



*Keywords- Seed Enterprise Investment Scheme- EIS1 used in error, whether that represented a prior risk capital investment, purposive construction of the SEIS legislation and realistic view of the facts- no prior risk capital investment, whether unilateral mistake and whether rectification possible, yes – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/01583**

**BETWEEN**

**FASHION ON THE BLOCK LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE HEATHER GETHING  
MEMBER DAVID BATTEN**

The hearing took place on 12 May 2021. With the consent of the parties, the form of the hearing was V (video). All of the parties attended remotely using the Tribunal video platform. A face-to-face hearing was not held because of covid 19 restrictions. The documents to which I was referred are a Trial Bundle of 245 pages, two short witness statements from Alexia-Anne Willetts and Katie Hirst and a skeleton argument from HMRC.

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.

**Alesia-Anne Willetts of Fashion on the Block for the Appellant**

**Ms Harry Jones, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This case concerns an appeal against a decision of HMRC not to authorise Fashion on the Block to issue Seed Enterprise Investment Scheme (“*SEIS*”) certificates of compliance to investors in respect of £149,990 paid by the investors to subscribe for shares on 9 February 2020.
2. During the course of the hearing we heard evidence from Alesia-Anne Willetts (“*Miss Willetts*”) and Ms Katy Hirst (“*Ms Hirst*”) for the Appellants.

### F ACTS

We find the facts set out below.

3. Fashion on the Block Limited (“**Fashion on the Block**”) was a UK based start-up fashion technology company incorporated on 12 December 2018. Alexia-Anne Willetts (“*Miss Willetts*”) is the co-founder of the company and chief executive officer. She had an intellectual property background and establishing a technology platform for the use and consumption of fashion had been the sole focus of her life in the preceding 24 months. The product is the “*Little Black Door*”, and it would enable individuals using the platform to store and have a full record of their high value fashion items, and enable them to use, sell or lease items to other individuals through the website. The Little Black Door will also provide repair and cleaning services and will therefore have a logistics operation.
4. Miss Willetts and her co-founder had some capital which was used in the early development phase but recognised that the business would need seed capital to grow. She hoped to raise £750,000. She also recognised that if the shares in Fashion on the Block could qualify for SEIS relief, the shares would be attractive to potential investors.
5. In January 2019 Miss Willetts applied for Advance Assurance from HMRC that Fashion on the Block’s shares would qualify for SEIS. She made an application on 12 January 2019, and after an exchange with HMRC, she made a further application on 23 January 2019 when she discovered the form she had used was an older version of the application for Advance Assurance. The form for Advance Assurance is the same whether the Advance Assurance is for SEIS, Enterprise Investment Scheme relief (“*EIS*”) and Venture Capital Trust relief (“*VCT*”).
6. It is clear from the email of 23 January which is headed Application for SEIS that accompanies the application for Advance Assurance and the content of the application form that Miss Willetts completed on 23 January 2019 that she was applying for Advance Assurance for SEIS for part of the £750,000 capital she hoped to raise. She was asked to resubmit the application and the documents on 24 January which she duly did. It is clear from that application for Advance Assurance that:
  - (1) It was confirmed that no commercial sales had taken place, and that the purpose of the capital raising was to undertake platform design and development, run a pilot programme for a new business, and cover employee and other operational costs.
  - (2) Miss Willetts ticked the box pertaining to SEIS relief and declared that the value of the company immediately before the share issue will be up to £100,000.
  - (3) Miss Willetts had ticked the box dealing with EIS relief.
  - (4) The application contains a declaration that certain documents are attached. Those documents were attached. The documents required to support each of SEIS, EIS and VCT are the same. They include the latest business plan, a draft prospectus, details of

prospective investors and details of the company's objectives in the long term. There is also a requirement to provide the latest company accounts but as the company was recently incorporated there were no such accounts at the date of the application for Advance Assurance. That was explained in the application. The form also contains a declaration that the applicant expects to be able to complete the declaration on EIS1 or SEIS1.

7. The Trial Bundle contains the documents attached to the application of 24 January 2019. The draft prospectus is at page 83 of the trial bundle. On page 101 of the bundle there is a description of the phases of development of the business. It sets out the following table of information

	START
• Q1 2019	Phase Alpha- development kick off Mobile app & Desktop Brand and messaging testing
• Q2 2019	Build and launch Website build Engage with early adopters Key Hires Secure premises
• Q3/4 2019	Phase Two Soft launch for early adopters Pivitol PR & Marketing Pre-register and golden ticket
• Q1/2020	Phase Three Launch LBD open to public Revenue making

8. At page 103 of the bundle there is a financial projection indicating that no revenue is expected to be generated in the period up to the end of August 2019. Modest revenues of £5,331 were expected in September rising to £19,358 at the end of December. The revenue projections for the years 2019, 2020, 2021, and 2022 were £49,387, £594,290, £1,245,720 and £1,947,230 respectively. Profits were not expected until 2021.

9. The draft business plan is at page [31] of the bundle and records at page [77] the capital that had to be raised to meet the development needs of the business in the three phases referred to above. No sales had been made at the date of the application as the platform was still being developed.

10. The emails were all addressed to "*Centre, Enterprise (WMBC)*".

11. A further application form for Advance Assurance dated 10 April 2019 is included in the bundle. It seems to be identical in all respects to the form dated 24 January 2019 save the amount of capital to be raised was increased from £750,000 to £850,000. The business proposition had evolved following advice from a technician in

the field and the business plan and financial projections had altered. Monetising the business would not now occur until year two, i.e. not until late 2020. The latest financial projections were attached to support the application.

