

Neutral Citation Number: [2006] EWHC 2820 (Ch)

Case No: CH/2006/APP/0196

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
REVENUE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 November 2006

Before :

THE HONOURABLE MR JUSTICE PUMFREY

Between :

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

Appellant

- and -

**VALENTINE MARKETING HOLDINGS
LIMITED**

Respondent

Nicola Shaw (instructed by **The Acting Solicitor, HMRC**) for the **Appellant**
Elizabeth Wilson (instructed by **Martin Westall**) for the **Respondent**

Hearing date: 12 July 2006

Judgment

Mr Justice Pumfrey :

Introduction

1. This is an appeal by way of case stated from the General Commissioners for the City of London Division. The question arising for decision is whether the decision to withdraw tax relief in respect of shares issued on 4 February 2000 in the company Valentine Marketing Holdings Limited (“VMHL”) was correct. The relief is said by the company to have been available under the Enterprise Investment Scheme (“EIS”) and the answer turns upon a difficult question of construction of sections 289(1A) and 293 ICTA 1988 in the form they had in 2000.
2. The facts as found by the General Commissioners are as follows.
 - (a) Just Greetings.com Limited was incorporated on 14 October 1999; the initial finance was provided by shareholders from an issue of shares on 4 February 2000 which raised approximately £600,000, £400,000 of which was then subject to claims by the shareholders for tax relief under the EIS.
 - (b) On 31 July 2000 it began a trade of selling greetings cards online. The trade was unsuccessful and in January 2001 Just Greetings.com Limited acquired the shares of another greetings card company, Valentine Marketing Limited (“VML”).
 - (c) A form EIS1 dated 5 February 2001 was submitted to the Inland Revenue (“IR”) in respect of the shares which had been issued on 4 February 2000. By a form EIS2 dated 13 February 2001, the IR authorised Just Greetings.com Limited to issue EIS certificates to the subscribers of that share issue.
 - (d) In mid-2001, Just Greetings.com Limited ceased trading and was thereafter a non-trading parent company. It changed its name to VMHL in October 2002.
 - (e) On 12 August 2003, the IR issued a notice to VMHL notifying it that the tax relief to the shareholders would be withdrawn because the company was in breach of section 289(1A) and section 293(2)(a) of the ICTA.
 - (f) VMHL has also appealed in connection with a subsequent share issue on 24 October 2001, but the IR had conceded the question in the company’s favour on the grounds that the share issue was to raise funds for the trade of the subsidiary company.

The statutory provisions

3. As of 2000, the relevant provisions of the ICTA were as follows:

‘289 Eligibility for relief

- (1) For the purposes of this Chapter, an individual is eligible for relief, subject to the following provisions of this Chapter, if
 - (a) eligible shares in a *qualifying company* for which he has subscribed wholly in cash are

issued to him and, under section 291, he qualifies for relief in respect of those shares,

...

- (b) the shares and all other shares in the same issue are issued in order to raise money for the purpose of a *qualifying business activity*,
- (ba) the requirements of subsection (1A) below are satisfied in relation to the company, and
- (c) The money raised by the issue is employed not later than the time mentioned in subsection (3) below wholly for the purpose of the activity mentioned in paragraph (b) above.

(1A) The requirements of this subsection are satisfied in relation to a qualifying company if throughout the relevant period the *active company*—

- (a) is a company which—
 - (i) is such a company as is mentioned in section 293(2)(a), and
 - (ii) if it is a subsidiary of the qualifying company, is a 90 per cent subsidiary of that company, or
- (b) would be a company falling within paragraph (a) above if its purposes were disregarded to the extent that they consist in the carrying on of activities such as are mentioned in section 293(3D)(a) and (b) and (3E)(a), or
- (c) is a 90 per cent subsidiary of the qualifying company and falls within subsection (1B) below.

(1B) ...

(1C) In subsection (1A) above ‘the active company’ means the qualifying company or, where the qualifying business activity mentioned in subsection (1) above consists in a subsidiary of that company carrying on or preparing to carry on a qualifying trade, research and development or oil exploration, that subsidiary.

