

**THE SPECIAL COMMISSIONERS**

**ALAN BLACKBURN  
ALAN BLACKBURN SPORTS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**Special Commissioner: DR JOHN F AVERY JONES CBE**

Sitting in public in London on 20-22 November 2006, 12 December 2006 (with subsequent further written submissions)

**Patrick Way**, counsel, instructed by **Fishburns**, solicitors, for the Appellant

**Michael Gibbon**, counsel, instructed by the **Acting Solicitor for HM Revenue and Customs**, for the Respondents

## DECISION

1. These are appeals first, by Alan Blackburn Sports Limited (“the Company”) against the Revenue’s refusal on 12 March 2003 to issue forms EIS2 and EIS3 (which forms must be submitted with a claim for Enterprise Investment Scheme deferral relief in respect of capital gains tax pursuant to Schedule 5B TCGA 1992 (“EIS Relief”)) to Mr Alan Blackburn (“Mr Blackburn”) in respect of ten forms EIS1 issued by the Company and submitted on 1 October 2002, and secondly, by Mr Blackburn against refusal to grant him EIS relief. Mr Patrick Way appeared for the Appellants, and Mr Michael Gibbon for the Revenue.
2. The issue concerns whether a number of share issues made by the Company to Mr Blackburn qualify for EIS relief.
3. I had three ring binders of documents and detailed skeleton arguments from the parties. I am greatly indebted to Mr Gibbon for his most helpful 56 page closing submissions that he produced the morning after completion of the evidence, which goes into great detail about when the events actually took place. Mr Way in turn provided a detailed 35 page reply with a 20 page appendix commenting on Mr Gibbon’s closing submissions.
4. There was an agreed statement of facts as follows:
  - (1) Mr Blackburn incorporated the Company on 24 August 1998 to own and operate a sports club known as the Isle of Wight Sports Club. Mr Blackburn and his wife, Anne Vincent Blackburn (“Mrs Blackburn”) were appointed, and remained at all material times the directors of the company. Mrs Blackburn was also appointed the Company Secretary.
  - (2) In October 2002 the Company submitted ten Forms EIS 1 in respect of various issues of shares to Mr Blackburn. The inspector in question has refused to issue Forms EIS 2 which is a prerequisite to the Company’s being able to issue Forms EIS 3.
  - (3) Mr. Blackburn has appealed against assessments to capital gains tax (“CGT”) as set out below:

Year of assessment	Amount of CGT appealed
1996/7	£60,000.00
1997/8	£55,999.96
1998/9	£241,999.97
1999/00	£117,999.77
  - (4) The Company has appealed against the inspector’s refusal to issue Forms EIS 2 in respect of the 10 Forms EIS 1.
  - (5) Mr. Blackburn was resident and ordinarily resident in the United Kingdom at the accrual time (as defined) and at the time when he submits that he made each qualifying investment.

- (6) Mr. Blackburn is not in relation to the shares in the Company a person to whom sub-paragraph (4) of paragraph 1 of Schedule 5B Taxation of Chargeable Gains Act 1992 has application.
- (7) The shares in the Company were issued to Mr Blackburn at a qualifying time (as defined by paragraph 1(3) of Schedule 5B TCGA 1992).
- (8) The Company is a qualifying company as defined by paragraph 19(1) of Schedule 5B and Chapter III of Part VII of the Income and Corporation Taxes Act 1988 (“the Taxes Act”).
- (9) The shares were subscribed for and issued for bona fide commercial purposes and were not as part of arrangements the main purpose or one of the main purposes of which was the avoidance of tax.
- (10) The requirements of s.289(1A) of the Taxes Act were satisfied in relation to the Company.

### **Issues**

5. The principal issues are agreed to be as follows:

- (a) whether certain of the shares were issued by the Company otherwise than fully paid up;
- (b) whether the provisions of TCGA 1992 Schedule 5B paragraph 13(2)(b) have application (value received) in relation to certain of the share issues;
- (c) whether certain of the shares were subscribed for otherwise than wholly in cash;
- (d) to what extent (if any) EIS Relief is not available to Mr. Blackburn.

### **Statutory provisions**

6. By para 1(2) of Schedule 5 to the Taxation of Chargeable Gains Act 1992:

The investor makes a qualifying investment for the purposes of this Schedule if—

- (a) eligible shares in a company for which he has subscribed wholly in cash are issued to him at a qualifying time...

...

- (c) at the time when they are issued the shares are fully paid up (disregarding for this purpose any undertaking to pay cash to the company at a future date)....”

The principal matter in dispute is whether Mr Blackburn subscribed wholly in cash for shares, and whether when they were issued the shares were fully paid up.

7. Para 13(1) provides:

“Where an individual who subscribes for eligible shares (“the shares”) in a company receives any value from the company at any time in the seven year period [for 2000-01 the defined expression “designated period” is substituted], the shares shall be treated as follows for the purposes of this Schedule –

(a) if the individual receives the value on or before the date of the issue of shares, as never having been eligible shares; and

(b) if the individual receives the value after that date, as ceasing to be eligible shares on the date when the value is received.”

Para 13(2) provides:

“For the purposes of this paragraph an individual receives value from the company if the company –

...

(b) repays, in pursuance of any arrangements for or in connection with the acquisition of the shares, any debt owed to the individual other than a debt which was incurred by the company –

(i) on or after the date on which he subscribed for the shares; and

(ii) otherwise than in consideration of the extinguishment of a debt incurred before that date.”

The application of these provisions is in issue in respect of some of the payments.