12. HMRC gave the Advance Assurance by letter of 2 May 2019. That letter covered both SEIS and EIS relief. The letter states that HMRC believe that they will be able to authorise the company to issue compliance certificates (a) under section 257EC (1) of Income Tax Act 2007 (for SEIS), and (b) under section 204(1) of Income Tax Act 2007 (for EIS). The letter explained that once shares have been issued the company must complete and send to HMRC a compliance statement. The letter directs applicants to go to the website “gov.uk” and enter SEIS or EIS and complete the form. Willetts thought she had not applied for EIS assurance but thought it was helpful and would avoid unnecessary delay at a later stage as it had taken some time to explain the business concept in relation to SEIS. She understood that SEIS relief is capped at £150,000 and is available only to new ventures where trading has not yet begun and that SEIS relief can be claimed for investment up to £150,000 and EIS can be claimed for any excess over that amount.

13. Ms Willetts considered that she was able to attract investment in Fashion on the Block because (a) its business will have a beneficial effect on the impact of fashion on world resources (in this context Fashion on the Block had attracted interest from the UN and universities in the UK) and (b) because of the SEIS Advance Assurance.

14. In the first capital raising Miss Willetts was successful in raising applications for more than £150,000, but only £150,000 was raised from UK investors. That investment could qualify for SEIS relief.

15. As Miss Willetts was heavily involved in the business development and capital raising and had insufficient time to deal with the formalities of applying for authority to issue certificates concerning SEIS to investors, Miss Willetts instructed Ms Hirst of Elm Financial Solutions (“**Elm**” and “**Ms Hirst**” respectively), a diligent professional Miss Willetts had known and worked with for many years, to complete and file an SEIS compliance statement.

16. Ms Hirst recalled being engaged to assist Miss Willetts in making the application on 9 February 2019.

17. Miss Willetts completed the dedicated SEIS/EIS/VCT agent authorisation form on 26 February 2020. The form gave Elm authority to represent Fashion on the Block in making an application to HMRC for Advance Assurance or “*the submission of a Compliance Statement under the VCT Schemes:*

*Enterprise Investment Scheme Relief (EIS),*

*Seed Enterprise Investment Scheme (SEIS), and*

*Venture Capital Trusts (VCTs)”*

18. At the foot of the form, Fashion on the Block authorises Elm “*to act on behalf of the Company listed above in relation to the EIS/SEIS/VCT (delete as appropriate) application submitted to HMRC.*” None of the items at the head or the foot of the form had been deleted.

19. Ms Hirst accessed the form that she completed through the HMRC website. She clicked the link to, and completed, a compliance statement. Another investor expressed an interest in investing in Fashion on the Block and the compliance statement had to be revised. Once the form had been saved it was impossible to amend it, so a fresh compliance statement had to be completed. Miss Hirst believed she had clicked the relevant link to

SEIS, completed the compliance statement, printed it, and sent it together with a covering letter to HMRC dated 26 February 2020. The covering letter states, “Please find enclosed an SEIS1 form.” It transpired that the form of compliance statement that Ms Hirst had completed was the form HMRC refer to as EIS1, and not an SEIS1. Miss Hirst noted that the compliance statement that she had printed has an identifying number at the foot “VCTSEIS1 v5.1”, our emphasis added.

20. HMRC were not able to explain at the hearing what had occurred when Ms Hirst used the website to access the form and could not verify or deny Ms Hirst’s version of events. (Since the hearing we have received information from HMRC that many applicants have applied for the relief and this was not a reported problem.)

21. HMRC also accepted at the hearing that Fashion on the Block intended to apply for authority to issue SEIS certificates and not EIS certificates.

22. New shares in Fashion on the Block were issued to investors on 9 February 2020 to five subscribers who had subscribed in aggregate £149,990.00 of capital.

23. The compliance statement confirms that the business was still in development mode and an Advance Assurance had been given. It also confirms that the company has continued to move towards the launch of the on-line wardrobe and sales platform.

24. Notwithstanding that the covering letter referred to SEIS, the claim for relief was less than £150,000, and the company was a start-up, developing new technology, and had made no sales, HMRC responded, by email on 10 March 2020 at 10.36 am, by form EIS2 authorising Fashion on the Block to issue certificates to investors entitling investors to claim **EIS** relief.

25. Ms Hirst responded by email on the same day at 10.54 am (18 minutes later) informing HMRC that there had been a mistake and asking for authority to issue SEIS certificates to investors. There was an exchange between HMRC and Ms Hirst, from which it appeared initially that HMRC would accept a new SEIS1, one was completed and submitted but in the event, HMRC ultimately decided that this was not possible. Fashion on the Block appeals against that decision.

26. The business comprising the Little Black Door was a brand-new business, it had never been carried on by any other company and Fashion on the Block had not commenced trade nor made any sales at the date the application for authorisation to issue compliance certificates was made.

27. The EIS and SEIS forms request information under specific headings referred to below.

(1) **“Investors”**: The forms are identical in terms of the information to be provided by the applicant about the company and the investors (save that the SEIS form seeks confirmation that the addresses of the investors are in the UK. As the form sets out London addresses and postcodes for all investors this requirement was met in all material respects).

(2) **“Qualifying Business activity”**-The details relating to the Qualifying Business Activity are in substance the same, both seek confirmation that the business activity has not been carried on by another company, albeit by different questions. The SEIS form asks for confirmation that the trade has not yet commenced. The EIS form in this section covers the possibility of the trade not having commenced (without seeking confirmation that it had not yet commenced) but the issue is dealt with specifically in a section in EIS1 headed, *“permitted maximum age”* of a company making a claim. It

specifically asks “*Has the company made a first commercial sale?*” The answer given was No. The EIS form seeks confirmation that the Company is carrying on the business activity whereas the SEIS form seeks confirmation the business has not been carried on by another person. In relation to Fashion on the Block at the date the certificate was issued the company had neither traded nor made any sales, it was a new company and was developing a new business.

