

THE SPECIAL COMMISSIONERS

MARTIN ASHLEY

Appellant

- and -

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

Respondents

Special Commissioner: ADRIAN SHIPWRIGHT

Sitting in public in London on 28 June 2007

**Patrick Way and Hui Ling McCarthy, Counsel instructed by Marcussen Consulting LLP,
for the Appellant**

P Colin Williams of the Appeals Unit, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Martin Ashley (“Mr Ashley”) against an assessment for £6,000 raised on 28 November 2005. An appeal against this was made by Mr Ashley by letter dated 28 November 2005. Mr Ashley applied for postponement of the tax assessed “withdrawing [Ms Ashley]’s EIS income tax relief of £6,000”.
2. The denial of relief to Mr Ashley because a third party had not obtained the technically correct bits of paper seems harsh and unmeritorious. However, for the reasons set out below I am driven to this unfortunate conclusion. It may be something that the Adjudicator could correct. Their policy in such matters should be considered by HMRC. Hopefully Parliament will consider the legislation.

The Issue

3. The issue resolved itself, in essence, as to the effect of section 306 (2) Income and Corporation Taxes Act 1988 (“TA”). Did Mr Ashley have the right documentation to claim EIS relief?
4. More complex matters as to preferential rights and similar matters had been raised earlier in correspondence but both parties confirmed to me that these were not in dispute.

The Law

The Legislation

5. The statutory provisions are found in Chapter III Part VII TA. Section 289 TA sets out the requirements as to eligibility to relief.
6. Section 306 TA is headed “Claims”. In so far as relevant it provides:

306 Claims

- (1) A claim for relief in respect of eligible shares issued by a company in any year of assessment (or treated by section 289B(5) as so issued) shall be made
 - (a) not earlier than the time the requirement in section 289A(6) is first satisfied; and
 - (b) not later than the fifth anniversary of the 31st January next following that year of assessment.

- (2) No claim for relief in respect of eligible shares in a company may be made unless the person making the claim has received from the company a certificate issued by the company in such form as the Board may direct and certifying that, except so far as they fall to be satisfied by that person, the conditions for the relief, are satisfied in relation to those shares.
- (3) Before issuing a certificate for the purposes of subsection (2) above a company shall furnish the inspector with a statement to the effect that, except so far as they fall to be satisfied by the persons to whom eligible shares comprised in the share issue have been issued, the conditions for the relief—
 - (a) are satisfied in relation to that issue; and
 - (b) have been so satisfied at all times since the beginning of the relevant period.
- (3A) A company may not furnish an inspector with a statement in respect of any shares issued in any year of assessment—
 - (a) later than two years after the end of that year of assessment, or
 - (b) if the period of four months referred to in subsection (1)(a) above ended after the end of that year, later than two years after the end of that period. ...
- (4) No certificate shall be issued for the purposes of subsection (2) above without the authority of the inspector; but where the company, or a person connected with the company, has given notice to the inspector under section 310(2) or paragraph 16(2) or (4) of Schedule 5B to the 1992 Act, the authority must be given or renewed after the receipt of the notice.
- (5) Any statement under subsection (3) above shall be in such form as the Board may direct and shall contain—
 - (a) such additional information as the Board may reasonably require, including in particular information relating to the persons who have requested the issue of certificates under subsection (2) above;
 - (b) a declaration that the statement is correct to the best of the company's knowledge and belief; and
 - (c) such other declarations as the Board may reasonably require.

- (6) Where a company has issued a certificate for the purposes of subsection (2) above, or furnished a statement under subsection (3) above and—
- (a) the certificate or statement is made fraudulently or negligently; or
 - (b) the certificate was issued in contravention of subsection (4) above;

the company shall be liable to a penalty not exceeding £3,000.

...

- (10) For the purposes of the provisions of the Management Act relating to appeals against decisions on claims, the refusal of the inspector to authorise the issue of a certificate under subsection (2) above shall be taken to be a decision refusing a claim made by the company. ...
- (11) Section 312(1A)(b) applies to determine the relevant period for the purposes of this section.”

7. Section 307 TA is headed “Withdrawal of relief”. In so far as relevant it provides:

“(1) Where any relief has been given which is subsequently found not to have been due, it shall be withdrawn by the making of an assessment to income tax for the year of assessment for which the relief was given; ...

(2) Subject to subsections (3) to (7) below, no assessment for withdrawing relief may be made, and no notice may be given under subsection (1A) above, more than six years after the end of the year of assessment—

- (a) in which the time mentioned in section 289(3) falls, or
- (b) in which the event by reason of which the claimant ceases to be eligible for relief occurs,

whichever is the latter....

