



TC07811

Capital Gains Tax-Entrepreneurs' Relief-Personal Company

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/01476

BETWEEN

GUY HOLLAND-BOSWORTH

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE JULIAN GHOSH QC

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 11 November 2019

Mr Derek Carr, Chartered Tax Adviser, Peters, Elsworthy & Moore for the Appellant

Ms Rosalind Oliver [counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs]/[litigator of HM Revenue and Customs' Solicitor's Office], for the Respondents

DECISION

INTRODUCTION

1. Mr Guy Holland-Bosworth ("the Appellant") appeals against a Closure Notice for the year of assessment 2014-2015, issued under the Taxes Management Act 1970 ("TMA 1970"), Section 28A(1), (2) on 4th September 2017 (which amended the Appellant's self-assessment for additional capital gains tax). The Appellant is represented by Mr Derek Carr, a Chartered Tax Adviser. The Respondents ("HMRC") seek additional tax of £109,957.32 from the Appellant. HMRC are represented by Ms Rosalind Oliver, one of Her Majesty's Inspectors of Taxes. I told the parties that I had represented the taxpayer in *Boporan v HMRC* SPC00587 (the Special Commissioner's Decision was, in fact, upheld by the Chancery Division of the High Court, in a seemingly unreported judgment) which was cited by HMRC in argument and I invited any objection to my sitting in this appeal. Neither party so objected.

2. The issue is whether, when the Appellant disposed of 50 "B" Ordinary Shares ("the B Shares") in The Hayward Holding Group Limited ("THHGL"), on 6th December 2014 (for £1,350,000), the Appellant was entitled to Entrepreneurs' Relief in respect of the capital gain of £1,294,964, which accrued on that disposal. The short answer is "no". The B Shares disposed of by the Appellant in THHGL were not shares in the Appellant's "personal company" within the meaning of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"), section 169S(3), as these B Shares did not confer, at the time of disposal, "... *at least 5% of the voting rights ... exercisable by [the Appellant] by virtue of that holding ...*", within the meaning of TCGA 1992, section 169S(3)(b), which is a necessary statutory condition that the Appellant must satisfy, in relation to these B Shares, in order to obtain Entrepreneurs' Relief. When I refer to "relevant voting rights", I refer to voting rights required to satisfy section 169S(3)(b), which, as I make clear below, are rights exercisable in general meeting.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

3. 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.

THE FACTS

4. The parties agreed as follows (there was no witness evidence led by either party):-

(A) Prior to 2007, the Appellant and Mr Tobias Ward were 50:50 Ordinary shareholders (holding shares of a single class) in THHGL; the Appellant and Mr Ward each held 310 ordinary shares in THHGL; Mr Ward is not a party to this appeal; in 2007, the Appellant sold 273 shares to Towergate Partnership Limited ("TPL"), an unconnected third party (TPL subsequently transferred TPL's shares in THHGL to a subsidiary, Tower Insurance Limited ("TIL") on 11th February 2011);

(B) the Appellant and Mr Ward each retained 37 shares in THHGL; the shares acquired by TPL were re-designated as "A Ordinary Shares" and the shares retained by the Appellant and Mr Ward were re-designated as 37 "B Ordinary Shares", that is, the B Shares which are the subject of this appeal, all by Special Resolution dated 3rd August 2007 ("the 2007 Resolution"). The 2007 Resolution was signed by each of TPL, the Appellant and Mr Ward, who

were, prior to the execution of the 2007 Resolution and the re-designation of the THHGL shares into A Ordinary Shares and B Shares, the (voting, in the sense of having a vote in general meetings of THHGL) shareholders of a single class of Ordinary Shares in THHGL; Mr Ward is not a party to this appeal;

(C) Both the Appellant and Mr Ward remained as directors of THHGL after the sale of shares to TPL;

(D) the 2007 Resolution and the THHGL Articles of Association which were amended, also on 3rd August 2007, were filed with Companies House on 6th February 2010 (that is, 3 years later);