(3) “***Qualifying Company***”- in relation to “qualifying company”, both forms have identical statements relating to risk and there being an objective to grow. Both seek confirmation of the number of employees and the value of the company immediately before the capital is injected. In the SEIS form the applicant has to tick one of three boxes depending on the value of the company before the injection of capital, either £0-100,000, £100,000-200,000 or over £ 200,000. On the EIS form the applicant has to tick the box indicating the value of the company before the investments. The lowest value is £1m. That box was ticked by Ms Hirst as the company had a value of less than £100,000.

(4) “***Issue and Share Capital details***” -The confirmations requested in the SEIS form are also contained in the EIS form. There are additional questions relating to loan capital in the EIS form. We note the no loan capital had been raised by Fashion on the Block.

(5) “***Value received by Investors***” - Both forms have a confirmation that no value has been received by investors. The EIS statement is more elaborate but covers the issues covered by SEIS form.

(6) “***Company information***”- The SEIS form seeks confirmation that the Company has not been in receipt of state aid payments. The same issue is covered by an elaborate provision in the EIS form and the answer given was that no such aid had been received. Both forms seek confirmation that the company has not been a 51% subsidiary. The confirmation was given.

(7) In relation to the declarations given at the end of each form, there are 16 statements in the SEIS form and 15 in the EIS form.

(8) Some declarations are identical on both forms such as:

- (a) SEIS Declaration 1 and EIS declaration1 - the objective to grow the business
- (b) SEIS Declaration 14 and EIS declaration 12 - the requirement to have a permanent establishment in the UK
- (c) SEIS declaration 8 and EIS declaration 11 – the company being an unquoted company.

(9) The majority of the issues covered in the SEIS declaration are covered in part by the EIS declarations or a combination of the declarations and information section in the EIS form, which information is declared to be true, for example:

- (a) SEIS Declaration 6 that the company has fewer than 25 full time employees. This is covered by EIS1 in section headed “*Qualifying Company*” where it states that the number of full-time qualifying employees at the date of the share issue is 0.
- (b) SEIS Declaration 7 that there has been no prior VCT issue is covered by the Information Box in the EIS statement under the heading “*Lifetime limit on EIS and other risk finance investments*”. After the narrative there is a

confirmation sought (which was given) that the company has not received any previous risk finance investment which term is defined as including SEIS, EIS and VCT)

(c) Declaration 9 that the business has not been carried on at a date earlier than 2 years prior to the share issue. This is covered by information sections of the EIS form under the sections headed “Qualifying Business Activity” where it states that the business activity commenced on 1 October 2019 and “Qualifying Company” where it confirms the business is still being developed. The business had manifestly not been carried on at a date 2 years prior to 26 February 2020.

(10) Other declarations differ in some technical details for example:

(a) SEIS declaration 4 which deals with arrangements for pre-arranged exists from the company under section 257CD ITA 2007, and EIS1 Declaration 5 which refers to section 177 ITA 2007 etc. There are material common elements between the two statutory provisions but section 177 does not for example expressly exclude cases where information is made available to investors about potential future exits before they invest, and investors in fact conclude arrangements for exit during period of three years after the issue of the shares. This is an SEIS requirement in section 257CD.

(b) Declaration 5 of SEIS1 seeks confirmation that the value of the gross net assets does not exceed £200,000 whereas the EIS form seeks confirmation that the value of the gross net assets does not exceed £15m. (We note that this requirement was met as can be seen from the accounts that were filed at companies House for the period ended 31 December 2019, the Company had a deficit on shareholders’ funds of £109,052.)

(c) Declarations 10, 11 and 12 of SEIS1 require confirmation that the company only owns qualifying subsidiaries and is not in partnership and that the situation will not change in the period of three years from the date of the issue of shares. These are materially the same as declarations 12,13,14 and 15 in the EIS form save for example there is no specific mention of partnership.

(11) We note that Fashion on the Block was able to complete the form SEIS1 and give all the declarations required and the investors who subscribed for the £150,000 worth of shares would be entitled to SEIS relief subject to the issue being considered in this appeal.

28. Companies Registry records relating Fashion on the Block of which we take judicial notice show:

(1) For the period ended 31 December 2019 the company had a negative balance on shareholder’s funds of £109,052.

(2) For the period ended 31 August 2020 there was a loss from the profit and loss account of 382,825 but positive shareholders’ funds of £49,162.

(3) We note that at the date of the share issue the business had been conducted for a period of 4 months and that the accounts show 70% of the capital raised had been spent by 31 December 2019.

## **29. Legislation relating to SEIS**

### ***Taxes Act 2007 (TA07) Part 5A (Seed Enterprise Investment Scheme***

### **Section 257A Meaning of SEIS relief and commencement**

- (1) This Part provides for SEIS income tax relief (SEIS relief), that is **entitlement** to tax reductions in respect of amounts subscribed by individuals of shares in companies carrying on new businesses. [Emphasis added]
- (2) In this Part SEIS stands for seed enterprise investment scheme.
- (3) ...

### **Section 257AA Eligibility for SEIS relief**

An individual (“the investor”) is eligible for SEIS relief in respect of an amount subscribed by the investor or 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 257AAA),
- (a) The shares are issued to the investor,
- (b) The investor is a qualifying investor in relation to the qualifying shares (see Chapter 2),
- (c) The general requirements (including requirements as to the purpose of the issue of the shares and the use of the 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.)

