



Neutral Citation: [2024] UKFTT 00366 (TC)

Case Number: TC09155

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2023/08683

INCOME TAX – Enterprise Investment Scheme - disposal of shareholding - late claim for EIS income tax relief – application to strike out appeal - whether the Tribunal has jurisdiction to consider a late claim or election – no – R(on the application of Ames) v R & C Comrs considered and applied – whether the appeal against the closure notice has any reasonable prospects of success – no - The First De Sales Limited Partnership v HMRC considered and applied – whether valid claim made for EIS income tax relief and the meaning of “an amount attributable to” in s 150A(2) of the Taxes and Chargeable Gains Act 1992 – non - Appeal struck out

Heard on: 21 March 2024
Judgment date: 1 May 2024

Before

JUDGE NATSAI MANYARARA

Between

KALJINDER SINGH KALAY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ashfaq Anjum, Accountant

For the Respondents: Ms Leah Fairhurst, litigator of HM Revenue and Customs Solicitor’s Office

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. The Appellant has appealed against HMRC's decision to refuse to admit a late claim for income tax relief in relation to the Enterprise Investment Scheme ('EIS'). The Appellant made his claim within his self-assessment tax return for 2019-20 tax year, which was submitted on 2 November 2020 and amended on 28 January 2022 (to include the late claim). The claim relates to shares sold on 1 September 2013. The deadline for making the claim was 31 January 2020 ("the late claim refusal").

2. The Appellant also appeals against a closure notice issued under s 28A(1B) and (2) of the Taxes Management Act 1970 ('TMA'), in relation to the 2019-20 tax year. Before the amended to the Appellant's tax return, the tax return showed tax due of £55,355.58. After the amendment, the Appellant's tax return showed tax due as follows:

Tax Year	Amount	Date Issued
2019-20	£1,653,837.80	3 March 2023

3. The closure notice was issued on the basis that the Appellant was not eligible for the EIS relief claimed in his 2020 tax return as there was no valid claim ("the closure notice").

4. HMRC have applied to strike out the Appellant's appeal pursuant to Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules") on the grounds that: (i) the First-tier Tribunal ('FtT') does not have jurisdiction to determine a late claim for EIS income tax relief - rule 8(2)(a) of the Procedure Rules ("the jurisdictional issue"); and (ii) the Appellant's appeal against the closure notice has no reasonable prospects of success as there is no valid claim for EIS income tax relief - rule 8(3)(a) of the Procedure Rules ("the reasonable prospects of success issue").

5. With the consent of the parties, the form of the hearing was V (video). The documents to which I was referred were (i) the Hearing Bundle consisting of 210 pages; (ii) the Authorities Bundle consisting of 143 pages; and (iii) HMRC's Skeleton Argument dated 14 March 2024. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

6. The parties have requested a full decision.

ISSUES

7. The issues before me are: (i) whether the FtT has any jurisdiction to consider HMRC's refusal to allow a late claim for EIS income tax relief; and (ii) whether the Appellant's appeal against the closure notice has reasonable prospects of success.

BACKGROUND FACTS

8. On 1 September 2013, the Appellant was issued with shares following an investment in a company known as "People Apps Ltd". On 12 November 2019, the Appellant made a complete disposal of his shareholding.

9. On 2 November 2020, the Appellant submitted his tax return for the tax year ending 5 April 2020. The tax return included a claim for EIS disposal relief, in the sum of £8,281,189.

10. On 5 October 2021, HMRC opened an enquiry into the Appellant's 2020 tax return under s 9A TMA.

11. On 28 January 2022, the Appellant's agent (Mr Anjum) made a late claim for EIS income tax relief for the 2012-13 tax year, within the 2020 tax return. This claim was rejected by HMRC on 8 December 2022.
12. On 3 March 2023, HMRC issued the closure notice on the basis that the Appellant did not meet the conditions for an EIS income tax relief claim. The Appellant appealed against the closure notice on 3 April 2023.
13. On 13 April 2023, HMRC issued their "View of the Matter" letter and offered the Appellant statutory review. The Appellant accepted the offer of review on the same date. On 25 May 2023, HMRC issued the review conclusion letter, upholding the decision.
14. On 22 June 2023, the Appellant appealed to the FtT.
15. On 19 October 2023, HMRC made the application which is the subject of this Decision.