## **Facts**

8. I heard evidence from Mr Blackburn and Mr Andrew Davis, solicitor, who exhibited two successive draft witness statements that he had taken from Mr John Tausig FCA practising as Michael Cole & Co, the Company’s accountant, before Mr Tausig’s death. Mr Davis’s evidence was helpful in producing the draft witness statements but not in other respects. Although he was acting for Mr Tausig’s professional indemnity insurers it is clear that he had not noted the discrepancies in the dating of the documents and had taken the dating at face value. As a result he had not discussed this aspect with Mr Tausig.
9. Having heard Mr Blackburn’s evidence it seems to me that while he fully understood the process of issuing shares he was not a “details man” and left such matters, or formalities as he would describe them, entirely to Mr Tausig. He was content to sign anything put in front of him by Mr Tausig, even though the dates were on the face of the documents obviously wrong, as will appear below. Since I shall find that many of the documents were not signed on the date they bear, a statement that a document is dated a certain date is a statement of the date it bears and should not be taken to imply that I find that it was signed on that date.
10. In finding the facts I bear in mind that Mr and Mrs Blackburn were the only directors of the Company and Mr Blackburn owned all the shares in the Company except for one share owned by Mrs Blackburn. Mr Tausig was the

Company's accountant and should not be equated with the Company dealing at arm's length with Mr Blackburn. I find the following facts:

*Original issue and formation of the Company*

11. The following events took place:

- (1) 20 July 1998 Mr Blackburn contracted to buy the leasehold property of the Isle of Wight Sports Club for £110,000 plus £10,000 for fixtures and fittings. A term of the contract was that the vendor was not required to transfer the property to anyone other than the named purchaser (Mr Blackburn). By a letter of 26 April 1998 to the vendor's solicitors Mr Blackburn had informed them from the start that the purchaser would almost certainly be a company. He paid a deposit of £12,000.
- (2) The Company was incorporated on 24 August 1998 by company registration agents. The first meeting of the directors took place that day when the nominees of the registration agents resigned and Mr and Mrs Blackburn were appointed directors and Mrs Blackburn company secretary. The nominees of the registration agents transferred one share to Mr Blackburn and one to Mrs Blackburn by transfer dated 24 August 1998.
- (3) On 1 September 1998 Mr and Mrs Blackburn's account was debited with £110,000. The cheque was in favour of Carvers, the solicitors who were acting for him in the purchase.
- (4) Completion of the property purchase took place on 1 September 1998 when the property was transferred to the Company (on the transfer "Alan Blackburn" is typed as the transferee and after his name is added in manuscript and initialled by the vendor "Sports Limited"). I assume that there was a direction to the vendor to transfer it to the Company (not seen) and perhaps an agreement by the vendor to waive the contractual condition preventing transfer to anyone other than Mr Blackburn (not seen).
- (5) Mr Blackburn paid on behalf of the Company skip hire charges of £76 by cheque debited to his account on 18 September 1998. He also paid in cash a parking fee of £1 on behalf of the Company on 28 September 1998.
- (6) On 4 September 1998 (receipt date stamped 7 September 1998) Mr Blackburn wrote to Mr Tausig returning the stock transfer forms (see paragraph 11(2)) in which I find that the transferees' names were filled in on the blank transfers about that time. The letter stated: "As per our telephone conversation I shall take up 150,000 shares at this stage which will meet all initial start up costs and hopefully most of the initial expenses." The number of shares was therefore decided around this date, as Mr Blackburn accepted.
- (7) Minute of a board meeting dated 28 August 1998 showing Mr and Mrs Blackburn as present, at which the transfer of the subscribers' shares was approved and stating

“It was reported that in addition to the above A Blackburn had applied to subscribe for 149,998 shares. It was resolved that these shares be allotted to Mr A Blackburn on receipt of £149,998 from Mr A Blackburn.”

No letters sending or returning the documents which would have helped in determining the timing were produced. The minute cannot have been signed before 8 September 1998 (Mr Tausig received Mr Blackburn’s letter of 4 September deciding on the number of shares on 7 September 1998 and the earliest Mr Blackburn can have received the minutes for completion was the next day) and it was more probably signed around 27 September 1998 on the assumption that Mr Tausig received the documents back on 28 September 1998 at the same time as he dated the return of allotments (see the next sub-paragraph). I consider that the later time is more probable and find that the minute was signed on 27 September 1998. Mr Blackburn stated that no meetings actually took place in relation to this or any other share issue but as Mr Gibbon waived taking the point that nothing had been done I shall treat this and later minutes as binding the Company.

- (8) Return of allotments stating that 149,998 shares had been allotted for cash on 28 August 1998. The form is dated “28/9/98” with the 9 for the month probably overwriting an 8. Mr Blackburn signed it undated. I find that it was dated by Mr Tausig on 28 September 1998 on receiving it from Mr Blackburn, and that no decision to allot these shares had been made until 4 September 1998. The form was stamped as received by Companies House on 9 October 1998.
- (9) Share certificates for 149,999 shares in Mr Blackburn’s name and 1 share in Mrs Blackburn’s name were dated 28 August 1998. For the same reason as above I find that these were signed about 27 September 1998.
- (10) The share register was written up at some time between 7 September 1998 (when Mr Tausig received Mr Blackburn’s letter of 4 September 1998) and 28 September 1998 (when he received the documents); I consider that the latter date is the more probable because Mr Tausig is likely to have given priority to preparing the documents he needed to send to Mr Blackburn and would therefore be likely leave writing up the share register until receiving the documents back, and I so find. The date of application and allotment was originally stated to be 28 August 1998. This was later changed to 25 August 1998 and 30 September 1998 respectively. Subsequently the register was rewritten showing each receipt of cash as a separate issue of shares with the following dates of application and allotment (which may have been intended to be the other way round): £110,000 1 September 1998 and 28 August 1998; £25,938 (ie £25,862 plus £76) 30 September 1998 and 28 August 1998. (I comment further on the changes to the register at paragraph 25(3) below.)
- (11) On 30 September 1998 £25,862.85 was paid to the Company from Mr and Mrs Blackburn’s current account by bank giro.

- (12) The payment for the 149,998 shares is made up of the £111,000, £75, £1, £25,862.85 mentioned above plus other payments, relief on which is not now claimed.
  - (13) The latest forms EIS 1 (in fact the third, but I shall ignore the others) to be submitted dated 1 July 2002 claim an issue of 110,000 shares on 1 September 1998, and 25,938 shares on 30 September 1998.
12. In summary, the £111,000 was paid to Mr Blackburn's solicitors on 1 September 1998 intending that the property should be transferred into the Company, and the other payments were made on 18, 28 and 30 September 1998. The decision to issue 148,998 shares was made no earlier than 4 September 1998, which I shall take as the date of an informal application for shares, with the rest of the money being paid later. The share register was written up on 28 September 1998 with the £25,862.85 being paid later. I find that when the £111,000 payment was made no decision had been taken to issue shares and accordingly the payment created a debt in favour of Mr Blackburn unconnected with any issue of shares.