### **Section 257D: Overview of Chapter**

The issuing company is a qualifying company in relation to the relevant shares if the requirements of this Chapter are met as to—

- (a) trading (see section 257DA)
- (b) the issuing company’s carrying on of the qualifying business activity (see section 257DC)
- (c) UK permanent establishment (see section 257DD)
- (d) financial health (see section 257DE)
- (e) unquoted status (see section 257DF)
- (f) control and independence (see section 257DG)
- (g) no partnerships (see section 257DH)
- (h) gross assets (see section 257DI)
- (i) **number of other risk capital scheme investments (see section 257DK)**
- (j) the amount raised through SEIS (see section 257DL)
- (k) qualifying subsidiaries (see section 257DM) and

property management subsidiaries (see section 257DN).

### **Section 257DK No previous other risk capital scheme investments**



*(1) The requirement of this section is that—*

*(a) no EIS investment or VCT investment is or has been made in the issuing company on or before the day on which the relevant shares are issued, and*

...

*(2) An “EIS investment” is made in the company if the company—*

*(a) issues shares (money having been subscribed for them), and*

*(b) (at any time) provides a compliance statement under section 205 in respect of the shares; and the EIS investment is regarded as made when the shares are issued.*

*(3) A “VCT investment” is made in the company if an investment (of any kind) in the company is made by a VCT.*

### **257EC 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 SEIS relief (see section 257AA) are for the time being met in relation to those shares, and*

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

*(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 257GF, 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.*

### **257ED Compliance statements**

*(1) A “compliance statement” is a statement, in respect of an issue of shares, to the effect that, except so far as they fall to be met by or in relation to the individuals to whom shares included in that issue have been issued, the requirements for SEIS relief (see section 257AA)—*

*(a) are for the time being met in relation to the shares to which the statement relates, and*

*(b) have been so met at all times since the shares were issued.*

*(2) In determining for the purposes of subsection (1) whether the requirements for SEIS relief are met at any time in relation to the issue of shares, references in this Part to the relevant shares are read as references to the shares included in the issue.*

*(3) A compliance statement must not be made in respect of an issue of shares before at least one of the following conditions is met—*

(a) at least 70% of the money raised by the issue has been spent for the purposes of the qualifying business activity for which it was raised,

(b) the new qualifying trade which constitutes the qualifying business activity or to which that activity relates has been carried on by the issuing company or a qualifying 90% subsidiary of that company for at least 4 months.

(4) A compliance statement must be in such form as the Commissioners for Her Majesty's Revenue and Customs direct and must—

(a) state which of the conditions in subsection (3) is met at the time the statement is made,

(b) contain such additional information as the Commissioners reasonably require, including in particular information relating to the persons who have requested the issue of compliance certificates,

(c) contain a declaration that the statement is correct to the best of the issuing company's knowledge and belief, and

(d) contain such other declarations as the Commissioners may reasonably require.

### **257EE Appeal against refusal to authorise compliance certificate**

For the purposes of the provisions of TMA 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.

## **29. Legislation relating to EIS**

### **Income Tax Act 2007 (ITA 2007)**

#### **Section 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.

#### **Section 205: Compliance statements**

*(1) A “compliance statement” is a statement, in respect of an issue of shares, to the effect that, except so far as they fall to be met by or in relation to the individuals to whom shares included in that issue have been issued, the requirements for EIS relief (see section 157)—*

*(a) are for the time being met in relation to the shares to which the statement relates, and*

*(b) have been so met at all times since the shares were issued.*

*(2) In determining for the purposes of subsection (1) whether the requirements for EIS relief are met at any time in relation to the issue of shares, references in this Part to “the relevant shares” are read as references to the shares included in the issue.*

*(3) A compliance statement must be in such form as the Commissioners for Her Majesty's Revenue and Customs direct and must contain—*

*(a) such additional information as the Commissioners reasonably require, including in particular information relating to the persons who have requested the issue of compliance certificates,*

*(b) a declaration that the statement is correct to the best of the issuing company's knowledge and belief, and*

*(c) such other declarations as the Commissioners may reasonably require.*

*(4) The issuing company may not provide an officer of Revenue and Customs with a compliance statement in respect of any shares issued by it in any tax year—*

*(a) before the requirement in section 176(2) or (3) (trade etc must have been carried on for 4 months) is met, or*

*(b) later than two years after the end of that tax year or, if that requirement is first met after the end of that tax year, later than two years after the requirement is first met*

### **30. FASHION ON THE BLOCK'S POSITION**

(1) Fashion on the Block appeal against HMRC's refusal to authorise it to issue SEIS compliance certificates.

(2) HMRC refuse to accept the compliance statement filed by Fashion on the Block as satisfying section 257ED ITA 2007.

(3) The form filed was accessed by Ms Hirst via the SEIS platform and was submitted with a covering letter indicating that an SEIS1 compliance statement was attached.

(4) HMRC processed the application as an EIS on 10 March 2020 but that was challenged within 18 minutes of HMRC authorising Fashion on the Block to issue EIS compliance certificates. HMRC personnel initially invited Fashion on the Block to submit a further form described as SEIS1 if the form they describe as EIS1 had been filed in error. Fashion on the Block did so on 16 March. The further form was submitted but no authority to issue compliance certificates was issued.

(5) Investors in the Fashion on the Black start-up business will be adversely affected as the tax relief for the first £150,000 is at 50% and not 30% which is available for EIS investors.

(6) HMRC accepted at the Tribunal that an error had been made and that this is not a case of the taxpayer “retrofitting” the facts.

(7) The Advance Assurance process began with an SEIS Advanced Assurance application. Fashion on the Block is a new on-line start-up. It had not commenced trade and was not expected to do so until the end of 2020. The investment met the legal

requirements for SEIS relief and Fashion on the Block was aware that the relief had to be applied for.