(E) on 15th February 2011, a Memorandum of Resolution dated 4th February 2011 (“the 2011 Resolution”) was filed with Companies House. The 2011 Resolution in fact comprised two Resolutions: first, an Ordinary Resolution whereby the Appellant and Mr Ward, as THHGL directors, were (broadly) “...instructed to take any action in connection with...[certain obligations of THHGL under “Transaction Documents” appended to the 2011 Resolution copies of which were not included in the Bundle of Documents prepared by the parties to this appeal]” (see Article 1.3 of the Ordinary Resolution) and second, a Special Resolution amending the THHGL Articles of Association (which did not affect any shares rights of the B Shares); the 2011 Resolution bore only one signature (on behalf of TPL); there was no signature of the 2011 Resolution by either the Appellant or Mr Ward; the signature designations on the copy of the 2011 Resolution enclosed in the Bundle of Documents prepared by the parties do not have any designation purporting to be on behalf of the B Shareholders;

(F) on 29th April 2013, the Appellant acquired a further 13 B Shares by way of a bonus issue, so that the Appellant now held, from that date, 50 B Shares, which amounted to 5% of the total ordinary share capital of THHGL (which comprised 900 "A" Ordinary Shares and 100 B Shares); the bonus issue was effected by way of an Ordinary Resolution dated 29th April 2013 (“the 2013 Resolution”) which was proposed by the Appellant and Mr Ward as THHGL directors; the Appellant and Mr Ward both signed the 2013 Resolution;

(G) the parties agree that there were no general meetings of THHGL at the material times;

(H) the Appellant sold his 50 "B" Ordinary Shares on 6th December 2014 for £1,350,000;

(I) the Appellant filed his 2014-2015 self-assessment tax return on 26th January 2016;

(J) the Appellant's self-assessment return included a claim to Entrepreneurs' Relief (see below) in respect of the capital gain of £1,294,964 which arose on the Appellant's disposal of his B Shares in THHGL;

(K) in his self-assessment return, the Appellant stated that the rights attached to the B Shares, in the Articles of Association, were incorrectly described but it was not possible for the Appellant or any other B Shareholder to rectify the error and for all intents and purposes the Appellant's B Shares had full voting rights;

(L) HMRC opened an enquiry under TMA 1970, Section 9A on 29th December 2016; the Appellant's representatives, Peters Elworthy & Moore ("PEM"), replied on 24th January 2017;

(M) there was an exchange of correspondence which led, eventually, to HMRC issuing a Closure Notice under TMA 1970, Section 28A(1), (2) on 4th September 2017, withdrawing Entrepreneurs' Relief and amending the Appellant's self-assessment;

(N) a Notice of Appeal was made by PEM on behalf of the Appellant in a letter dated 2nd October 2017 and the statutory review of the conclusion in the Closure Notice was requested;

(O) HMRC issued a "view of the matter" letter on 7th November 2017;

(P) a review by HMRC was concluded on 2nd February 2018, upholding HMRC's original decision;

(Q) the appeal was notified to the Tribunal on 13th February 2018.

5. Mr Carr, on behalf of the Appellant, invited me to make further findings of fact which it is convenient to deal with here. The burden of Mr Carr's submissions of fact is that, were I to find these further facts, I should, on construction of the THHGL Articles of Association, find that the B Shares did have voting rights so as to bring the B Shares within Section 169S. Mr Carr's submissions were based entirely on an analysis of certain documents, to which I refer below and not on any witness evidence: as I have observed, neither party led any witness evidence in this appeal.