(1D) ...

(2) In this Chapter “qualifying business activity”, in relation to a company, means—

- (a) the company or any subsidiary—
 - (i) carrying on a qualifying trade which, on the date the shares are issued, it is carrying on, or
 - (ii) preparing to carry on a qualifying trade which, on that date, it intends to carry on wholly or mainly in the United Kingdom and which it begins to carry on within two years after that date,

but only if, at any time in the relevant period when the qualifying trade is carried on, it is carried on wholly or mainly in the United Kingdom.’

4. In section 293 of the ICTA the definition of “qualifying company”:

‘(1) Subject to section 294, a company is a qualifying company (whether it is resident in the United Kingdom or elsewhere) if it complies with the requirements of this section.

(2) The company must, throughout the relevant period, be an unquoted company and be—

(a) a company which exists wholly for the purpose of carrying on one or more qualifying trades or which so exists apart from purposes capable of having no significant effect (other than in relation to incidental matters) on the extent of the company’s activities, or

(aa) the parent company of a trading group.

...’

5. Qualifying trades are listed in section 297. There is no doubt that the wholesale and retail sale of greetings cards are qualifying trades within section 297. Finally, I should set out the definition of ‘relevant period’ from section 312:

‘(1A) In any provision of this Chapter “relevant period”, in relation to relief in respect of any eligible shares issued by a company, means whichever of the following periods is applied for the purposes of that provision—

(a) the period beginning with the incorporation of the company (or, if the company was incorporated more than two years before the date on which the shares were issued, beginning two years before that date) and ending five years after the issue of the shares, and

(b) the period beginning with the date on which the shares were issued and ending either—

(i) three years after that date, or

(ii) in a case falling within section 289(2)(a) where the company or subsidiary had not begun to carry on the trade in question on that date, three years after the date on which it begins to carry on that trade.’

6. What happened is that VMHL did not satisfy either branch of the definition of section 293(2) for the whole of the relevant period, but satisfied the first branch (a company existing to carry on a qualifying trade) during the first part of the period and the second branch (the holding company of a group) during the second part of the period. So the first question is whether the word “or” at the end of paragraph 293(2)(a) is being used exclusively (one or the other, but not both during the relevant period) or inclusively (one or the other from time to time during the relevant period).
7. If the first question is answered in VMHL’s favour, and it is a qualifying company, the second question is whether it can satisfy the requirements of subsection 289(1A). That in its turn involves identifying ‘the active company’ and, again, the definition of ‘the active company’ in subsection (1C) contains another ambiguous ‘or’, making it impossible to determine as a matter of language whether the subsection permits the identity of ‘the active company’ to change during the relevant period.
8. The construction placed upon the provision by the General Commissioners was, in effect, to resolve both questions in favour of an inclusive meaning for the word “or” over the relevant period. Ms Shaw, for the Revenue, says that such an analysis is patently wrong on the face of the legislation. She submits that section 289(1A) is concerned with the status of *the* active company during the relevant period, and there can be only one active company over the period. So, she says, the trade must be carried on by either VMHL or VML to the exclusion of the other for the whole of the period. I accept entirely that there must be at least one company: but the use of the word “the” does not necessarily indicate that the identity of the company must not change during the period. What is needed, therefore, is some indication fixing the identity of the qualifying company in point of time.
9. Her second point is that the identity of the active company and the identity of the qualifying company are fixed for all time at the date of issue of the shares. At the date of the issue, it is necessary to know whether the issuing company is a “qualifying company”. The section imposes cumulative requirements: (1) the “qualifying company” must be either a trading company or the parent of a trading group (section 293(2)) and (2) the active company, which must be either the qualifying company or a 90% subsidiary of the qualifying company, must carry on the qualifying business activity. Unfortunately, I cannot find in the provisions any requirement, explicit or implicit, that the identity of the active company must be fixed for all time at the date of the issue.
10. I do, however, think that the necessary temporal restriction is found in the definition of “qualifying business activity”. This is defined not merely in terms of the trade itself (that is dealt with by the definition of “qualifying trade”) but by reference also to the identity of the person carrying on that trade. To repeat:

‘(2) In this Chapter “qualifying business activity”, in relation to a company, means—

- (a) the company or any subsidiary—
 - (i) carrying on a qualifying trade which, on the date the shares are issued, it is carrying on, or
 - (ii) preparing to carry on a qualifying trade...’