THE HEARING

16. The hearing proceeded on the basis of submissions only. The Appellant did not attend the hearing. As this is HMRC's application, I heard from Ms Fairhurst first:
17. Ms Fairhurst's submissions can be summarised as follows:
 - (1) The Appellant's claim was made in respect of shares issued on 1 September 2013. The Appellant had until 31 January 2020 to make an in-time EIS income tax relief claim. The Appellant's claim was out of time.
 - (2) Section 202(1)(b) of the Income Tax Act 2007 ('ITA 2007') provides for the time-limit for making a claim. A late claim is not allowable under s 118(2) TMA. The FtT does not have jurisdiction to hear the appeal against the refusal to accept the late claim as there is no right of appeal against a refusal to consider a late claim or election.
 - (3) HMRC have discretion, under their care and management powers, pursuant to s 5 of the Commissioners for Revenue and Customs Act 2005 ('CRCA'), to admit a late claim for EIS relief. This is not, however, a matter that is within the jurisdiction of the FtT to consider, but is a matter that is relevant to judicial review proceedings.
 - (4) Whilst the FtT has jurisdiction to consider the appeal against the closure notice, in order for this part of the Appellant's appeal to succeed, the Appellant needs to have met all of the relevant conditions under s 150A of the Taxation of Chargeable Gains Act 1992 ('TCGA'), one of which is the requirement to make a valid claim for EIS tax relief. Case law further confirms that a valid claim for EIS income tax relief is required to meet the conditions of s 150A TCGA.
 - (5) For a gain to be exempt from tax, an amount of EIS relief must be attributable to the shares. For disposal relief to be allowable, the Appellant first needs to have made a valid claim for EIS income tax relief.
 - (6) Albeit that the FtT cannot conduct a mini-trial of the issues, the requirements for EIS disposal relief constitute a short point of law and the FtT has sufficient information before it to determine the point in the strike out application. There is no valid claim for EIS income tax relief, nor - once the first part of the appeal has been struck out - will there be any current proceedings that could result in there being a valid claim for EIS income tax relief.
18. Mr Anjum's submissions can be summarised as follows:
 - (1) HMRC have not given adequate consideration to the Appellant's reasons why he did not make the claim in time. Whilst it is agreed that the time-limit should have been

adhered to by the Appellant, HMRC have not considered the Appellant's mitigating circumstances.

(2) The Appellant was suffering from personal problems (mental health and family). As the Appellant suffered a mental breakdown, the time-limits are of little consequence. This is why the legislation permits consideration of the issue of whether there is a reasonable excuse.

(3) The Appellant was not in a fit state to make decisions. As a judicial body, the FtT has the jurisdiction to consider the mitigating circumstances, and to direct HMRC to consider the claim by making a declaration.

19. Prior to the conclusion of the hearing, Ms Fairhurst submitted that whilst reference has been made to the Appellant's mental ill-health, the Appellant was nevertheless able to file his self-assessment tax returns for the period from 2013 to 2020 without difficulty. Mr Anjum submitted, in reply, that the Appellant's family members, who had taken over his business, were instrumental in ensuring that the tax returns were filed. He further submitted that the filing of the Appellant's tax returns was not indicative of the Appellant's ability to make a timely claim for EIS income tax relief.

20. At the conclusion of the hearing, I reserved my decision, which I now give with reasons.

APPLICABLE LAW

21. Part 5 ITA 2007 deals with the EIS as follows:

“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)

...

22. The relevant law in respect of the time-limit for making an EIS relief claim is set out at s 202(1)(b) ITA 2007, as follows:

“202 Time for making claims for EIS relief

(1) A claim for EIS relief in respect of shares issued by a company in any tax year may be made-

(a) ...

(b) not later than the fifth anniversary of the normal self-assessment filing date for the tax year.”

23. HMRC allow late claims if the person has a reasonable excuse in the exercise of their care and management powers.

24. Section 5(1) CRCA provides that:

“5 Commissioners’ initial functions

(1) The Commissioners shall be responsible for-

(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,

(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and

(c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.”