6. First, Mr Carr submitted that TPL would have agreed to amend the THHGL Articles of Association "...so that the Appellant could meet the 5% shareholding requirement for *Entrepreneurs' Relief*..." (paragraph 38 of the Appellant's Skeleton Argument, repeated in oral submissions by Mr Carr). I take this submission to be that whatever voting rights were required in respect of the B Shares to satisfy section 169S (that is, whatever the nature of the relevant voting rights might be), TPL (or TIL) would have agreed to amend the THHGL Articles of Association to ensure that the B Shares fell within section 169S(3)(b). As I understand Mr Carr's submissions, Mr Carr relies on (1) the THHGL Annual Returns from 2006 to 2012, each of which narrates that "*the holders of the [B] shares are entitled to vote, receive income and a return on capital*" (see for example the 2011 annual return for THHGL at page 6), which demonstrated, at the very least, according to Mr Carr, that TPL/TIL would amend the THHGL Articles of Association as necessary to ensure that the B Shares would satisfy Section 169S(3)(b) and (2) the terms of the 2011 Resolution: despite the fact that the 2011 Resolution was signed only by a representative of TPL and not by the Appellant, the 2011 Resolution was drafted, says Mr Carr, on the basis that the B Shareholders would indeed sign the 2011 Resolution, thus, according to Mr Carr, raising the inference that TPL would have agreed to amend the THHGL Articles of Association so as to ensure that the B Share rights were sufficient to ensure that THHGL was the Appellant's "personal company" for TCGA 1992, section 169S purposes, if the B Shares were not already within section 169S(3)(b).

7. Second, Mr Carr invited me to make a finding of fact that TPL (and TIL), together with the B Shareholders, all considered that the B Shares did indeed have voting rights (being relevant voting rights for the purpose of Section 169S, as to which see below); Mr Carr relied on further submissions to make this submission good as follows.

8. Mr Carr submitted (at paragraph 45 of the Appellant's Skeleton Argument and repeated in oral submissions) that the B Shareholders (and the Appellant in particular) were not only

present but voted on the 2011 Resolution (albeit that no B Shareholder signed the 2011 Resolution).

9. Mr Carr further submitted (at paragraph 48 of the Appellant's Skeleton Argument) that the B Shareholders voted on the 2013 Resolution which resulted in the bonus issue of B shares to the Appellant, which, according to Mr Carr, raised the inference that TPL/TIL and the B Shareholders all considered the B Shares to have relevant voting rights.

10. Mr Carr also submitted that the 2013 Resolution was passed "...specifically to benefit the B Ordinary Shareholders by allowing them to meet the 5% shareholding condition to claim Entrepreneurs' Relief" (paragraph 46 of the Appellant's Skeleton Argument);

11. I decline to make the further findings of fact which Mr Carr invited me to make.

12. In relation to TPL's subjective intentions (or those of TIL) as to any amendment of the THHGL Articles of Association, as I have repeatedly observed, Mr Carr led no evidence from any TPL/TIL director (or any witness evidence at all) as to TPL's/TIL's subjective intentions. The THHGL Annual Returns are, in so far as these set out that the B shares had voting rights, simply wrong (or alternatively referred to the voting rights of the B Shareholders *inter se*, within Article 5 of the THHGL Articles of Association: see below), albeit that this error is replicated over a number of years, and of themselves are insufficient to displace the clear terms of the THHGL Articles of Association as to the intentions of the THHGL members of what the respective share rights are, as between the A Ordinary Shares and the B Shares. The 2011 Resolution is not signed by the Appellant, or by Mr Ward (and even had the Appellant and/or Mr Ward signed the 2011 Resolution, their signatures would be explained by their respective capacities as THHGL directors, signing in their capacity as directors in respect of the Ordinary Resolution, not as B Shareholders exercising voting rights on the Special Resolution). Neither does the 2011 Resolution contain any designation for a signatory to sign in his capacity as a B Shareholder. The 2011 Resolution is thus, in my view, irrelevant in any consideration of the intentions of TPL/TIL, or the B Shareholders. These are sufficient reasons to reject Mr Carr's submission that TPL/TIL would have amended the THHGL Articles of Association so as to permit the B Shares to fall within Section 169S(3)(b), if the B Shares did not already do so.

