered to be acceptable. However, I have no judicial review powers through which to consider whether their actions had given rise to a legitimate expectation that the arrangements were not Disqualifying Arrangements and so make no further comment.

Condition B

213. In consequence of the conclusion on Condition A it is not necessary to consider Condition B. However, I propose to do so briefly.

214. Condition B precludes EIS treatment where it would be reasonable to expect that the whole or a greater part of the qualifying trade (on the basis that, being a single trade, there are no component activities) would have been carried on by a related person.

215. The only suitable candidate who might have carried on the Appellant's qualifying business activity/trade i.e. the licensing and exploitation of the Daisy IP asset is Entertainment.

216. In *CMAR* I determined on the facts of the case that there was no evidence that SCF had ever intended to produce films, only develop them to the point of production and then transfer the rights to a production company. I further noted that, in that case, HMRC had systematically authorised the issue of compliance certificates prior to the introduction of the Risk Capital Condition despite the Disqualifying Arrangements provisions having been on the statute book throughout.

217. In *Coconut* the Tribunal was tempted to conclude that but for the arrangements in that case (virtually identical to the arrangements here) Entertainment would have carried on the qualifying trade. However, it considered that such a conclusion was not the correct one to reach on the basis, and by reference to *CMAR*, that Entertainment was a production company and there was no other company in the Media group of companies (which excluded the investee companies which were not connected in a relevant statutory sense to Media) which carried on the qualifying activity of IP exploitation and which it would therefore be reasonable to conclude would have carried on the activities in the absence of the issuing company.

218. Perhaps not unsurprisingly I consider that such analysis applies with equal force here. There is no evidence on which it is reasonable to conclude that any company which was party to the arrangements (i.e. Fund, Media, Entertainment of Enterprises) or any party connected to them which might have been expected to exploit Daisy in the absence of Daisy.

219. I therefore conclude that Condition B is not met.

Conclusion

220. There are Disqualifying Arrangements which meet Condition A and otherwise meet there requirements of section 178A.

DISPOSITION

221. The Appellant has satisfied me that it was reasonable to conclude that there was an objective to grow and develop a qualifying business activity in the long term. However their appeal fails on the grounds that there were Disqualifying Arrangements.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

222. 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 KC
TRIBUNAL JUDGE

Release date: 03rd JANUARY 2023

APPENDIX
LEGISLATION

The relevant legislative provisions in force at the time include the following, all of which are found within Part 5 of ITA 2007 which establishes EIS relief.

156 Meaning of "EIS relief" and commencement

(1) This Part provides for EIS income tax relief ("EIS relief"), that is, entitlement to tax reductions in respect of amounts subscribed by individuals for shares.

(2) In this Part "EIS" stands for the enterprise investment scheme.

(3) In accordance with section 1034(3), this Part has effect only in relation to shares issued on or after 6 April 2007. This is subject to Schedule 2 (transitional provisions and savings).

157 Eligibility for EIS relief

(1) An individual ("the investor") is eligible for EIS relief in respect of an amount subscribed by the investor on the investor's own behalf for an issue of shares in a company ("the issuing company") if–

(za) the risk-to-capital condition is met (see section 157A),

(a) the shares ("the relevant shares") are issued to the investor,

(aa) the shares are issued before 6 April 2025,

(b) the investor is a qualifying investor in relation to the relevant shares (see Chapter 2),

(c) the general requirements (including requirements as to the purpose of the issue of shares and the use of money raised) are met in respect of the relevant shares (see Chapter 3), and

(d) the issuing company is a qualifying company in relation to the relevant shares (see Chapter 4).

(1A) The Treasury may, by regulations, amend subsection (1)(aa) to substitute a different date for the date for the time being specified there.

157A Risk-to-capital condition

(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.

(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 EIS relief.

(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 subcontracted 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.

(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.

174 The purpose of the issue requirement

(1) The relevant shares (other than any of them which are bonus shares) must be issued in order to raise money for the purpose of a qualifying business activity so as to promote business growth and development.

(2) For this purpose "business growth and development" means the growth and development of—

(a) if the issuing company is a single company, the business of that company, and

(b) if the issuing company is a parent company, what would be the business of the group if the activities of the group companies taken together were regarded as one business.

178A The no disqualifying arrangements requirement

(1) The relevant shares must not be issued, nor any money raised by the issue employed, in consequence or anticipation of, or otherwise in connection with, disqualifying arrangements.