(8) That the HMRC Advance Assurance letter covered SEIS and EIS was not queried by Fashion on the Block as it was thought that that would relieve pressure at a later date.

(9) The covering letter attached to the compliance statement indicated Fashion on the Block's intentions to apply for SEIS relief.

(10) The immediate reaction of Ms Hirst to the EIS authorisation was evidence of Fashion on the Block's intention was to apply for SEIS.

(11) The conditions for the grant of the discretionary remedy of rectification are satisfied:

(a) There is evidence of intention to apply for SEIS which HMRC acknowledged at the Tribunal.

(b) There is evidence of disproportionate harm caused because of the mistake.

(c) The compliance statement is a document capable of rectification.

(d) The error may well have been a technological one.

(e) HMRC was aware of the mistake at the material time.

(f) The issue was raised at the earliest possible moment by Fashion on the Block.

### **31. HMRC's POSITION**

(1) HMRC consider that it is not possible for HMRC to give Fashion on the Block authority to issue SEIS compliance certificates to its investors in respect of shares issued by it in February 2020 ("*the relevant shares*") because the requirement of section 257DK cannot now be satisfied.

(2) Section 257DK refers to the conditions that must be satisfied for a company to be a qualifying company. It requires that no EIS investment is or has been made in the issuing company on or before the day on which the relevant shares are issued. An EIS investment is deemed to have been made in a company by section 257DK(2) if the company has issued shares (and money has been subscribed for them) and at any time the company has provided to HMRC a compliance statement under section 205 ITA 2007 in respect of those shares. The EIS investment is regarded in such circumstances as having been made when the shares were issued.

(3) HMRC consider that the compliance statement provided by Fashion on the Block was the form EIS1 and not SEIS1. It was filed in February 2020 and the shares in respect of which the statement was made were issued on 9 February 2020. An EIS investment had therefore been made on 9 February 2020.

(4) The statutory scheme contains no express mechanism for correcting a compliance statement or withdrawing an authority to issue EIS certificates once issued.

(5) A refusal by HMRC to authorise Fashion on the Block to issue compliance certificates to investors under SEIS is regarded as the refusal of a claim (the claim being the compliance statement) but only for the purpose of the provisions in the Taxes Management Act 1970 pertaining to appeals (as opposed to amending claims). In consequence HMRC consider there is no ability to amend a compliance statement.

(6) That Fashion on the Block sent a letter to HMRC stating that form SEIS1 is attached and actually attached a form HMRC describe as EIS1 does not alter the fact that declarations in the form EIS1 related to EIS and not SEIS. The EIS1 statement once provided cannot be disregarded.

(7) The UT determined in *X-Wind Power Ltd v The Commissioners for HMRC* (“*X-Wind*”) [2017] UKUT 0290 (TCC) at [17] and [18] that it was unable to accept an EIS 1 form submitted in error was a nullity as argued by X-Wind. The UT said that the compliance certificate complied with the requirements of section 205(3)(b) ITA 2007 on which the legislature intended HMRC should be able to rely. The UT pointed to section 207 which imposed penalties for errors in a compliance statement whether made negligently or fraudulently. Therefore, a compliance statement that has been made fraudulently or negligently must still be regarded as a compliance statement.

(8) There are cases in the FTT which dealt with inadvertent submission of forms EIS rather than SEIS and the current case cannot be distinguished, see *GDR Food Technology v The Commissioners for HMRC* [2016] UKFTT 466 (TC) and *Innovate Commissioning Services Ltd v The Commissioners for HMRC* [2017] UKFTT 741 (TC).

(9) HMRC in their Statement of Case raised the issue of whether HMRC are entitled to exercise discretion and accept the compliance statement provided and authorise Fashion on the Block to issue SEIS compliance certificates to investors. HMRC say the only option available to them and the Tribunal is to reject the compliance statement. HMRC are bound to follow the UT decision in *X-Wind*.

(10) In response to the Tribunal’s request for submissions on whether there had been a unilateral mistake and whether the discretionary remedy of rectification could be available to Fashion on the Block (which would mean its tax position would be determined as if the EIS compliance statement had been rectified) HMRC submitted that the equitable relief should not be granted for the following reasons:

(a) The FTT does not have jurisdiction to give effect to a right to rectification and it may not determine the tax position of Fashion on the Block as if the remedy were available. The Tribunal must determine the tax position of Fashion on the Block following *X-Wind*. The FTT is a creature of statute and appeals ought to be heard in the FTT without recourse to other Courts. (see *Autologic Holdings plc and others v Commissioners of Inland Revenue* [2005] UKHL 54).

(b) Rectification is an equitable remedy and is available only where a person has exercised the power to obtain a court order, per Goff & Jones at [40-05]. (We note this section is dealing with equitable rights in property and confirms that until the right is exercised the rights in the property are voidable only, but the owner can give good title to a bona fide purchaser for value without notice despite the possibility of rectification).

(c) Once rectification is obtained it has retrospective effect and alters the rights of the parties, see Goff & Jones at [4-32] and [40-43].

(d) Where a person has a mere right of rectification that has no effect in law or in equity unless and until a Court order is obtained.

(e) The remedy of specific performance was considered in *Joost Lobler v Commissioners for HMRC* (“*Joost Lobler*”) [2015] UKUT 0152 (TCC) at [48]. Proudman J noted that it has never been suggested that before the FTT can take

into account the effect of the availability of specific performance, that the appellant must go to court to obtain the remedy of specific performance. On the contrary the cases such as *Oughtred v IRC* [1960] AC 206 and *Jerome v Kelly* [2004] UKHL 25 show that is not the case. A tribunal such as the FTT must however consider all the factors that the Court would in deciding whether specific performance ought to be available.