13. I also reject Mr Carr's submission of fact that each of TPL (and TIL), the Appellant and Mr Ward considered that the B Shareholders did indeed have voting rights which entitled the B Shareholders to vote at THHGL general meetings. I did not understand Ms Oliver to quarrel with Mr Carr's submission that the B Shareholders were present at all of the meetings which related to written resolutions of THHGL. However, there is simply no evidence presented by the Appellant that, even if the B Shareholders had been so present, the B Shareholders voted at any meeting of THHGL in their capacity as B Shareholders, or that TPL/TIL considered that the B Shareholders were entitled to so vote (and I find that there is no THHGL meeting in which the B Shareholders exercised votes in their capacity as B Shareholders). I have already observed that the parties agree that there were no general meetings of THHGL at the material times and no evidence has been led by either party of any other THHGL meetings at which TPL/TIL accepted that the B Shareholders had voting rights in their capacity as B Shareholders. The 2013 Resolution was an Ordinary Resolution, proposed by the Appellant and MR Ward as directors of THHGL and thus the fact that the Appellant and Mr Ward signed the 2013 Resolution says nothing about the B Share rights at all. As for Mr Carr's suggestion that the 2013 Resolution and the 2013 bonus issue were specifically effected in order to ensure that the Appellant obtained Entrepreneurs' Relief, while it may well not have taken much further evidence to establish this, I cannot make this finding in the absence of any evidence at all. While the bonus issue clearly gave each of the Appellant and Mr Ward 5% of the total share capital of THHGL, which is a necessary condition for THHGL to be a "personal company" for

each of them within Section 169S, in the absence of any evidence as to the reason for the bonus issue (beyond the fact of the bonus issue itself) I decline to find that the reason for the bonus issue was specifically to permit the Appellant and Mr Ward to access Entrepreneurs' Relief. I do not understand Ms Oliver to concede that this was the reason for the 2013 bonus issue. I make no finding as to the reason for the 2013 bonus issue. I also do not make any inference that the 2013 bonus issue of itself shows that TPL/TIL and the B Shareholders considered that the B shares, including the B shares issued in the 2013 bonus issue, were voting shares (presumably, as I understand Mr Carr would have it, on the basis that if the 2013 bonus issue was to access Entrepreneurs' Relief and the only action which the parties thought necessary was to issue further B Shares, the necessary votes must already have been contained in the B Share rights). There is nothing I have been shown by either party on the face of the 2013 Resolution which says anything at all about Entrepreneurs' Relief and there is no evidence as to any consideration given by any of TPL/TIL or the B Shareholders as to the voting rights in respect of the B Shares in relation to the 2011 Resolution, the 2013 Resolution or the 2013 bonus issue. My observations above about the THHGL Annual Returns and the 2011 Resolution are also relevant here. The Annual Returns are not sufficient to displace the intentions of the THHGL members as to voting rights displayed in the THHGL Articles of Association and the 2011 Resolution says nothing about the intentions of TPL/TIL or the B Shareholders, for the reasons I give above.

CONSTRUCTION OF THE ARTICLES OF ASSOCIATION OF THHGL

Article 4

14. Article 4 of the THHGL Articles of Association provides, relevantly, that:

"the holders of the B ordinary shares shall not be entitled to receive notice of, attend or vote at any general meeting of the company [THHGL]".

Article 5

15. Article 5 states that:

*"... all or any of the rights for the time being attached to any class of shares for the time being in issue may from time to time (whether or not the Company [THHGL] is being wound up) be altered or abrogated with the written consent of the holders of not less than three-quarters of the issued shares of **that** class or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of such shares ... [and] every holder of shares of the class shall be entitled on a poll to one vote for every such share held by him ..." (emphasis added).*