(2) Arrangements are "disqualifying arrangements" if—

(a) the main purpose, or one of the main purposes, of the arrangements is to secure—

(i) that a qualifying business activity is or will be carried on by the issuing company or a qualifying 90% subsidiary of that company, and

(ii) that one or more persons (whether or not including any party to the arrangements) may obtain relevant tax relief in respect of shares issued by the issuing company which raise money for the purposes of that activity or that such shares may comprise part of the qualifying holdings of a VCT,

(b) that activity is the relevant qualifying business activity, and

(c) one or both of conditions A and B are met.

(3) Condition A is that, as a (direct or indirect) result of the money raised by the issue of the relevant shares being employed as required by section 175, an amount representing the whole or the majority of the amount raised is, in the course of the arrangements, paid to or for the benefit of a relevant person or relevant persons.

(4) Condition B is that, in the absence of the arrangements, it would have been reasonable to expect that the whole or greater part of the component activities of the relevant qualifying business activity would have been carried on as part of another business by a relevant person or relevant persons.

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

(6) In this section—
"component activities" means—
(a) if the relevant qualifying business activity is activity A (see section 179(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 179(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) SEIS relief under Part 5A 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: reinvestment) 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: reinvestment) in consequence of which SEIS re-investment relief is attributable to the shares (see paragraph 4 of that Schedule).

179 Meaning of "qualifying business activity"

(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.

(2) Activity A is–
(a) the carrying on of a 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 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 within two years after that date.

[3]…..

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

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

[5]……..

(6) In determining–

(a) for the purposes of subsection (2)(b) when a qualifying trade is begun to be carried on by a qualifying 90% subsidiary of the company, or

(b) for the purposes of subsection (4)(a) when research and development is begun to be carried on by such a subsidiary,

any carrying on of the trade or, as the case may be, the research and development by it before it became such a subsidiary is ignored.

(7) References in subsection (2)(b)(i) or (4)(b) to a qualifying 90% subsidiary of the company include references to any existing or future company which will be such a subsidiary at any future time.

181 The trading requirement

(1) The issuing company must meet the trading requirement throughout period B.

(2) The trading requirement is that–

(a) the company, ignoring any incidental purposes, exists wholly for the purpose of carrying on one or more qualifying trades, or

(b) the company is a parent company and the business of the group does not consist wholly or as to a substantial part in the carrying on of non-qualifying activities.

(3) If the company intends that one or more other companies should become its qualifying subsidiaries with a view to their carrying on one or more qualifying trades–

(a) the company is treated as a parent company for the purposes of subsection (2)(b), and

(b) the reference in subsection (2)(b) to the group includes the company and any existing or future company that will be its qualifying subsidiary after the intention in question is carried into effect.

This subsection does not apply at any time after the abandonment of that intention.

(4) For the purpose of subsection (2)(b) the business of the group means what would be the business of the group if the activities of the group companies taken together were regarded as one business.

(5) For the purpose of determining the business of a group, activities are ignored so far as they are activities carried on by a mainly trading subsidiary otherwise than for its main purpose.

(6) For the purposes of determining the business of a group, activities of a group company are ignored so far as they consist in–

(a) the holding of shares in or securities of a qualifying subsidiary of the parent company,

(b) the making of loans to another group company,

(c) the holding and managing of property used by a group company for the purpose of one or more qualifying trades carried on by a group company, or

(d) the holding and managing of property used by a group company for the purpose of research and development from which it is intended–

(i) that a qualifying trade to be carried on by a group company will be derived, or

(ii) that a qualifying trade carried on or to be carried on by a group company will benefit.

(7) Any reference in subsection (6)(d)(i) or (ii) to a group company includes a reference to any existing or future company which will be a group company at any future time.

(8) In this section–

"incidental purposes" means purposes having no significant effect (other than in relation to incidental matters) on the extent of the activities of the company in question,

"mainly trading subsidiary" means a qualifying subsidiary which, apart from incidental purposes, exists wholly for the purpose of carrying on one or more qualifying trades, and any reference to the main purpose of such a subsidiary is to be read accordingly, and

"non-qualifying activities" means–

(a) excluded activities, and

(b) activities (other than research and development) carried on otherwise than in the course of a trade.