(f) One issue is therefore whether the same principle applies to rectification as it does for specific performance.

(g) A taxpayer who enters into a contract has equitable rights merely by entering into the contract, see *Walsh v Lonsdale* at [14] *Oughtred* at [227] and *Neville v Wilson* at [157]. This contrasts with the position where a person has a mere right to rectify. (Notwithstanding the above assertion, HMRC cite at [15] of their representations what Proudman J said at [49] and [50] in *Lobler*. At [49] Proudman J refers to equity treating as done that which ought to be done in cases dealing with specific performance. At [50] she considers whether the same is true of rectification and concludes that as both are discretionary remedies there is no relevant distinction for present purposes.)

(h) HMRC consider that in any event replacing the EIS compliance statement with an SEIS compliance statement does not fall within the scope of rectification or rescission.

(i) In relation to rectification, the remedy involves amending the terms of a legal document to bring those terms into line with the original intention of the party (or parties) to the document. HMRC state that Fashion on the Block do not seek to rectify but to replace EIS1 with SEIS 1. This involves a wholesale change to the document which does not fall within the scope of rectification. Rectification is a closely guarded remedy which as Lord Walker noted in *Pitt v Holt* [2013] STC 1148 at [31] is, “*strictly limited to some clearly established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences.*”

(j) To replace EIS1 with SEIS 1 would be to defeat the will of Parliament as Parliament has indicated that a compliance statement cannot be replaced.

(k) The compliance statement is a form provided by HMRC to ensure compliance with tax legislation. It is crown copyright. It is not a contract between the parties. It is a declaration by the taxpayer. The High Court in *Webster* determined that a tax return is not a unilateral instrument that is capable of rectification. See *Re Webster* [2020] EWHC 2275 (Ch) at [46] to [50] (“*Webster*”).

(l) In relation to rescission HMRC consider the compliance statement is not a contract and that the remedy of rescission is not available. *Lobler* only applies to rectification.

(m) In relation to the evidence needed to support a claim in rectification cogent evidence is required to support an application. The party seeking rectification should provide evidence, in particular the circumstance of the mistake and the seriousness of the mistake in order to allow the court to assess whether it would be unconscionable to leave the mistaken disposition uncorrected.

(11)HMRC comment on the evidence relied upon by the Appellant at the hearing as follows:

- (a) HMRC point to the fact that Miss Hirst recalled being instructed to apply for SEIS on 9 February 2020 and Ms Willetts recalled it was 26 February 2020.
- (b) Miss Willetts says she applied for SEIS and not EIS Advance Assurance. There were multiple iterations of the application for Advance Assurance. Some cover both and as the amount of capital intended to be raised was £750,000, and then increased to £850,00, it is clear both were required.
- (c) The appointment of agent form covered both SEIS and EIS.
- (d) HMRC agreed that the intentions were to apply for SEIS up to the maximum allowable.
- (e) HMRC point to the system of completing the forms on-line and suggest that it is impossible to open SEIS or SEIS 1 and complete an EIS 1. And the words EIS appear on every page of the form EIS 1.
- (f) Notwithstanding that at the hearing HMRC accepted that Fashion on the Block had made a mistake in providing the EIS 1 form instead of SEIS 1, HMRC ask for an opportunity to make submissions on Fashion on the Block's reconciliation of its intentions in relation to EIS and SEIS for HMRC to make submissions on those representations as it was not understood that unilateral mistake was a relevant consideration before the Tribunal hearing on 14 May.

### **Discussion**

32. The unanimous House of Lords decision in *BMBF v Mawson* [2004] UKHL TC 76 ("***BMBF v Mawson***") at [36] indicates that the correct approach to the construction of taxing statutes is that they should be construed purposively and applied to the facts viewed realistically. HMRC propose in this case a literal interpretation.

33. The purpose of the SEIS legislation is set out admirably succinctly at section 257A (1) and it is to provide income tax relief – i.e. "***entitlement to tax reductions in respect of amounts subscribed by individuals for shares in companies carrying on new businesses***". There are of course substantive conditions that must be met but that is Parliament's expressed intention.

34. HMRC's understanding of the purpose of the SEIS relief and its interaction with EIS (which accords with the natural reading of the legislation dealing with EIS and SEIS) is set out very clearly in the HMRC Manual on Venture Capital:

*VCM30100 - Seed Enterprise Investment Scheme: Overview of SEIS reliefs*

*"The Seed Enterprise Investment Scheme ('SEIS') is designed to help small, early-stage companies to raise equity finance by offering a range of tax reliefs to individual investors who purchase new shares in those companies. It complements the existing Enterprise Investment Scheme ('EIS') which will continue to offer tax reliefs to investors in higher-risk small companies. SEIS is intended to recognise the particular difficulties which very early-stage companies face in attracting investment, by offering tax relief at a higher rate than that offered by the existing EIS.*

*The income tax relief rules are in ITA07/Part 5A (see VCM31000+). The rules have been designed to mirror those of EIS as it is anticipated that companies may want to go on to use EIS after an initial investment under SEIS."*

35. It is clear following the House of Lords decision in *Regina v Her Majesty's Commissioners of Inland Revenue (respondents) ex parte Wilkinson* [2005] UKHL 30 at [21] that “HMRC has discretion to enable it formulate policy in the interstices of the tax legislation, dealing pragmatically with minor transitory anomalies, cases of hardship at the margin or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of time.”