*Issue for £140,000*

13. The following events took place:
- (1) On 30 December 1998 (stamped as received 2 January 1998 [which obviously should be 1999]) Mr Blackburn wrote to Mr Tausig proposing to "reinvest Jan/Mar 99 £140,000" adding "I propose delaying the purchase of new shares in the sports club (major building work is at least 10 weeks before commencement) to provide investment income for me between now and March, perhaps the shares should be allotted subject to full payment on or before 'say' 31 March 1999, your comments would be welcomed."
  - (2) Mr Tausig replied on 4 January 1999: "...in view of the proposed re-investments and the due date for capital gains tax on 31 January, I believe it would be preferable to (sic) immediately to re-invest £140,000." The letter enclosed a board minute pre-dated 11 January 1999, return of allotments on 11 January 1999, a share certificate pre-dated 11 January 1999 and also form 291 [claim for reinvestment relief, the predecessor of EIS relief] showing the date of acquisition of shares as 11 January 1999.
  - (3) The Form 291 showing the date of acquisition of shares as 11 January 1999, signed and dated by Mr Blackburn on 6 January 1999, was sent to the Revenue on 7 January 1999. I infer that it was actually signed on 6 January 1999, sent to Mr Tausig that day and was forwarded by him on 7 January 1999 without his noticing that it stated that the acquisition took place in the future.
  - (4) Board minute pre-dated 11 January 1999 showing Mr Blackburn as present and Mrs Blackburn as in attendance stated:
    - "It was reported that application for 140,000 ordinary shares had been received from Mr Alan Blackburn. It was resolved that these shares be issued on receipt of £140,000 from Mr A Blackburn."

I find that this was signed by Mr Blackburn on 6 January 1999 at the same time as the other documents.

- (5) Return of allotments stating the date of allotment of 140,000 ordinary shares as 11 January 1999 with £1 due and payable per share. Mr Blackburn dated the form 6 January 1999. The date is overwritten as 12 January 1999 in another hand which I find was Mr Tausig's who changed the date on 12 January 1999 when he sent it to Companies House because otherwise it would have been signed before the allotment. It was stamped as received by Companies House on 14 January 1999.
  - (6) Share certificate pre-dated 11 January 1999 for 140,000 fully paid shares signed by Mr and Mrs Blackburn as director and secretary. I find that it was signed on 6 January 1999 at the same time as the other documents.
  - (7) Share register written up showing date of application and date of allotment as 11 January 1999, the latter then changed to 10 February 1999. I deduce that this was written up between 7 January 1999 (when Mr Tausig received the documents signed by Mr Blackburn) and 12 January 1999 (when Mr Tausig sent the return of allotments to Companies House), but there is no evidence that would enable me to choose between these dates. This shows the date of application and allotment originally as 11 January 1999 with the latter subsequently changed to 10 February 1999. Subsequently this was changed to 10 February 1999 and 11 January 1999. (I comment further on the changes to the register at paragraph 25(3) below.)
  - (8) The £140,000 was debited to Mr and Mrs Blackburn's account and credited to the Company's account on 10 February 1999.
  - (9) The latest form EIS 1 to be submitted dated 1 July 2002 claims that an issue of 140,000 shares was made on 10 February 1999.
14. In summary, on 6 January 1999 the board resolved to issue 140,000 shares on receipt of £140,000 but wrote up the share register to show the shares as having been allotted on 11 January 1999 and issuing a share certificate for fully paid shares on 6 January 1999 (but dated 11 January 1999) with payment being received on 10 February 1999.

*Issue for £210,000*

15. The following events took place:
- (1) 18 June 1999 Mr Blackburn wrote to Mr Tausig (stamped as received on 21 June 1999) in which Mr Blackburn calculated that the balance to meet expenditure is, say, £250,000.
  - (2) On 24 June 1999 Mr Tausig replied: "Can I therefore suggest a further £210,000 investment as at the present time for which I enclose herewith the form 88(2) and board minute and share certificate for signature by yourself and Anne as indicated."
  - (3) Instruction to Lloyds Private Banking Limited by Mr and Mrs Blackburn dated 26 June 1999 (a Saturday) requesting a transfer of

£210,000 to the Company's account "at a convenient date after 28 June 1999." I infer that Mr Tausig's letter of 24 June 1999 suggesting the figure of £210,000 had been received by Mr Blackburn on 26 June 1999.

- (4) Board minute pre-dated 28 June 1999 (the following Monday) showing Mr Blackburn as present and Mrs Blackburn as in attendance:

"It was reported that application for 210,000 ordinary shares had been received from Mr Alan Blackburn. It was resolved that these shares be issued on receipt of £210,000 from Mr A Blackburn."

I find that this was signed on 28 June 1999, the date of Mr Blackburn's letter returning it to Mr Tausig.

- (5) Return of allotments stating the date of allotment of 210,000 ordinary shares as 28 June 1999 with £1 due and payable per share. This was signed by Mr Blackburn and dated 28 June 1999, when I find it was signed, and was stamped as received by Companies House on 2 July 1999.
- (6) Share certificate pre-dated 28 June 1999 for 210,000 fully paid shares signed by Mr and Mrs Blackburn as director and secretary. I find it was signed on that date.
- (7) The board minute, return of allotments, share certificate and form IR 291 were returned by Mr Blackburn with his letter of 28 June 1999. The form IR 291 was sent to the Revenue on 30 June 1999.
- (8) Share register written up showing date of application and date of allotment as 28 June 1999. I find that this was written up between 24 June 1999 (the date of Mr Tausig's letter sending the documents) and 30 June (by when Mr Tausig must have received the documents back as he sent the form IR291 to the Revenue); I regard the latter as more probable because at the earlier time he would be likely to give priority to preparing documents that needed to be sent to Mr Blackburn, and find it was 30 June 1999, the day Mr Tausig wrote to the Revenue and was therefore working on this file. The date of allotment was subsequently changed to 29 June 1999 which was overwritten 1 July 1999 (the draft witness statement of Mr Tausig refers to changes made between 18 and 25 June 2001 and it is likely that this is the change). The rewritten version shows the date of application as 1 July 1999 and allotment as 28 June 1999. (I comment further on the changes to the register at paragraph 25(3) below.)
- (9) The bank transfer took place on 30 June 1999.
- (10) The latest form EIS 1 to be submitted dated 1 July 2002 claims that an issue of 210,000 shares was made on 1 July 1999.