(8A) References in this section to the withdrawal of relief include its reduction”.

The Authorities

8. I was provided with copies of the following authorities:

NatWest Bank plc v IRC [1994] STC 580

Pooley v HMRC Commissioners SpC 525

Nomura

The Evidence

9. An agreed bundle of documents was produced and admitted in evidence.
10. Witness statements were provided for Mr Ashley and for Mr McCloskey. Neither party wished to examine or cross examine these witnesses. Indeed MrMcCloskey was in the United States. No objection was taken as to the admission of this evidence.
11. An agreed statement of facts was produced (see below).

Findings of Fact

12. From the evidence I make the following findings of facts.
13. Paragraphs 1 to 11 of the agreed statement of facts read as follows:
 - “1. On 5 July 2002, Mr Martin Ashley was issued with 931 paid-up, ordinary shares (“the Shares”) in Vibrant Media Limited (“Vibrant Media”) for £30,000. Each share had a nominal value of £0.01.
 2. Mr Ashley participated as a “business angel” and his holding constituted 0.64% of the total shareholding in Vibrant Media.
 3. At all times during the period between 5 July 2002 in excess of 3 years and 8 July 2005, Vibrant Media was a “qualifying company” as defined by section 293 Income and Corporation Taxes Act 1988 (“ICTA 1988”) and the Appellant was an individual qualifying for relief as defined by section 291 ICTA 1988.
 4. On 11February 2003, the (then) company secretary of Vibrant Media, Mr Gavin McCloskey, completed Form EIS 1 and returned it to the Respondents. In respect of the shares issued to the Appellant, the form showed that the Appellant (as one of a number of subscribers) subscribed £30,000 for 931 1 pence ordinary shares, which were shown as issued to him on 31 December 2002.
 5. On 20 March 2003, the Respondents issued Vibrant Media with a Form EIS2
 6. On 24 March 2003, the company secretary issued the Appellant with Form EIS 3. The form showed the date of issue of the shares as 31 December 2002, notwithstanding that the correct issue date was 5 July 2002.
 7. Mr Ashley claimed Enterprise Investment Scheme relief for this subscription in his tax return for the year ended 5 April 2003.
 8. On 8 July 2005, a Delaware corporation, Vibrant Media Holdings Inc (“Vibrant Holdings”) acquired Vibrant Media on the basis of a share for share exchange, following which there was a redemption of some of the shares by Vibrant Holdings.
 9. Following the restructuring, Mr Ashley held 931 shares of “Type 3” Common Stock in Vibrant Holdings. These shares had a preference over

shares of “Type 1” Common Stock on liquidation, so were not eligible shares” for the purposes of section 289(7) ICTA 1988.

10. On 10 November 2005, the Respondents raised an assessment under Case VI of Schedule D withdrawing the Appellant’s EIS income tax relief of £6,000 (“the Relief”).

11. The Appellant appealed the assessment in a letter dated 28 November 2005 and requested the appeal be transferred to the Special Commissioners. The following day (29 November 2005), the Appellant applied for a postponement of all the tax assessed.”

14. I find the matters set out in paragraph 13 as facts.

15. I further find:

(1) Form EIS 1 – Company Statement was filled in and dated “11/02/03”. It provided at paragraph 1 “The following subscribers have asked the company to issue certificates on forms EIS 3 in respect of shares which it issued to them on 31 December 2002

(2) The names of the subscribers were not set out in the boxes below. Across the boxes was written “-SEE ATTACHED FORM-”. The attached form was headed “Enterprise Investment Scheme Company Statement”. It set out details under the headings:

- (a) Subscribers Full Name
- (b) Address
- (c) Description of Shares & Nominal Value
- (d) Description of Shares & Nominal Value
- (e) Number of Shares Issued
- (f) Amount Subscribed (£)

(3) No date of issue was set out on the attached form. There was nothing to identify Mr Ashley’s shares as having been issued other than on 31 December 2002. Certain people on the list had had shares issued to them on 31 December 2002. These included Mrs Ashley, Mr Ashley’s wife.