36. HMRC are effectively saying because there is no express right to alter a statement of compliance filed by Company A, taxpayer B who has made a risk investment as encouraged to do so by Parliament in Company A, is not entitled to the relief (as Parliament intended). This is the type of problem “*in the interstices of the tax legislation*” where Lord Hoffmann indicated in *ex parte Wilkinson* at [21] that HMRC have a discretion to manage the system. HMRC say the error made in this case is rare. That makes it more difficult to understand HMRC’s reluctance to exercise its power of management (as X-Wind can be distinguished) and accept the replacement SEIS1 compliance statement or allow the statement to be amended to allow investors that have made risk investments to claim SEIS relief they are entitled to where the substantive requirements of the legislation have been met.

37. As this Tribunal has no jurisdiction to direct HMRC to exercise its discretion and give effect to what we consider to be the will of Parliament, we now apply the rule of statutory construction as set out in the House of Lords in *BMBF v Mawson*.

38. We consider that the nature of the business of Fashion on the Block is a new business of the sort referred to in section 257A (1).

39. We understand that HMRC contend that SEIS relief is not available in this case solely because, a form identified by HMRC as EIS1 had been provided in error, which HMRC say has the effect that a prior risk capital investment has been made in Fashion on the Block so that it cannot be said to be a qualifying company.

40. We cannot accept that when the facts are viewed realistically, there has been any prior risk capital scheme investment under EIS. The only shares that have been issued are those that satisfied the SEIS requirements and that a form which HMRC identify as EIS1 was presented in the following circumstances ought not to be regarded as an EIS investment.

(1) Fashion on the Block is a company that has commenced a novel and new business of the sort at which section 257A is aimed.

(2) Fashion on the Block applied for SEIS Advance Assurance and latterly SEIS and EIS.

(3) Fashion on the Block raised just under £150,000 in risk capital and issued shares, “the relevant shares”.

(4) Ms Hirst applied for SEIS relief. This is clear from the covering letter indicating form SEIS1 was attached.

(5) The substantive conditions for SEIS relief were met and the declarations required under an SEIS1 could be given (and indeed have been given). This is the sort of case which HMRC expects to qualify for SEIS and for EIS to be claimed in respect of later issues of shares.

(6) The Officer in processing the form as an EIS1 failed to take into account the substantive compliance with SEIS requirements, the request for SEIS in the covering letter, that the purpose of the legislation is to provide SEIS for the first £150,000 and



EIS for later issues of capital and treat the form as an SEIS from or return it to Ms Hirst to enable her to complete the appropriate form.

41. HMRC invite the Tribunal to follow FTT decisions in *DCR* and *Innovative Technology Limited* and indicate that it is bound by the UT decision in *X-Wind*, another case where form EIS1 had been submitted instead of SEIS1. In *X-Wind* Arnold J considered that:

(1) The compliance statement could not be regarded as a nullity merely because *X-Wind* had not intended that its investors should be able to benefit from SEIS and not EIS. He pointed to section 207 ITA 2007, which indicates that there are penalties for fraudulent or negligent errors in the compliance statement and considered that supported the proposition that a compliance statement was still a compliance statement irrespective of the intentions of the issuing company.

(a) We note that at [7] Arnold J records that “*The FTT found that there was nothing to put HMRC on notice that X-Wind intended to seek SEIS compliance certificates rather than EIS.*” We consider this is a relevant distinction between *X-Wind* and this case as the officer of HMRC would have been possessed of all the background information in the Advance Assurance application relating to Fashion on the Block and the covering letter which indicates that the applicant is attaching an SEIS1 compliance statement, features not present in *X-Wind*.

(b) We would point out that there are penalties for inaccuracies in tax returns but that does not prevent a return from being altered. Parliament permits amendments to returns within particular periods following filing, for example. The imposition of penalties for negligent and fraudulent inaccuracies in a compliance statement are necessary as the compliance statement has no equivalent in the general tax legislation. A compliance statement is not a return, if it were, section 207 would not be required.

(c) We therefore conclude that we are not bound by *X-Wind* and following *BMBF v Mawson* that there had been no prior EIS investment, that the requirements of section 257 (1) to (4) and section 257DK were met, and the requirements of section 205 were not met. We allow the appeal.

42. During the course of the hearing, we asked the parties to consider the issue of rectification that had been raised in *Joost Lobler* as the decision had been included in the bundle of authorities by HMRC. If the facts cannot be construed realistically as required by the House of Lords in *BMBF v Mawson*, and if HMRC refuse to exercise their discretion to allow the form submitted to be amended, the Tribunal must consider the possible availability of the equitable remedy of rectification.

43. In *X-Wind*, Arnold J indicated that HMRC’s refusal to authorise *X-Wind* to issue compliance certificates was reasonable unless *X-Wind* can point to a basis for attacking HMRC’s refusal to admit the SEIS replacement compliance statement. It was not possible, he held, to claim that section 49(2) Taxes Management Act can apply to allow *X-Wind* to modify its claim because the compliance statement is regarded as a claim only for the purpose of bringing an appeal and not more generally.

44. HMRC invite the Tribunal to follow the High Court decision in *Webster* which was concerned with an application to rectify a return to enable Mr Webster to carry back a gift aid donation. The gift aid legislation requires the gift aid carry back claims to be made in the earlier return concerned and prohibits the later amendment of the earlier return. As the compliance statement is not a return the case is not binding on the Tribunal in this case. We note that Master Kaye considered that the return could not be rectified but he

noted at [69] *“To my mind this tends to reinforce my preliminary view that the relevant unilateral instrument, if rectification were available at all, would be the Gift Aid Declaration itself”*. It is the Tribunal’s view that the compliance statement in this case equates with the gift aid declaration in the case of *Webster*.