16. In summary, Mr Blackburn decided to issue 210,000 shares on 26 June 1999 (on receipt of Mr Tausig's letter of 24 June 1999), which I shall take to be the date of the informal application, resolved to do so on 28 June 1999. The share register was written up on 30 June 1999, with the cash being directed to be paid on the first convenient date after 28 June 1999 and being received on 30 June 1999, the same date as the register was written up.

*Issue for £100,000*

17. The following events took place:

- (1) On 21 September 1999 Mr Blackburn wrote to Mr Tausig "It will be necessary for me to invest a further £100,000 in the club prior to the year end taking the total up to £600,000."
- (2) On 29 September 1999 Mr Tausig wrote to Mr Blackburn enclosing papers for increasing the share capital, application for shares, minutes and share certificate. Mr Blackburn wrote on the bottom of the letter "Returned 5/10/99."
- (3) Application for shares pre-dated 29 September 1999 "I hereby apply to subscribe for 100,000 ordinary shares in Alan Blackburn Sports Limited" and signed by Mr Blackburn. I find that it was signed on the date the documents were returned, 5 October 1999.
- (4) Board minute pre-dated 29 September 1999 [the same day as the letter sending them] at 11.45 am calling an AGM to increase the share capital from £500,000 to £600,000 showing Mr Blackburn in the chair and Mrs Blackburn and Mr Tausig as in attendance. Minute of EGM at 12 noon showing the same attendances. I find that Mr Tausig was not present and the minutes were signed on the date the documents were returned, 5 October 1999.
- (5) Board minute pre-dated 29 September 1999 showing Mr Blackburn as present and Mrs Blackburn as in attendance stating:

"It was reported that application for 100,000 ordinary shares had been received from Mr Alan Blackburn. It was resolved that these shares be issued on receipt of £100,000 from Mr A Blackburn."

I find that this was signed on 5 October 1999.
- (6) Return of allotments stating the date of allotment of 100,000 ordinary shares as 29 September 1999 with £1 due and payable per share. This was signed by Mr Blackburn and dated 5 October 1999, when I find it was signed, and was stamped as received by Companies House on 8 October 1999.
- (7) Share certificate pre-dated 29 September 1999 for 100,000 fully paid shares signed by Mr and Mrs Blackburn as director and secretary. I find that this was signed on 5 October 1999.
- (8) Mr Blackburn also signed a form IR291 on 5 October 1999 stating the date of acquisition of the shares to have been 29 September 1999 (even though the form states that the date must be before 6 April 1998). Mr Tausig sent this to the Revenue on 6 October 1999, indicating that he must have received the documents back on that date.
- (9) Share register written up showing date of application and date of allotment as 28 June 1999. This was written up between 29 September 1999 (the date of Mr Tausig's letter sending the documents) and 6 October 1999 (by when Mr Tausig had received the documents back); I consider that the later date is more probable because at the earlier time he would be likely to give priority to preparing documents required to be sent to Mr Blackburn, and I so find. The original date of application

and allotment was 29 September 1999. The latter was changed to 29 October 1999. The rewritten version shows both application and allotment on 29 October 1999. (I comment further on the changes to the register at paragraph 25(3) below.)

- (10) 29 October 1999 payment of £100,000 was debited to Mr and Mrs Blackburn's account and credited to the Company's account.
  - (11) The latest form EIS 1 to be submitted dated 1 July 2002 claims that an issue of 1000,000 shares was made on 29 October 1999.
18. In summary, the application was the informal one by letter of 21 September 1999, the share capital was increased on 5 October 1999 and the shares resolved to be allotted that day. The share register was written up on 6 October 1999 and the cash was received on 29 October 1999.

*Issue of £350,000*

19. The following events took place:

- (1) On 6 March 2000 Mr Blackburn wrote to Mr Tausig "With regard to the funding of the club expenses between today and the end of May, there is little doubt that I shall need to inject at least a further £300,000 of Capital."
- (2) On 26 April 2000 Mr Blackburn wrote to Mr Tausig "I have made cash advances to the Company in March and April amounting to £96,000 and will transfer the balance of £254,000 during April to June." The £96,000 comprises £51,000 paid on 6 March 2000 (instruction to bank on 3 March 2000, three days before his letter of 6 March 2000 which does not refer to it) and £45,000 paid on 4 April 2000 (instruction to bank on 28 March 2000).
- (3) On 3 May 2000 Mr Tausig wrote to Mr Blackburn enclosing papers for increasing the share capital, application for shares, minutes and share certificate. Mr Blackburn wrote on the bottom of the letter "John, Signed forms. Regards, Alan 8/5/2000."
- (4) On 3 May 2000, the same day as he sent the documents to Mr Blackburn, Mr Tausig wrote to the Revenue saying that Mr Blackburn had invested a further £350,000 in the Company and asking for an EIS3 form.
- (5) Application for shares pre-dated 1 May 2000 [two days before the letter sending it] "I hereby apply to subscribe for 350,000 ordinary shares in Alan Blackburn Sports Limited" and signed by Mr Blackburn. I find that this was signed on the date the documents were returned, 8 May 2000.
- (6) Board minute pre-dated 1 May 2000 at 11.45 am calling an AGM to increase the share capital from £600,000 to £1,000,000 showing Mr Blackburn in the chair and Mrs Blackburn and Mr Tausig as in attendance. Minute of EGM at 12 noon showing the same attendances. I find that Mr Tausig was not present and nor were the minutes signed on 1 May 2000 since they were only sent by letter of 3 May 2000. I

find that they were signed on 8 May 2000, the date documents were returned.

- (7) “Minutes of Extraordinary general Meeting” [presumably intended to be a board meeting] pre-dated 1 May 2000 showing Mr Blackburn as present and Mrs Blackburn and Mr Tausig as in attendance:

“It was reported that application for 350,000 ordinary shares had been received from Mr Alan Blackburn. It was resolved that these shares be issued on receipt of £350,000 from Mr A Blackburn.”

I find that this was signed on 8 May 2000.