25. The substantive tax appeal turns on the meaning to be given to the words “an amount of EIS relief is attributable to the shares” in s 150A(2) TCGA, which provides that:

“150A Enterprise investment scheme

(1) For the purpose of determining the gain or loss on any disposal of...shares by an individual where-

(a) an amount of [EIS relief] is attributable to the shares, and

(b) apart from this subsection there would be a loss.

then consideration given by him for the shares shall be treated as reduced by the amount of the [EIS relief].

(2) Subject to subsection (3) below, if on any disposal...shares by an individual after the end of the period referred to in section 312(1A)(a) of the Taxes Act [or section 159(2) of ITA 2007] where an amount of [EIS relief] is attributable to the shares, there would (apart from this subsection) be a gain, the gain shall not be a chargeable gain.”

26. Section 201 ITA 2007 provides that:

“201 Attribution of EIS relief to shares

(1) References in this Part, in relation to any individual, to the EIS relief attributable to any shares or issue of shares are to be read as references to any reduction made in the individual’s liability to income tax that is attributed to those shares or that issue in accordance with this section.

This is subject to the provisions of Chapters 6 and 7 providing for the withdrawal or reduction of EIS relief.

(2) If an individual’s liability to income tax is reduced in any tax year, then-

(a) if the reduction is obtained because of one issue of shares, the amount of the reduction is attributed to that issue, and

(b) if the reduction is obtained because of two or more issues of shares, the amount of the reduction-

(i) is apportioned between those issues in the same proportion as the amounts claimed by the individual in respect of each issue, and

(ii) is attributed to those issues accordingly.”

27. Section 150A(11) TCGA provides that:

“(11) Chapter III of Part VII of the Taxes Act ... applies for the purposes of this section to determine whether EIS relief is attributable to any shares and, if so, the amount of EIS relief so attributable; and ‘eligible shares’ has the same meaning as in that Chapter ...”

28. Therefore, the provisions of Chapter III apply to determine whether relief is attributable to the shares and, if so, the amount of relief so attributable.

[Emphasis added]

FINDINGS OF FACT

29. The background facts are undisputed. Having considered the submissions and the documentary evidence, I find that:

- (1) On 1 September 2013, the Appellant was issued with shares following an investment. He made a complete disposal of his shareholding on 12 November 2019.
- (2) On 2 November 2020, the Appellant submitted his tax return for the tax year ending on 5 April 2020. The tax return included a claim for EIS disposal relief.
- (3) On 28 January 2022, the Appellant’s agent (Mr Anjum) made a late claim for EIS income tax relief for the 2012-13 tax year. This claim was rejected by HMRC on 8 December 2022 and an enquiry into his tax return was opened on 5 October 2021.
- (4) On 3 March 2023, HMRC issued the closure notice on the basis that the Appellant did not meet the conditions for an EIS tax relief claim.

DISCUSSION

30. The Appellant seeks to appeal against HMRC’s decision to refuse to admit his late claim for EIS tax relief. The Appellant further appeals against the decision to issue a closure notice under s 28A TMA, in relation to the 2019-20 tax year.

31. The EIS offers tax relief to individual investors who buy new shares in a company. When an investment is made, form EIS3 is issued to confirm that certain conditions of the scheme are satisfied. The time-limit for EIS income tax claims is specified in s 202(1)(b) ITA 2007. The time-limit is not later than the fifth anniversary of the normal self-assessment filing date for the year. The Capital Gains Tax (“CGT”) exemption is set out at s 150A TCGA. For the gain to be exempt from tax, an amount of EIS relief must be “attributable to the shares”. This depends on the date that the shares are issued.

32. This is HMRC’s application to strike out the Appellant’s appeal under rule 8(2)(a) and 8(3)(c) of the Procedure Rules. As a starting point, the Procedure Rules provide the procedural framework for proceedings within the FtT, as well as the procedure in the FtT’s exercise of its case management powers. The overriding objective provides that:

“Overriding objective and parties’ obligation to co-operate with the Tribunal

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

...

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

...”

33. The case management powers of the FtT are provided for at rule 5, as follows:

“Case management powers

5.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

...

(e) deal with an issue in the proceedings as a preliminary issue;

...

34. HMRC's application in respect of the late claim is made pursuant to rule 8(2)(a) of the Procedure Rules, which provides that:

“Striking out a party's case

8.-...

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
(a) does not have jurisdiction in relation to the proceedings or that part of them; and (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.”