11. In my judgment, it is essential that on the date on which the shares are issued it must be possible to determine whether a qualifying business activity is being carried on: and this is only possible if the relevant company can be identified at this point. As I see it, the relief is available in respect of money raised to be employed for the purpose of a qualifying business activity (section 289(1)(c)) and that condition must be satisfied at the date of issue of the shares. It cannot be satisfied if the active company cannot be identified
12. Thus, VML can never become the active company within sub-s 289(1C). It was not a subsidiary at the date of issue of the shares, and so its activity was not a qualifying business activity *on that date*, which is the date on which the question whether it would ever carry on a qualifying business activity has to be determined.
13. This is a short point, but very difficult to decide. Ms Shaw relies also upon a subsequent amendment to the provision effected by the Finance Act 2004. The effect of the amendment is, it is said, to make it clear beyond doubt that the relief is available if (inter alia) at no time during the relevant period is the qualifying trade being carried on by a person *other* than the qualifying company or a 90% subsidiary of that company (sub-s 289(1A) ICTA 1988 as amended). There is no reference to an ‘active company’.
14. Ms Shaw submitted that if the earlier legislation is ambiguous, later legislation *in pari materia* can be employed to resolve the ambiguity. The way in which the subsequent amendment is relied upon is this. The statement by the Economic Secretary to the Treasury in Standing Committee is relied on as showing the change to the existing regime which was intended to be effected by the amendment: so, it is said, the amendment, and the reason for it, are admissible to show what the statute meant: and *Pepper v Hart* [1993] AC 593 is employed to make the Economic Secretary’s statement admissible:

‘Thirdly, the active company rule is abolished. That rule requires that the company’s trade or research and development benefits from the money that is raised under the EIS is earmarked at the outset and must remain the same, usually for three years. The new rule will enable that trade or research and development to be moved within the group, provided it is carried on by the company in which the investment is made, or by a qualifying 90 per cent subsidiary.’ (Standing Committee A for 20 May 2004, col 323.)’
15. The purpose of the amendment is thus to abolish a rule to the effect that I consider exists as a matter of construction. I believe that the statement is not admissible under the principles of *Pepper v Hart* to elucidate an ambiguity in the existing statute, as opposed to a pending bill. However, it is admissible as to the result intended to be

achieved by the amendment, and the amendment itself is admissible (at least in the case of ambiguity) to interpret the statute prior to amendment—see *Kirkness v John Hudson & Co Ltd* [1955] AC 696 at 710 (Viscount Simonds) and 735 (Lord Reid) (compare Lord Morton dissenting at 725, who found the provision ambiguous). I feel it unnecessary in the present case to use these additional aids to construction because I think that the words that prevent VML from ever becoming an active company are clear.

16. The respondent taxpayer submits that a proper purposive construction of the provisions requires that the definition of section 289(2) is not imported into section 289(1C). There is, however, no reason for supposing that the purpose to be achieved is any more generous than that achieved by the construction for which HMRC contends. “Qualifying business activity” is a defined term, and the definition appears to be used to restrict the availability of the relief only to a sub-class of those companies which might be thought to be similar economic entities: it can scarcely matter that the business is carried on either by the qualifying company itself or by any 90% subsidiary from time to time during the relevant period. I do not think that section 293 affects the question, because it only defines the class of companies which can potentially benefit from the scheme. All the requirements of section 289(1A) must be satisfied if the relief is to be available, and these depend upon the definition provided by section 289(1C).
17. In the result, therefore, I conclude that the HMRC’s construction is the correct one, and the appeal must be allowed.