- (8) Return of allotments stating the date of allotment of 350,000 ordinary shares as 1 May 2000 with £1 due and payable per share. This was signed by Mr Blackburn and dated 1 May 2000. I find that it was signed on 8 May 2000, received by Mr Tausig on 9 May 2000 and sent that day to Companies House where it was received on 10 May 2000.
- (9) Share certificate pre-dated 1 May 2000 for 350,000 fully paid shares signed by Mr and Mrs Blackburn as director and secretary. I find that this was signed on 8 May 2000.
- (10) The share register was written up between 3 May 2000 (when Mr Tausig sent the documents) and 9 May 2000 (when he received the documents back); the latter date is more probable because at the earlier time he would be likely to give priority to preparing documents required to be sent to Mr Blackburn, and I so find. The date of application and allotment was originally recorded as 1 May 2000. The latter date was changed to 15 May 2000. The rewritten version shows separate share issues of 96,000 applied for and allotted on 1 May 2000; 90,000 on 2 May 2000; 20,000 on 5 May 2000; and 144,000 on 15 May 2000. (I comment further on the changes to the register at paragraph 25(3) below.)
- (11) Further payments were made from Mr and Mrs Blackburn’s account to the Company’s account of £90,000 on 2 May 2000, £20,000 on 5 May 2000 and £144,000 on 15 May 2000.
- (12) The latest forms EIS 1 to be submitted dated 1 July 2002 claim that issues of 96,000 shares was made on 1 May 2000, 90,000 shares on 2 May 2000, 20,000 shares on 5 May 2000, and 144,000 shares on 15 May 2000.
20. In summary, £96,000 had been paid on 6 March and 4 April 2000 before any mention of a share issue. The application for shares was made informally in Mr Blackburn’s letter of 26 April 2000 (or by the formal application signed on 8 May 2000). The capital was increased and the shares resolved to be allotted on 8 May 2000. The share register was written up on 9 May 2000. The balance was paid on 2, 5 and 15 May 2000.

*Issue for £240,000*

21. The following events took place:

- (1) Payments totalling £240,000 were made from Mr and Mrs Blackburn’s account to the Company’s account of £100,000 on 5 July 2000 (on 7

July 2000 the Company made a payment for building work of £76,375), of £100,000 on 7 August 2000 (on 14 August 2000 the Company made a payment for building work of £85,201.60), and £40,000 on 9 October 2000 (on 11 October 2000 the Company made a payment for build work of £38,097.03).

- (2) On 27 December 2000 Mr Tausig wrote to Mr Blackburn referring to a fax of 13 December 2000 from Mr Blackburn (not seen) and enclosing papers for increasing the share capital, application for shares, minutes and share certificate. Mr Blackburn wrote on the bottom of the letter "Returned 5/1/01" (a Friday).
- (3) Board minute pre-dated 19 December 2000 [eight days before the letter sending them] at 11.45 am calling an AGM to increase the share capital from £1,000,000 to £1,190,000 showing Mr Blackburn in the chair and Mrs Blackburn and Mr Tausig as in attendance. Minute of EGM at 12 noon showing the same attendances. I find that Mr Tausig was not present and nor were the minutes signed on 19 December 2000. The likely date was the date the documents were returned, 5 January 2001.
- (4) Board minute pre-dated 19 December 2000 showing Mr Blackburn as present and Mrs Blackburn and Mr Tausig as in attendance:

"It was reported that application to subscribe for 240,000 ordinary shares had been received from Mr Alan Blackburn in respect of subscription monies previously received. It was resolved that these shares be issued to Mr A Blackburn."

This is a change of wording from all the previous board minutes which refer to the shares being issued on receipt of the money to reflect the reality that payment had already been made. I find that the minute was signed on 5 January 2001, the date the documents were returned, and that Mr Tausig was not present.
- (5) Return of allotments stating the date of allotment of 350,000 ordinary shares from 19 December 2000 to 19 December 2000 with £1 due and payable per share. This was signed by Mr Blackburn and dated 5 January 2001, when I find it was signed. It was stamped as received by Companies House on 9 January 2001.
- (6) Share certificate pre-dated 19 December 2000 for 240,000 fully paid shares signed by Mr and Mrs Blackburn as director and secretary. I find that this was signed on 5 January 2001.
- (7) The share register was written up between 27 December 2000 (when Mr Tausig sent the documents) and (Monday) 8 January 2001 (when he would have received the documents back); I regard the latter date as more probable because at the earlier time he would be likely to give priority to preparing documents required to be sent to Mr Blackburn, and I so find. The date of application and allotment was originally shown as 19 December 2000 and the rewritten version is the same. (I comment further on the changes to the register at paragraph 25(3) below.)
- (8) The latest form EIS 1 to be submitted dated 1 July 2002 claims that an issue of 240,000 shares was made on 19 December 2000.

22. In summary, all the payments to the Company were made between 5 July and 9 October 2000 before any reference was made to the issue of shares. The application for shares was made either informally in the 13 December 2000 fax or formally by the application signed on 5 January 2001. The share capital was increased and the shares allotted on 5 January 2001, and the share register was written up on 8 January 2000.

*General summary in relation to the timing of payments*

23. While I accept the existence of a generalised intention on the part of Mr Blackburn that money he put into the Company would be in respect of shares I am unable to accept that whenever money was paid he was informally applying for shares. In my view he was putting money into the Company to meet the Company's cash requirements with the intention of sorting out the issue of shares later. His initial approach to Mr Tausig in respect of each issue (except for the £240,000 where I have not seen the fax) was in terms of the Company's requirement for money. In relation to the £350,000 issue he expressly referred to having made "cash advances" to the Company before he raised the issue of issuing shares with Mr Tausig. Accordingly I approach the case by looking for evidence of an intention to apply for shares in respect of specified sums of money.
24. On this basis the facts divide themselves into two extremes: (a) cases where the money was paid to the Company before any application was made for the issue of shares in respect of that money, and (b) cases where the issue of shares was otherwise complete before the money was paid in respect of the issue. In category (a) is the £110,000 paid on 1 September 1998 in order to complete the purchase of the property (part of the original issue), the payments of £51,000 on 6 March 2000 and £45,000 on 4 April 2000 (total £96,000) (part of the £350,000 issue), and the whole of the money relating to the £240,000 issue. The £75 for skip hire and the parking fee of £1 were paid after the application for shares and before their issue, with the parking fee paid on the same day as writing up the share register. It is common ground that I should treat these as payments of cash to the Company as a set-off arose when Mr Blackburn paid them on behalf of the Company. I shall deal with these at the same time as category (b) applying to all the remaining payments. The £210,000 the cash was received the same day as the register was written up and so no issue arises.