Discussion of Article 4 and Article 5 of the THHGL Articles of Association

16. It is convenient to summarise my conclusion on the construction and application of Article 4 and Article 5 of the Articles of Association at this stage. Article 4 could not be clearer. The holders of the B Shares were not entitled to vote at any general meeting of THHGL. Article 5 provides for an "alteration or abrogation" of (here) the B Share rights. An "alteration" or "abrogation" suggests a modification of existing rights, (see the reference to "attached" in Article 5, with the "sanction" of an extraordinary resolution passed at a separate general meeting of the holders of such shares, the rights of which were being "*altered or abrogated*"). Article 5 provides a protection against the modification of share rights, which the affected shareholders may not want. Article 5 does not provide for the conferral of share rights, effected by shareholders of a particular class of shares, unilaterally as a class. Article 5 applies to all

and any modification of existing rights to shares, nothing more. There is no ambiguity as to the effect of Article 4 and Article 5. These respective Articles simply apply fully on their terms.

17. My conclusion is reinforced by reference to authority. The United Kingdom Supreme Court, in *Arnold v Brittain* [2015] UKSC 36, provides the test to ascertain the intentions of the parties to a contract (here the THHGL Articles of Association). The parties' intentions in relation to contractual terms is properly ascertained by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean...by focusing on the meaning of the relevant words...*" (per Lord Neuberger at paragraph [15]). Focusing on the words of Article 4 and of Article 5, the clarity of Article 4 is not displaced by the text of Article 5. The two Articles may be read perfectly well together, giving full effect to both Article 4 and Article 5. Thus the B Shareholders could not, to my mind, unilaterally, as a class, arrogate to the B Shares votes (or any other share rights which had the effect of diluting the share rights of other classes of shares) by any appeal to Article 5. Neither "background knowledge" (I have already observed that I have not found the further facts which Mr Carr invited me to find, so I do not apprehend any relevant "background knowledge" which I should appeal to, in order to construe the THHGL Articles of Association in any event) nor *contra proferentum* would permit a contrary construction of the THHGL Articles of Association, which results in the B Shareholders being able, under Article 5, to hold a B Shareholders' meeting and arrogate to the B Shares ("alter" the B Share "attached" rights) voting rights, exercisable in general meeting. Any such contrary construction gives rise to patent absurdity. Say the B Shareholders held a meeting and arrogated voting rights (say 100% of the votes in THHGL) to the B Shares. This would take votes away from the other classes of shares (here the A Ordinary shares held by TPL and then by TIL), without the consent of those other shareholders who held other classes of shares. This is a supremely [unconvincing construction of the intention of the parties?] to the THHGL Articles of Association. And in any event, those other shareholders could, even on this contrary construction, hold their own class meeting to re-attribute voting rights to their own class of shares. Such a battle is not, in my view, one contemplated by the draftsman of the THHGL Articles of Association. I find that Article 5 does not permit the B Shareholders to unilaterally, as a class, arrogate voting rights exercisable in general meeting (or indeed to arrogate any voting rights which affects the votes of other classes of shares, here the A Ordinary shares) to the B Shares.

18. Further, on any view, until the "B" Share rights were "*altered or abrogated*", the "B" Shares had no voting rights to vote at THHGL general meetings. So even if (contrary to my view) Article 5 encompassed a conferral of rights, there was, on the evidence, no "written consent" of B Shareholders to the B Shares being given voting rights exercisable in a THHGL general meeting (however that term is applied to a conferral of rights) and neither is there any evidence of an extraordinary resolution in relation to the B Shares.

THE RELEVANT STATUTORY PROVISIONS

19. TCGA 1992, Section 169S(3) provides that:

"Personal company" in relation to an individual, means a company -

- (a) at least 5% of the ordinary share capital of which is held by the individual, and*
- (b) at least 5% of the voting rights in which are exercisable by the individual by virtue of that holding".*

THE APPELLANT'S SUBMISSIONS

20. The Appellant considers THHGL to have been the Appellant's "personal company", in particular, that the "B" Shares conferred "voting rights" which were "*exercisable [as to 5%] by [the Appellant] by virtue of [the Appellant's holding of the 50 "B" Shares]*".