34. I now turn to the late claim and the jurisdictional issue:

Whether the Tribunal has any jurisdiction to consider a late claim for EIS income tax relief

35. HMRC have made an application to strike out the Appellant's appeal on the basis that the FtT has no jurisdiction to consider HMRC's refusal to exercise discretion to admit the late claim. Mr Anjum, for the Appellant, submits that HMRC have not considered the Appellant's mitigating circumstances, and that the FtT has the jurisdiction to consider whether a reasonable excuse has been established by virtue of the mitigating circumstances put forward by the Appellant. He further submits that the FtT can direct HMRC to consider the late claim by making a declaration. I find that Mr Anjum's submissions are misconceived in light of the accepted facts in this appeal, and give my reasons for so finding.

36. Section 202(1)(b) ITA 2007 requires any claim for EIS income tax relief to be made no later than the fifth anniversary of the 31st January following the year of assessment. It is common ground that, in the Appellant's case, this meant 31 January 2020 for relief on the shares sold on 1 September 2013. This matter is not in issue between the parties. It is also common ground that HMRC have jurisdiction, under their care and management responsibilities in s 5(1) CRCA, to admit a late claim for EIS relief. HMRC's discretion in this respect is unfettered.

37. Having considered the case law, and the statutory powers of the FtT, I am satisfied that the FtT has no jurisdiction to consider a late claim for EIS income tax relief.

38. In *Ames v HMRC* [2015] UKFTT 337 (TC) (*'Ames'*), which I find to be persuasive though not binding on me, Mr Ames invested £50,000 in shares, which HMRC accepted were eligible for EIS income tax relief. The investment was made on 27 January 2005; however, Mr Ames did not claim that relief because he had no taxable income in the relevant year. Mr Ames sold the shares for £333,200 on 17 June 2011 and did not include the gain of £272,540 in his self-assessment calculation because he understood that there was no Capital Gains Tax (*'CGT'*) on disposal. Mr Ames made a late claim for EIS income tax relief. HMRC subsequently opened an enquiry and amended Mr Ames' tax return to include the gain on the basis that the CGT exemption was only available if EIS income tax relief had been claimed. Mr Ames asked HMRC to exercise their *"care and management"* discretion to allow the gain to be exempt from tax. HMRC did not accede to this request. Mr Ames consequently

requested that the FtT consider the late claim and require HMRC to exercise their discretion in his favour.

39. The FtT held that it did not have jurisdiction to allow Mr Ames to make a late claim, or to consider the way in which HMRC had exercised their powers of care and management under s 5 CRCA. Judge Redston held, at [110], that:

“Jurisdiction over late claims

110. Not only does the Tribunal have no jurisdiction to allow a late claim under TMA s 118(2), we were also unable to identify any provision which gives a person the right to appeal against an HMRC refusal to allow a late claim. TMA s 33 simply states the time limit. TMA Sch 1A, which provides for claims made outside returns, only allows appeals against amendments to claims, not against a refusal to extend a time limit so as to admit a claim. We therefore find that the Tribunal has no jurisdiction to allow Mr Ames to make a late claim.”

40. And, at [117]:

“...the Tribunal does not have jurisdiction over HMRC’s exercise of their care and management powers. Whether HMRC have exercised those powers unfairly is a matter for judicial review. This is clear from the case law. In *Aspin v Estill* [1987] STC 723 Donaldson LJ, giving the leading judgment with which the rest of the Court of Appeal concurred, found that the General Commissions had no judicial review powers. In *HMRC v Hok Limited* [2012] UKUT 363 Warren J and Judge Bishopp considered *Asplin v Estill* and also the statutory jurisdiction under which the Tribunal was established, before saying that there is “no room for doubt that the First-tier Tribunal does not have judicial review jurisdiction.”

41. Mr Ames appealed to the Upper Tribunal (‘UT’) on the grounds that, *inter alia*, the late claim for income tax relief should be admitted on the basis that he had a reasonable excuse for not making it earlier, and the claim was made without unreasonable delay after the excuse ceased: *R (on the application of Ames) v R & C Comrs* [2018] UKUT 190 (TCC) (Fancourt J and Judge Sinfield). The UT reached the same view as the FtT; that being that the FtT did not have the jurisdiction to entertain the appeal against the refusal to admit the late claim. The decision of the FtT was only quashed by the UT on the grounds that the decision-maker (within HMRC) had wrongly fettered his discretion and, accordingly, the decision-making process had been flawed. HMRC’s decision to refuse Mr Ames’ late claim was, therefore, remitted to HMRC for reconsideration.