*Subsequent events*

25. The following events took place:
- (1) On 15 May 2001 Mr Tausig telephoned the Revenue and their note of the conversation records that he asked whether it would matter if the moneys were received before or after the share certificate was issued. The Inspector said that the both were a problem.
  - (2) On the same day Mr Tausig wrote to Mr Blackburn including a list of the subscriptions for shares and adding:

“For each subscription could you please forward to me a copy of your letter applying for the shares which should be before the first monies are paid in for that subscription. I believe there were letters to state I wish to subscribe for an additional xxx number of shares and when the total amount of monies is received, please issue the necessary share certificate.”

Even though Mr Tausig has not had the opportunity of explaining this passage, I cannot read this in any way other than an invitation to manufacture evidence, after Mr Tausig had realised from the telephone conversation with the Revenue that at least the cases where cash was received in advance of anything being done to issue shares were doubtful. Mr Blackburn to his credit did not act on this suggestion; this seems to be the only occasion that he did not follow Mr Tausig’s suggestions. His reply of 5 June 2001 states “As per 3.” The reply to paragraph 3 says “Your letter dated 25 May 2001 refers.” Neither Mr Tausig’s nor Mr Blackburn’s copy of that letter has been produced, which particularly coming after the letter of 15 May 2001 I regard as suspicious and it suggests that both Mr Tausig and Mr Blackburn had determined that it should be destroyed.<sup>1</sup> The likely explanation for the contents of the missing 25 May 2001 letter is that Mr Tausig had suggested that he would change the share register if Mr Blackburn did not object. Mr Tausig’s draft witness statement records that he made a first change on 8 June 2001, which is shortly after he would have received Mr Blackburn’s letter of 5 June 2001. Mr Davis believes that the amendments were made in September 2001 but as Mr Tausig did not change this passage in his draft witness statement I consider that Mr Tausig’s version with the specific reference to 8 June 2001 is more likely to be correct.

- (3) The position of the amendments to the share register is confused. Mr Tausig’s draft witness statement refers to a further amendment made between 18 and 25 June 2001. The original was sent to the Revenue on

---

<sup>1</sup> After I had issued this decision up to paragraph 0 as an interim decision Mr Blackburn submitted a witness statement explaining that as a result of the interim decision he searched again for the letter of 25 May 2001 which he found filed in a folder dealing with staff salaries, in which he looked having noticed that the letter of 5 June 2001 also related to forms P11D. The letter of 25 May 2001 from Mr Tausig read:

*“Enterprise Investment Scheme*

There is a postal strike but I enclose herewith copy letter of 15 May, which could you please respond to. As regards the paragraph asking for the subscription agreements I believe I have signed letters because each time you subscribed I asked you to sign a letter.

Please ignore this paragraph

*Forms P11D*

Could you please forward the original forms so they can be completed and sent back to you, that is the form P11D front sheet and Class 1A computation.”

The Revenue indicated that they would object to my altering my interim decision unless they had the opportunity of cross-examining Mr Blackburn on this letter. I was reluctant to allow a further hearing for cross-examination when, assuming if I accepted everything in the letter, it would affect the decision only by removing the observation that the fact of the letter being missing was suspicious. I suggested that I should add a footnote referring to the letter and the witness statement, to which the Appellant consented.

13 September 2001. Subsequently the existing entries were crossed out and a completely new list of applications and allotments made which separates out the separate payments, for example what was formerly shown as the issue of 350,000 shares was now separated into issues of 96,000, 90,000 20,000 and 144,000 shares on the dates the money was paid (except for the £96,000, which was received on 6 March and 4 April 2001, being shown as applied for and allotted on 1 May 2001). This final version is still confused since in 12 cases the date of allotment is shown as preceding the date of application (but may have been intended to be the other way round). I have made findings about when the register was originally written up and I do not consider the subsequent changes to be relevant.

### **Contentions of the parties**

26. Mr Way, for the Appellants, contends in outline:

- (1) The Appellants are within the policy of the legislation. New money has been put into the Company and shares have been issued. No money has been recycled.
- (2) It is conceded that the paper work was poor but the Tribunal should have regard to the substance not the form.
- (3) As Lord Templeman said in *National Westminster Bank plc v IRC* [1994] STC 580, 587 “the word ‘issue’ in the 1988 Act is appropriate to indicate the whole process whereby unissued shares are applied for, allotted and finally registered.” Here the issue was not complete until the money was received and accordingly there was an issue of fully-paid shares.
- (4) Alternatively, there was an issue of shares subject to the condition precedent that the money was received, as in *Spitzel v The Chinese Corporation Ltd*, *The Law Times*, 13 May 1899, Vol.80 p.347.
- (5) The Company was entitled to, and did, rectify errors in the share register without an application to the court.
- (6) Where money was paid in advance of the issue of shares it was part as the subscription for the shares and did not create a debt within the value received rules. If that were not so it would never be possible to comply with the legislation. An interpretation that applies common sense, allows the legislation to have effect, avoids an absurd or unworkable result, or avoids a disproportionate counter-mischief should be adopted.

27. Mr Gibbon, for the Revenue, contends in outline:

- (1) Either money was paid to the Company in advance of any subscription for shares, in which case the value received rules apply, or the money was received after the share register was written up which is the time of issue of the shares and accordingly the shares were not fully-paid at the time of issue.
- (2) Attempts by the Company to rectify the share register are ineffective and any such application should have been made to the Court. The

Court would not now rectify the register under s 359 of the Companies Act 1985. In any case it is not a question of rectifying an error but of saying that something different happened than actually did happen.

- (3) There was no conditional issue of shares as in *Spitzel*. The facts of that case were different in that there was a conditional contract and a statement in the share register that the shares were conditionally allotted. Here there was no evidence to support a conditional issue.

## Reasons for decision

### *Allotment and issue of shares*

28. It will be seen from the above findings of fact that the issue of shares was muddled. I start by looking at the authorities on the meaning of issue if this had been carried out correctly. In *National Westminster Bank* Lord Templeman said at 584j:

The 1985 Act preserves the distinction in English law between an enforceable contract for the issue of shares (which contract is constituted by an allotment) and the issue of shares which is completed by registration. Allotment confers a right to be registered. Registration confers title. Without registration, an applicant is not the holder of a share or a member of the company: the share has not been issued to him.