21. As I understand the Appellant's submissions, although the Appellant expressed his argument as having four separate limbs, the Appellant in fact made three alternative submissions.

22. First, in so far as Section 169S(3)(b) requires shares to have voting right exercisable in general meeting, the Appellant considers Article 4 and Article 5 of the THHGL Articles of Association to confer such voting rights on the B Shares because:

(1) even if the B Shares did not have such voting rights, the B Shareholders could have unilaterally changed the B Share rights at any time to confer relevant voting rights on the B Shares (the Appellant relied on the principle of *contra proferentem* to bolster this submission, on the basis that the THHGL Articles of Association should be construed so as to minimise prejudice to the B Shareholders). This means, in turn, that the Appellant is properly considered to have had the relevant voting rights for the purposes of section 169S(3)(b);

(2) TPL (and TIL), together with the B Shareholders, considered that the B Shareholders did indeed have voting rights which were exercisable at THHGL general meetings, so that the THHGL Articles of Association should be construed and applied on the basis that the B Shares did indeed have the relevant voting rights, either from the date of issue of the B Shares or by way of a variation (which amount to two separate submissions).

23. The Appellant relied on *Nairich Pty Limited v The Commissioner of Payroll Tax* for the proposition that an appeal to the factual background of a contract is permitted to construe that contract (or to find a variation of that contract). *Nairich* is consistent with a well known proposition that, in appropriate circumstances, there may be an appeal to a factual matrix outside the four corners of a document, in order to construe that document and adds nothing relevant (for the purposes of this appeal) to the approach to construction established in *Arnold v Brittain*, which I discuss above. The Appellant does not rely on mistake and does not seek to set the Articles aside; neither does the Appellant seek rectification (in relation to which the Tribunal has no jurisdiction in any event).

24. Second (and in the alternative) the Appellant submits that the voting rights which are sufficient to satisfy section 169S(3)(b) need not be voting rights exercisable in general meeting and the voting rights carried by the B Shares, within Article 5 of the THHGL Articles of Association are sufficient for the B Shares to fall within Section 169S(3)(b).

HMRC'S SUBMISSIONS

25. I mean no disrespect to HMRC to record that I understand that their submissions are properly distilled into three simple propositions:

(1) the relevant voting rights for the purposes of section 169S(3)(b) are voting rights exercisable in general meeting, citing *Hepworth v Smith* [1981] STC 354 and *Boporan v HMRC*;

(2) the construction and application of Article 4 and Article 5 of the Articles of Association mean that the B Shares simply did not have any relevant voting rights. HMRC cited *Arnold v Brittain* as providing the correct basis to construe a contract (here the THHGL Articles of Association); HMRC also cited *Ibe v McNally* [2005] EWHC

1551 (Ch) for the proposition that contra proferentum cannot be applied in construing a contract in any dispute between a taxpayer and HMRC; and

(3) there has been no variation to the THHGL Articles of Association which conferred relevant voting rights to the B Shares.

DISCUSSION

26. I find that the B Shares did not have votes exercisable in a THHGL general meeting. I have already set out, above, my construction of Article 4 and Article 5 of the THHGL Articles of Association. The B Shares did not have any voting rights exercisable in THHGL general meetings at all. That is clear from Article 4. The terms of Article 4 are sufficiently clear so as to leave no room for any doubt as to their construction and contra proferentum does not displace that clear construction (I therefore need not address the submission made by HMRC that contra proferentum cannot be applied to construe a contract, or, as here, Articles of Association, in any dispute with HMRC). As for Article 5, the only "voting" rights that a B Shareholder has under that Article is to give written consent or to vote on an extraordinary resolution to any "alteration or abrogation" of B Share rights which were "attached" to the B Shares, which "attached" rights did not include voting rights and could not, to my mind arrogate voting rights exercisable in a general meeting of THHGL to the B Shares, for the reasons I give above.