45. HMRC assert that the Tribunal has no jurisdiction to determine the appeal based on a right to rectification. Rectification is only available when a person has applied to the Court for an order. A right of rectification has no effect until a Court order is obtained. We do not agree. The jurisdiction of the Tribunal was clearly explained by Proudman J in *Joost Lobler* at [48] to [50]. At [49] Proudman J refers to equity treating as done that which ought to be done in cases dealing with specific performance. At [50] she considers whether the same is true of rectification and concludes that as both are discretionary remedies there is no relevant distinction for present purposes.

46. The issue then is whether there was a unilateral mistake. In our view there was. HMRC received form EIS1. SEIS1 was intended to be filed as HMRC agreed at the hearing. The investors were entitled to SEIS relief as they had subscribed cash for shares in a company that was carrying on a new business. The mistake was fundamental to the application for authorisation to issue certificates of compliance in respect of the relevant shares.

47. As to whether the evidence of the mistake is cogent, we consider it is. As Miss Willetts completed the dedicated VCT agent authority on 26 February 2020 she would necessarily have to have instructed Ms Hirst before that date. Ms Hirst recalls being instructed on 9 February. We do not find this evidence to be inconsistent as suggested by HMRC in their written representations. Further HMRC agreed at the hearing that there had been a mistake.

48. The consequences of failure to file SEIS1 would in our opinion be serious if HMRC are correct that this Tribunal is bound by the decision in *X-Wind*. The investors entitlement to income tax relief under section 257A would be extinguished.

49. In this case the mistake in providing a form EIS1 rather than SEIS1 is a mistake as to its content.

50. We note the content of the forms EIS1 and SEIS1 are materially similar in the information they request and the declarations that are required. We note the narrative in the forms differ, but the narrative is not material. The material aspects are the information provided and declarations given.

51. The compliance statement provided to HMRC by Ms Hirst was, according to HMRC, one which satisfied section 205 ITA 2007 which deals with EIS relief, and by inference it was one which did not satisfy section 257ED which deals with SEIS relief.

52. A compliance statement which satisfies section 257ED (4) must *“be in such form as the Commissioners for Her majesty’s Revenue & Customs direct and must:*

- (1) State whether the business has been conducted for a period of 4 months and if not must confirm that 70% of the monies raised have been spent*
- (2) Contain additional information that may be reasonably required, in particular relating to persons requesting a compliance certificate*
- (3) Contain a declaration that the information is correct, and*
- (4) Such other declarations that may reasonably be required.”*

53. As mentioned at [27] above the form of compliance statement that was submitted by Fashion on the Block provided nearly all the information required by the SEIS legislation about the investors, the value of the eligible subscriptions not exceeding £150,000, the age of the business being 4 months old, the nature of the business, the date of incorporation, the date the business commenced, the fact that no sales had been made, the number of full-time employees engaged and no prior “risk investment” had been made. There is a declaration of truth at the end of the form confirming all information provided was accurate.

54. Also as discussed at [27], it is possible to identify the extent to which the declarations in SEIS1 and EIS1 are identical and those which are not and what changes would be required to rectify the form EIS1 to make it conform to SEIS1.

55. HMRC consider that in any event replacing the EIS compliance statement with an SEIS compliance statement does not fall within the scope of rectification or rescission. We consider rectification can be achieved in this case by amending the wording of the form so that it covers the necessary detailed requirements of Chapter 5A of ITA 2007 or to use HMRC’s words, to bring those terms into line with an SEIS1, the original intention of Fashion on the Block, the party (or parties) to the document.

56. We recognise that rectification is a closely guarded remedy which as Lord Walker noted in *Pitt v Holt* [2013] STC 1148 at [31] is, “*strictly limited to some clearly established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences.*”

57. In this case in giving the information and declarations Ms Hirst believed she was giving the information and declarations required by SEIS1. Fashion on the Block intended to complete SEIS1. The words of the declarations can be altered to reflect Fashion on the Block’s true intentions, to give the information and declarations required to comply with section 257ED ITA 2007.

58. HMRC consider the will of Parliament will be defeated if rectification were to be available in a case such as this. On the contrary the will of Parliament to confer entitlement to income tax relief to those that risk their capital by subscribing for shares in companies that have new businesses, will be secured. Parliament did not expressly provide a right to amend a compliance statement, it conferred a right of appeal as if the compliance statement were a claim. It is likely that the draftsman considered the likely disputes would concern whether the substantive requirements of the relief had been met but failed to imagine the need to deal with this issue as the forms are not prescribed by the legislation. We have sympathy with the draftsman, for failing to imagine the unimaginable. HMRC has confirmed that this is a rare occurrence.

59. HMRC appear to suggest that the form cannot be altered owing to crown copyright. We do not accept that is the case. We understand that there is a general licence to use and copy HMRC materials which can be found in the National Archive.

60. The equitable remedy of rectification would be available to Fashion on the Block. We allow the appeal on the alternative basis that the form provided by Ms Hirst should be treated as if it had been rectified to reflect the information and declarations in form SEIS1.

61. We note that SEIS relief can be withdrawn by HMRC if the substantive requirements have not been met as set out in Chapter 7 of Part 5A of ITA 2007. Any risk to the Exchequer in rectification of the form filed to comply with SEIS1 is thereby reduced.

62. We also note that it is possible that the extra details that are required in an SEIS1 form over and above those in the EIS1 may be just icing on the compliance cake and for HMRC to insist on the declarations in this case in those terms may not be reasonably required as specified in section 257ED(4). We do not address this further as we have not received submissions on this aspect.

### **DECISION**

63. We allow the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

64. 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.

**HEATHER GETHING  
TRIBUNAL JUDGE**

**Release date: 2 SEPTEMBER 2021**