The allotment of a share, followed by the registration of the shareholder followed by the furnishing of a share certificate may take place on the same day or on different days. In the present case shares were allotted on 12 March but the shares were not registered and therefore no share certificate could be furnished until 2 April. The shares were allotted on 12 March and issued on 2 April.

No person can be a shareholder until he is registered. A person who is not a shareholder by registration cannot claim that the share has been issued to him, but only that the company is bound by contract to issue a share to him. A person who has been allotted shares is in as good a position in equity as a person to whom shares have been issued but that does not mean that there is no distinction between allotment and issue; an allotment creates an enforceable contract to issue and accept shares.

29. He also said at 587h:

In *Central Piggery Co Ltd v McNicoll* (1949) 78 CLR 594, s 4 of the Industrial Conciliation and Arbitration Acts 1932 to 1947 provided that no company 'shall proceed to the issue to any of its employees any shares in the company' without the consent of the industrial court. Shares were applied for, paid for, allotted and registered but the applicant was not notified of the allotment or registration until after he had become an employee of the company. The High Court of Australia held that the Act had been infringed. Latham CJ said (at 598):

'The issue of the shares is the act which ends the transaction and ends in the issue of the shares to a specific person, an employee. The act of issuing involves a set of proceedings which result in the employee becoming a shareholder.'

In that case the process of issuing shares was not complete until notification because application, payment, allotment and registration preceded notification. In the present case the issue of shares was not complete on 15 March 1993 because although there had been application, payment and allotment there had been no registration.

In the present case, in my opinion, the word 'issue' in the 1988 Act is appropriate to indicate the whole process whereby unissued shares are applied for, allotted and finally registered.

30. Section 22 of the Companies Act 1985 provides:

“(1) The subscribers of a company’s memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.”

31. By s 361 of the Companies Act 1985:

“The register of members is prima facie evidence of any matters which are by this Act directed or authorised to be inserted in it.”

One of the matters required to be inserted is by s 352(2)(b) “the date on which each person was registered as a member.”

32. Accordingly issue of shares is the whole process which results in the person becoming a member. If the process is carried out correctly registration as a shareholder is the last step in this process. Section 22(2) of the Companies Act 1985 provides that a person whose name is entered in the register is a member, and s 361 provides that the register is prima facie evidence of when the person was registered as a member. The problem applying this to the facts of this case is that in some cases registration was not the last step; in many cases receipt of the money was the last step but it was nevertheless still part of the process. The essential difference between the parties is that Mr Way contends that until the receipt of the money the whole process is not complete, while Mr Gibbon contends that if the shares are registered before payment is received the person becomes a member and the consequence is an issue of a nil paid share (which is possible under the Companies Act for a private company).

#### *Subscription for shares*

33. Subscription is not defined in the Companies Act 1985. In relation to a public company offering shares to the public, the company issues a prospectus, following which (not earlier than the third day later) the subscription lists open (s 82). The prospective shareholder makes an offer to subscribe. His name is entered on the subscription list. Shares are allotted to them so long as the minimum amount to be raised has been satisfied, and the amount payable on application for his shares had been paid (s 83). He is then notified of the allotment, following which there is a contract for issue (*National Westminster Bank* at p 582). The person’s name is then put on the share register, which is the completion of the process of the issue (*National Westminster Bank* at p 587). This process can be done more informally by a private company but there must be an application for shares, which can be oral.

34. In the definition of prospectus in what is now s 744, referring to the offering to the public of shares for subscription or purchase, subscription has been

explained by Wynn-Parry J in *Governments Stock v Christopher* [1956] 1 WLR 237, 242:

“In my view the word [subscription] means: taking or agreeing to take shares for cash. It imports that the person agreeing to take the shares puts himself under a liability to pay the nominal amount thereof in cash.”

Subscription is therefore equated with the application for shares.

*Registration in the share register before receipt of money*

35. I shall first consider those cases where the money was paid to the Company after the share register was written up showing Mr Blackburn as the holder of the shares, which I have described as category (b) in paragraph 24 above. Section 22(2) states that where there had been (1) an agreement to become a member, and (2) the person's name is entered on the share register, then he becomes a member of the company. I shall consider (1) below in connection with Mr Way's alternative contention that there was a conditional issue of shares, but assuming at this stage that there was an unconditional agreement by Mr Blackburn to become a member of the Company, there is no doubt that he was put on the register and accordingly became a member and so the shares must have been issued to him on the date he was registered. The date when that is stated in the register to have happened may be wrong but the register is only prima facie evidence of the date. Mr Gibbon accepts that I can find the true date when Mr Blackburn was put on the register, as I have done above. But if that true date is before receipt of the cash he would still, in accordance with s 22, become a member when his name was put on the register, in which case the shares must have been issued nil paid. I cannot use Lord Templeman's statement in *National Westminster Bank* that issue is “the whole process whereby unissued shares are applied for, allotted and finally registered,” to say that the process was not complete until receipt of the money as this result would be contrary to s 22. On the assumption that there has been an unconditional agreement by Mr Blackburn to become a member of the Company, I cannot therefore accept Mr Way's primary submission that the process of issue of shares was not complete until the money was received.
36. Mr Way has an alternative contention, that there was an issue of shares conditional on receipt of the cash. Such an event is legally possible as is shown by *Spitzel v The Chinese Corporation Ltd*, *The Law Times*, 13 May 1899, Vol.80 p.347. A written agreement provided that 160,000 fully-paid shares should be allotted and the certificates deposited in escrow ready for issue. The agreement provided that on the vendor of a business showing good title to certain premises and conveying the premises to the company, a cable was to be sent and “the escrow shall cease and the said certificates shall be delivered to the vendor...and the shares comprised therein shall be issued.” In the share register the entry for those shares stated “Allotted conditionally subject to the resolution of the board of the 1st Sept. 1898.” Stirling J held that in what is now s 22 the vendor had agreed only conditionally to become a member and so the process was not complete until the condition was satisfied:

“...but it seems to me that the allotment may be subject to a condition—as, for example, that the allottee should not only indicate acceptance, but perform some other act, such as payment of a sum of money. In other words, I think that a company may offer specified shares to AB on the terms that the title of AB should not arise until he had paid a sum of money to the company, and, this being so, a contract may provide, as I think, that allotment shall be subject to conditions.”