42. During the hearing before me, Mr Anjum conceded that the FtT does not, in fact, have jurisdiction to hear an appeal against a refusal to admit a late claim. This was following his consideration of *Ames*. This was, however, despite his earlier submission that the FtT could consider whether a reasonable excuse had been provided for the late claim.

43. I have found that the FtT does not have jurisdiction to consider the refusal to admit the late claim. I am further satisfied that the FtT does not have jurisdiction over HMRC’s exercise of their care and management powers. The FtT was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 (‘TCEA’), “*for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act*”. It follows that its jurisdiction is derived wholly from statute. The FtT has no judicial review function. That the FtT has no judicial review function is the only conclusion which can be drawn from the structure of the legislation which brought the FtT into being. The TCEA conferred a judicial review function on the UT, a function it would not have had - since it too is a creature of statute without any inherent jurisdiction - had the Act not done so; and it hedged the jurisdiction it did confer with some restrictions.

44. It is perfectly plain, from perusal of the TCEA itself that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the FtT, and there is nothing in the

Transfer of Tribunal Functions Order which points to a contrary conclusion. Furthermore, the FtT has no supervisory jurisdiction over HMRC. It follows that the Appellant's appeal against the refusal to admit the late claim must be struck out for want of jurisdiction.

45. I now turn to the closure notice:

Whether the Appellant's appeal against the closure notice has any reasonable prospects of success

46. HMRC have applied to strike out this part of the appeal (i.e., that relating to the closure notice) on the ground that the Appellant's appeal has no reasonable prospects of success. Ms Fairhurst submits that in order for the appeal against the closure notice to succeed, the Appellant needs to have met all of the relevant conditions under s 150A TCGA, one of which requires there to have been a valid claim for EIS income tax relief claim. She further submits that the FtT would not be conducting a mini-trial, but would be considering a short point of law in striking out the Appellant's appeal on this basis.

47. The Procedure Rules provide a discretion to strike out an Appellant's case if it has no reasonable prospect of success. Rule 8(3)(c) provides that:

“8(3) The Tribunal may strike out the whole or a part of the proceedings if— [...] (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.”

48. The UT formulated the following test for assessing the “reasonable prospects of success” test in *HMRC v Fairford Group* [2014] UKUT 329 (TCC); [2015] STC 156 (*Fairford'*) (Simon J and Judge Bishopp). In *Fairford*, the UT was considering the issue as to the jurisdiction of the FtT, under rule 8(3)(c), to strike out the whole, or part, of an appellant's case; and whether such powers should have been exercised in that appeal. The appeal related to 36 transactions and more than £13,000,000 input tax. The appeal was against HMRC's decision to deny input tax for the periods 03/06 and 06/06 on the basis that the taxpayer's transactions were connected with the fraudulent evasion of VAT, and that they knew, or should have known, of the connection. The alleged connection forming the basis of HMRC's decision is with the Missing Trader Intra-Community ('MTIC') fraud. The fraud in that appeal involved both the “vanilla” version, where transactions carried out by the taxpayers can be traced directly to a fraudulent tax loss, and the “contra-trading” version, where the transactions carried out by the taxpayers can be traced through a “clean” chain to a trader involved in covering up the tax losses of fraudulent, defaulting traders in a linked dirty chain. At [30], the UT held:

“30. ... The FTT has the power to strike out a part of the proceedings if it concludes that there is no reasonable prospect of all or part of an appellant's case succeeding. A party's case is not confined to its positive case, nor to a form of pleading. Although Rule 8(3)(c) is in different terms, the parties (rightly in our view) accepted that CPR Part 3.4, which applies to the formal statements of case which are served in civil proceedings, was a helpful source of guidance on the proper application of Rule 8(3)(c). CPR Part 3.4(2)(a) confers a power to strike out a statement of case, including a defence, even where the burden of proof is on the Claimant; and it would be surprising if it were otherwise. The Court's powers may be exercised if a defence is vague, evasive, incoherent or obviously ill-founded, although in such cases the objectionable nature of the party's case can often be cured by amendment or further particulars.”