(9) This section is supplemented by section 189 (meaning of "qualifying trade") and sections 192 to 199 (excluded activities).

189 Meaning of "qualifying trade"

(1) For the purposes of this Part, a trade is a qualifying trade if–

(a) it is conducted on a commercial basis and with a view to the realisation of profits, and

(b) it does not at any time in period B consist wholly or as to a substantial part in the carrying on of excluded activities.

(2) References in this section and sections 192 to 198 to a trade are to be read without regard to the definition of "trade" in section 989.

192 Meaning of "excluded activities"

(1) The following are excluded activities for the purposes of sections 181 and 189–

(a) dealing in land, in commodities or futures or in shares, securities or other financial instruments,

(b) dealing in goods otherwise than in the course of an ordinary trade of wholesale or retail distribution,
(c) banking, insurance, money-lending, debt-factoring, hire-purchase financing or other financial activities,
(d) leasing (including letting ships on charter or other assets on hire),
(e) receiving royalties or licence fees,
(f) providing legal or accountancy services,
(g) property development,
(h) farming or market gardening,
(i) holding, managing or occupying woodlands, any other forestry activities or timber production,
(ia) shipbuilding,
(ib) producing coal,
(ic) producing steel,
(j) operating or managing hotels or comparable establishments or managing property used as an hotel or comparable establishment,
(k) operating or managing nursing homes or residential care homes or managing property used as a nursing home or residential care home,
(ka) generating or exporting electricity or making electricity generating capacity available,
(kb) generating heat,
(kc) generating any form of energy not within paragraph (ka) or (kb),
(kd) producing gas or fuel, and
(l) any activities which are excluded activities under section 199 (provision of services or facilities for another business).

(2) Subsection (1) is supplemented by the following provisions–
(a) section 193 (wholesale and retail distribution),
(b) section 194 (leasing of ships),
(c) section 195 (receipt of royalties and licence fees),
(d) section 196 (property development),
(da) section 196A (shipbuilding),
(db) section 196B (producing coal),
(dc) section 196C (producing steel),
(e) section 197 (hotels and comparable establishments),
(f) section 198 (nursing homes and residential care homes)
(g) section 198A (export of electricity).

195 Excluded activities: receipt of royalties and licence fees

(1) This section supplements section 192(1)(e) (receipt of royalties and licence fees).

(2) If the requirement of subsection (3) is met, a trade is not to be regarded as consisting in the carrying on of excluded activities within section 192(1)(e) as a result only of its consisting to a substantial extent in the receiving of royalties or licence fees.

(3) The requirement of this subsection is that the royalties or licence fees (or all but for a part that is not a substantial part in terms of value) are attributable to the exploitation of relevant intangible assets.

(4) For this purpose an intangible asset is a "relevant intangible asset" if the whole or greater part (in terms of value) of it has been created–

(a) by the issuing company, or

(b) by a company which was a qualifying subsidiary of the issuing company throughout a period during which it created the whole or greater part (in terms of value) of the intangible asset.

(5) In the case of an intangible asset that is intellectual property, references to the creation of an asset by a company are to its creation in circumstances in which the right to exploit it vests in the company (whether alone or jointly with others).

(6) In this section–

"intangible" asset means any asset which falls to be treated as an intangible asset in accordance with generally accepted accountancy practice,

"intellectual property" means–

(a) any patent, trade mark, registered design, copyright, design right, performer's right or plant breeder's right, or

(b) any rights under the law of a country or territory outside the United Kingdom which correspond or are similar to those falling within paragraph (a).

(7) If–

(a) the issuing company acquired all the shares ("old shares") in another company ("the old company") at a time when the only shares issued in the issuing company were subscriber shares, and

(b) the consideration for the old shares consisted wholly of the issue of shares in the issuing company,

references in subsection (4) to the issuing company include the old company.

204 Compliance certificates

(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 EIS relief 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.

(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.

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

(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 241 of this Act or paragraph 16(2) or (4) of Schedule 5B to TCGA 1992, a compliance certificate must not be issued unless the authority is given or renewed after the receipt of the notice.

(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.

206 Appeal against refusal to authorise compliance certificate

For the purpose of the provisions of TMA 1970 [Taxes Management Act 1970] relating to appeals, the refusal of an officer of Revenue and Customs to authorise the issue of a compliance certificate is taken to be a decision disallowing a claim by the issuing company.