27. As I explain above, Article 5 casts no ambiguity on the construction or application of Article 4. Article 4 expressly prohibits B Shareholders from voting at THHGL general meetings. Article 5 permits B Shareholders (and indeed all shareholders of THHGL) to consent (in writing) to or vote on an extraordinary resolution on any proposed modification which dilutes existing ("attached") share rights. There is no factual "background" evidence which permits a contrary construction of Article 4 or Article 5. I have declined to find as facts that TPL/TIL and the B Shareholders considered that TPL/TIL would have consented to any amendment of the THHGL Articles of Association and I have also declined to find that TPL/TIL and the B Shareholders considered that the B Shares did indeed have voting rights exercisable in general meeting.

28. Further even if Article 5 permitted the B Shareholders to unilaterally arrogate relevant voting rights to the B Shares, until and unless that happened, the B Shares did not have any relevant voting rights at all. There is no evidence of any written "consent" within Article 5 which arrogated voting rights to the B Shares and no evidence of any extraordinary resolution.

29. Finally, there is no evidence which suggests that any of TPL/TIL or the B Shareholders considered there to be any variation to the THHGL Articles of Association (whether effected through the application of Article 5 or some other method) and I find that there was no such variation.

30. As for the type of voting rights which are sufficient to fall within section 169S(3)(b), the relevant voting rights are those exercisable in general meeting of the putative personal company. Votes exercisable only in a "general meeting" of a particular class of shares are not sufficient to fall within section 169S(3)(b). This is clear as a matter of text. Section 169S(3)(b) refers to "...*a company...at least 5% of the votes in which are exercisable...*" (emphasis added). Thus, the relevant votes attached to a share must be "exercisable" as against the putative personal company, not merely against other shareholders who hold shares of the same class of share, as in the case of the B Share rights. That the relevant votes are votes exercisable in general meeting is also consistent with the scheme of section 169S(3). The 5% holding of ordinary share capital required by section 169(3)(a) refers to the share capital of the company as a whole. It follows that any relevant voting referred to in section 169S(3)(b) must, to be consistent with the approach of the draftsman of section 169S(3)(a), be exercisable in (as against) the company and the other shareholders as a whole (and not just against the holders of

a single class of share). That the relevant voting rights are rights to vote in a general meeting of the putative personal company is also consistent with principle. Section 169S(3) assesses whether a company is a taxpayer's "personal company" by reference to the type of shares held by that taxpayer and whether those shares give the taxpayer a sufficient connection to the company to attract Entrepreneurs' Relief. Section 169S(3) is not concerned with the relationship of shareholders who hold a particular class of shares *inter se*.

31. So far as authority is concerned, both Hepworth v Smith and Boporan v HMRC are of limited assistance. While it is true that in Hepworth v Smith the voting rights in question were exercisable in general meeting (see 358, 359), Hepworth v Smith concerned the issue of whether certain voting rights were "exercisable" despite never having been exercised. The decision was "yes" (see Vinelott J at 358, 359). This is not the issue in the present appeal. In Boporan v HMRC, the relevant votes were also exercisable in general meeting (see the oblique reference in paragraph [30] of the Special Commissioner's Decision, in recording HMRCs' submissions) but Boporan v HMRC also concerned whether votes attaches to particular shares were "exercisable" and decided that votes held by the taxpayer in a parent company did not make the votes held by that parent company in a wholly owned subsidiary "exercisable" by the taxpayer (see paragraphs [33]-[40] of the Special Commissioner's Decision, which Decision was upheld in the High Court). Again, this issue is not present in this appeal. However, my conclusions as to the text of section 169S(3), the scheme of section 169S(3) and principle are sufficient for me to conclude that the relevant voting rights which fall within section 169S(3)(b) are votes exercisable in general meeting of the company. The B Shares do not have such votes.

DISPOSAL OF THE APPEAL

32. I dismiss the appeal.

33. 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 r39 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.

JUDGE JULIAN GHOSH QC
CHAMBER PRESIDENT
RELEASE DATE: 12 AUGUST 2020