49. At [41], the UT held that the FtT should consider a strike out application under rule 8(3)(c) in a similar way to the approach to an application under CPR rule 3.4:

“41. In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst

recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see Swain v Hillman [2001] 2 All ER 91 and Three Rivers (see above) Lord Hope at [95]. A ‘realistic’ prospect of success is one that carries some degree of conviction and not one that is merely arguable, see ED & F Man Liquid Products v Patel [2003] EWCA Civ 472. The tribunal must avoid conducting a ‘mini-trial’. As Lord Hope observed in Three Rivers, the strike out procedure is to deal with cases that are not fit for a full hearing at all.”

50. At [48], the UT referred to what it described as a “practical and legitimate” procedure for dealing with applications of the nature in this appeal. The UT concluded that:

“48. ...An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC’s evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC’s resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.”

51. And at [49]:

“49. In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC’s witnesses, and does not identify the respects in which the statements of those of HMRC’s witnesses who deal only with the questions set out at para 47 above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under FTT Rule 15(1) (see also Rule 5(3)(f)), and that cross-examination of that witness will not be permitted.”

52. In *British Telecommunications Plc v R & C Comrs* [2023] UKUT 00122 (TCC), at [68] and [69] (Leech J and Judge Aleksander), the approach was adopted as follows:

“68. In *HMRC v Fairford Group plc* [2014] UKUT 329 (TCC) the Upper Tribunal addressed the approach that should be taken in the FTT when dealing with an application to strike out. The Fairford Group appeal related to an MTIC fraud and Judge Brooks declined to strike-out the appeal in the FTT because he could not conclude that the taxpayers had no reasonable prospect of challenging HMRC’s evidence without a detailed examination of that evidence. In doing so he formulated the following test at [41]:

In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all.”

53. The UT further amplified this guidance in *The First De Sales Limited Partnership v HMRC* [2018] UKUT 396 (TCC); [2019] 4 WLR 21 (*The First De Sales Ltd Partnership*)

(Henry Carr J and Judge Sinfield), where the UT cited the judgment of Lewison J (as he then was) in *Easycare Limited v Opal Telecom* [2009] EWHC 339 and stated, at [33], that:

“33. Although the summary in Fairford Group plc is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, in *Easycare Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Son v Caitlin Five Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

54. At [74], the UT said this:

“The issue concerning section 225 ITEPA 2003 gave rise to a short point of construction. The FTT, correctly in our judgment, was satisfied that it had before it all the evidence necessary for the proper determination of the question and that the parties had an adequate opportunity to address it in argument. The Appellants’ evidential case was, in our view, hopeless, based on the evidence before the FTT. The FTT was right to conclude it is not enough simply to

argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.”

55. On 5 October 2021, HMRC opened an enquiry into the Appellant’s 2019-20 self-assessment tax return, which was submitted on 2 November 2020. This was followed by a closure notice on 3 March 2023. The enquiry was closed in accordance with s 28A TMA, and an amendment was made to the Appellant’s tax return. Where a claim is included in a return made under ss 8 or 8A TMA, the enquiry must be under s 9A TMA. Enquiries under s 9A extend to anything contained in the return, or required to be contained in the return, including a claim or election included in the return. The time-limit for s 9A enquiries is 12 months from the filing of the return. The enquiry in this appeal was, therefore, within the time-limit of one year following the filing of the tax return on 2 November 2020.

56. Turning to the issue of whether there are reasonable prospects of success in the Appellant’s appeal against the closure notice, the Appellant made his claim for EIS income tax relief in his 2020 tax return, in respect of the 2013-14 tax year. In order for such relief to be allowable, statute and case law establishes that the Appellant is required to have made a valid claim for EIS income tax relief. This was confirmed by the UT in *Ames*.