(4) Form EIS 2 – Authority to issue certificates relating to subscriptions for eligible shares was signed and issued by the Inspector of Taxes. It provided (insofar as is relevant):

“I authorise the company to issue certificates, on the attached forms EIS3, in respect of the subscriptions for eligible shares issued on 31 December 2002 which are listed at item 1 of the form EIS 1 signed on 11 February 2003. This does not guarantee the availability of relief under the Enterprise Investment Scheme to any particular subscriber. Subscribers receiving a form EIS 3 should read the information given on it before deciding whether

to claim relief. Part 1 of each form EIS 3 should be fully completed before it is issued. ...”

16. It is unclear to me what the point of saying on EIS 2 “Subscribers receiving a form EIS 3 should read the information given on it before deciding whether to claim relief” when it is a form sent to the company rather than the subscribers. However, they should read the form they receive carefully.
17. Form EIS 3 dated 24 March was issued by the company to Mr Ashley. Insofar as relevant it provided:

“The following eligible shares in the company named below were subscribed for by you and issued to you or as directed by you:

Description of shares	Nominal value of each share	Number of shares issued	Amount subscribed £	Date of issue of the shares
Ordinary	£0.01	931	30,000	31 Dec 02

I certify that the conditions of the scheme other than those you have to satisfy are for the time being satisfied in relation to the shares...”

The Submissions of the Parties

The Appellant Submissions in outline

18. In essence, the Appellant submitted that:
 - (a) It is accepted that the form had been filled in incorrectly. However, this was done by the Company, and not Mr Ashley who had no part in this process.
 - (b) Sections 306 and 307 TA set out discrete procedures for claiming relief and for withdrawing relief.
 - (c) Section 306 TA deals with what the Company has to do. Section 307 TA deals with assessing the individual and the individual’s position. This is emphasised by the penalty provisions which impose a penalty of £3,000 on the Company where section 306 TA is breached] but nothing on the individual (see section 306(6) TA).
 - (d) Common sense requires one to look at what happened and in effect treat as what ought to have been done as done.

- (e) The mischief requires one to look at both sections 306 and 307 TA where the form filled out incorrectly by a third party such that substance should prevail over form.

HMRC's Submissions

19. In essence, HMRC submitted that the Form EIS 3 applied on its terms to shares issued on 31 December 2002 not shares issued on 5 July 2002 (as is common ground was the case here). Accordingly, there was no applicable certificate relating to the shares in question for the purposes of section 306(2) TA so that no claim for EIS relief could be made and the assessment was correctly made under section 307 TA. The appeal should be dismissed.

Discussion

Introduction

20. Section 306(2) TA provides that:

“No claim for relief in respect of eligible shares in a company may be made unless the person making the claim has received from the company a certificate issued by the company in such form as the Board may direct and certifying that, except so far as they fall to be satisfied by that person, the conditions for the relief, are satisfied in relation to those shares.”

21. Accordingly, from this, and the arguments of the parties, the following questions arise:

- (1) Was there a valid certificate in respect of the shares in question for the purposes of section 306(2) TA?
- (2) If not, was a valid claim to EIS relief made?
- (3) If not, was the assessment validity made under section 307 TA?

Was there a valid Section 306 Certificate?

22. I have found that the EIS Certificate related to shares issued on 31 December 2002, not 5 July 2002. Section 306(2) requires a certificate that the “conditions for the relief are satisfied in relation to those shares.” There is no certificate that I have seen that relates to the shares issued on 5 July 2002.
23. I can see how the mistake arose and that it was the Company’s mistake and not Mr Ashley’s. However, I have to apply to Statute as written. This required a certificate relating to shares issued on 5 July 2002 before a claim can be made by Mr Ashley for EIS Relief. There is no such certificate that I have seen.

If no Certificate, was EIS Relief validly claimed?

24. The terms of section 306(2) are clear. No claim can be made without the requisite certificate. Accordingly, no valid claim to EIS Relief was validly made.

Was the Section 307 TA assessment valid?

25. I accept sections 306 and 307 are different procedures for concerning different participants. However, “where any relief is given which is subsequently found not to be due...” the relief may be withdrawn by assessment. If no valid claim for the relief could be made because there was no requisite Section 306 Certificate the relief was not due. The relief needs to be claimed but could not be validly claimed so the relief is not due. Consequently, the section 307 TA assessment is valid.

Conclusion

26. I have found that:
- (1) No valid Section 306 TA Certificate existed in respect of the shares issued on 5 July 2002. The certificate related to shares issued on 31 December 2002.
 - (2) The relief could not be validly claimed by reason of Section 306(2) TA and so was not due;
 - (3) As the relief was not due, the assessment under Section 307 TA was validly made.
27. Accordingly, the appeal is dismissed. I make no order as to costs.