57. A key issue for determination before the FtT in *Ames* had been whether the gain on Mr Ames’ shares was exempt from CGT. The CGT exemption is set out at s 150A TCGA (supra). The FtT found that the wording in the legislation meant that the CGT exemption is only available if an individual’s income tax has been reduced following a claim for EIS relief. The tax appeal before the UT turned on the meaning to be given to the words “an amount of EIS relief is attributable to the shares”. Mr Ames’ first ground of appeal, and primary case, was that “attributable” in s 150A(2) TCGA means “able to be attributed to” rather than “has been attributed to”. It was further argued on Mr Ames’ behalf that there were two stages to attribution: (i) eligibility; and (ii) quantification, and that it was not necessary for a person to make a claim for, and be granted, EIS income tax relief in order to be entitled to the CGT exemption. The UT held, at [37], that:

“...We do not consider that we can be “abundantly sure”, to use Lord Nicholls’ term, that the intended purpose of section 150A(2) was to allow CGT exemption on the disposal of shares where no EIS income tax relief had been obtained. Parliament could have decoupled the two tax reliefs in a way that would have benefited those who paid no income tax in the relevant year, but equally Parliament could have intended the question of eligibility for CGT exemption to be determined at the earlier stage of claiming and receiving income tax relief...”

58. The UT held that the language of s 150A(2) is clear, and “an amount of relief is attributable” means that at the time that the CGT exemption is claimed, and a claim for EIS income tax relief is claimed, a claim for EIS income tax relief has to have been made and given effect. The CGT exemption under the EIS, therefore, depends on there having been a claim for EIS income tax relief under the scheme, and the grant of relief. The UT was further satisfied that the fact that Parliament had retained the link between an EIS income tax relief claim and the CGT exemption when amending the legislation in 1995 to correct an error showed that the link had been a deliberate, and intended, feature of the EIS. The appeal tribunal would not be entitled to apply a rectifying construction.

59. In relation to the conditions that must be satisfied, the UT in *Ames* held, at [28], [30] and [31], that:

“28. We consider that the meaning of “attributable” is made clear by section 150A(11) TCGA and section 289B ICTA. Section 150A(11) provides that section 289B (among other sections) applies for the purposes of determining whether EIS relief is attributable to any shares, and if so the amount of relief so attributable. Section 289B(1) provides that “relief attributable to any shares” must be read as a reference to “any reduction made in the individual’s liability to

income tax which is attributed to those shares”. That interpretative provision therefore applies directly to section 150A(1) and (2). Those words are clear and show that “an amount of relief is attributable” in those subsections must be interpreted as referring to a reduction in liability to income tax. In our view, the argument that section 150A(2) is concerned only with eligibility is wrong. If the words “an amount of” were omitted from subsection (2) and subsection (11) of section 150A did not exist, the point would have been well arguable, but those two provisions mean that it is clearly wrong. Even though section 150A(1) does not apply in Mr Ames’ case, the words “an amount of relief is attributable” must have the same meaning in subsection (2) as they do in subsection (1), where they clearly connote an actual amount of relief having been given.

...

31. In conclusion, it seems to us that the language of section 150A(2) is clear and “an amount of relief is attributable” means that, at the time that the CGT exemption is claimed, a claim for EIS income tax relief must have been made and given effect. We consider that, in the absence of a claim for EIS income tax relief which reduced the individual’s income tax, the individual has no right to the CGT exemption on any subsequent disposal of the shares. We do not consider that “attributable” can be interpreted as “available but not claimed” which is, in essence, what Mr Gordon asks us to accept. Had that been the draftsman’s intention then section 150A(2) and section 150A(11) would have been worded differently and section 150A(3) would have been unnecessary.”

60. I am satisfied that the issue before me in relation to the application to strike out the Appellant’s appeal against the closure notice is a short point of construction, and that I have before me all the evidence necessary for the proper determination of the question.

61. The Appellant in the appeal before me purchased his shares in 2013-14. It is clear from the authorities that in order for disposal relief to be allowable, the Appellant needs to have made a valid claim for EIS income tax relief. The time-limit for EIS income tax claims is provided for at s 202(1)(b) ITA 2007. The time-limit clearly is not later than the fifth anniversary of the normal self-assessment filing date for the tax year. The incontrovertible fact in this appeal is that the Appellant did not meet this time-limit, and I have found that the FtT does not have jurisdiction to entertain an appeal against the refusal to admit a late claim on public law grounds, nor indeed does it have the jurisdiction to exercise any supervisory jurisdiction over HMRC in relation to this issue. I am satisfied that the appeal against the closure notice has no reasonable prospects of success, in light of the wording under s 150A(2) TGCA, the absence of a valid claim and the statutory scheme.

62. Accordingly, therefore, the appeal against the closure notice is also struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

Release date: 1st MAY 2024