37. Mr Gibbon contends that the facts of *Sptizel* are far removed from this case since the conditionality of the issue was clear from the written agreement and more importantly from the register. He also contends that Mr Blackburn gave no evidence of conditionality; he simply signed the documents that were prepared by Mr Tausig. Since in the only case where the board minute was different, the £240,000 issue, the fax of 13 December 2000 is missing I should be cautious about the reason for the changed wording.
38. Summarising the facts here in relation to these cases:
- (1) Mr Blackburn’s first communication with Mr Tausig in relation to each issue, or Mr Tausig’s reply, specifies an amount of money that to be invested by way of new shares.
  - (2) The board resolutions were all (except for the issue for £240,000 which is the only issue where the whole of the money was paid before the resolution) in this form:

“It was reported that application for xxx ordinary shares had been received from Mr Alan Blackburn. It was resolved that these shares be issued *on receipt of £xxx from Mr A Blackburn.*” [my italics]
  - (3) The returns of allotments state that the nominal amount is due and payable.
  - (4) The share certificates issued before receipt of the money describe the shares as fully-paid.
  - (5) Mr Blackburn’s name was entered on the register around the same time that the share certificate was issued.
  - (6) Money equal to the nominal amount of the shares was subsequently received.
39. Taking all these together there is no doubt from the board resolution that the intention was to issue fully paid shares on receipt of the money. I regard it as significant that in the only case where all the money was paid before the board resolution, the £240,000 issue, the wording of the resolution was changed from resolving to issue the shares “on receipt of £X from Mr A Blackburn” to “in respect of subscription monies previously received” and in the latter case the resolution was to issue the shares unconditionally. I do not therefore consider that I should ignore the wording of the relevant resolutions. In one case, that of the £140,000 issue, Mr Blackburn himself suggested a conditional allotment without any prompting from Mr Tausig: “perhaps the shares should be allotted subject to full payment on or before ‘say’ 31 March 1999.”
40. I am therefore faced with a choice between two rather unusual contentions: either that there has been a conditional issue of shares, or a nil-paid issue

without intending it. While I agree with Mr Gibbon that the facts are less clear than in *Sptizel* since there the share register made clear that the shares were allotted conditionally, it seems to me that a conditional issue of shares pending the receipt of the full amount of cash fits the facts much better than to say that there was an unconditional issue leading to the conclusion that the shares were issued nil paid. The references to investment of the money, the share certificate and return of allotments are consistent with an intention to issue fully-paid shares, and this interpretation gives full effect to the wording of the resolution to issue the shares on receipt of the money. I bear in mind that I am dealing with essentially a “one-man” company where share issues might be expected to be dealt with somewhat informally.

41. Accordingly I find that that in all these cases Mr Blackburn agreed to become a member conditionally on payment of the money even though he was registered before the money was paid. Under s 22 of the Companies Act 1985 he did not become a member until the money was paid because he agreed to become a member only conditionally on payment. Accordingly the shares were not issued to him until that time. It follows that the shares were subscribed for wholly in cash and were fully paid-up at the time the issue was completed by satisfaction of the condition.

*Payment to the Company of money before the application for shares*

42. I deal next with the payments to the Company made in advance of any reference to the issue of shares (category (a) in paragraph 24 above).
43. Mr Way relied on the Special Commissioners’ decision in *Inwards v Williamson* [2003] STC (SCD) 355, 356 to the effect that where a debt is incurred as part of the issue of shares it is outside the mischief of the legislation.
44. Mr Gibbon pointed to differences in wording between the EIS relief and reinvestment relief considered in that case, and also to the factual difference that in *Inwards* the Inspector had conceded (see p 369) that the advance made nine months before the issue was part of a single arrangement for the provision of subscription funds. He also recorded on instructions that the practice stated at 367d (that where there were available shares and the delay between any deposit and the issue was not unreasonable, by concession this would be ignored) did not exist, and that the Revenue would have liked to appeal *Inwards* but this was precluded by the way the facts were argued.
45. Although the wording of EIS relief is similar to reinvestment relief, although with some differences, I do not consider that there is any need to rely on *Inwards* as the EIS legislation deals with this point. Paragraph 13(1) of Schedule 5 to the Taxation of Chargeable Gains Act 1992 (set in paragraph 7 above), stating that if a company repays any debt in connection with the acquisition of shares to the subscriber for shares he receives value from the company and the shares are not (or they cease to be) eligible shares, does not, by para 13(2)(b), apply if the debt was incurred on (or after) the date of subscription, which I have equated with application, for the shares (and also that

the debt was not incurred for the extinguishment of an earlier debt). Accordingly, if a person applies for shares and at the same time (or later) pays cash to a company, although a debt is created in his favour because at that stage the directors have not resolved to allot the shares, there is no value received from the company resulting in the shares not being eligible shares, because the debt is incurred on or after the subscription for shares. This is the answer to Mr Way's contention that without a contract to subscribe for shares one could never satisfy the EIS conditions because paying money in advance of the issue always resulted in value received.

46. Applying this to the facts, I find that at the time of these payments a debt was created before any application (or subscription) for shares. I have found that at best there was a generalised intention eventually to issue shares for cash paid to the Company but there was no application for a specific number of shares at the time these payments were made.
47. Mr Way contends that in relation to the completion of the purchase of the property there was a set-off in accordance with *Coren v Keighley* 48 TC 370, 375E:

“...if two cross-demands for money immediately payable are honestly set off against each other without the formality of handing the money over and handing it back again, each such set-off would substantiate a plea of payment in cash and a set-off would constitute such payment.

In my view this does not arise because I have not found any application for shares prior to paying the money and so there is no debt from Mr Blackburn to the Company for shares against which anything could be set. Mr Blackburn was liable to pay the purchase price under the contract for purchase and he merely paid the money to his solicitors intending that the property be transferred to the Company. He thereby created a debt due to himself from the Company before any intention to issue a particular number of shares arose.

48. My decision is that the cases where the money was paid to the Company before any application was made for the issue of shares in respect of that money (category (a) in paragraph 24 above) are caught by the value received provisions in para 13 of Schedule 5B to the Taxation of Chargeable Gains Act 1992, but otherwise all the issues satisfy the conditions for relief.

### **Effect on the EIS relief**

49. As I had not heard any argument about the consequences of my decision on the EIS relief, I issued the decision up to this point as an interim decision and adjourned to allow the parties to make further written submissions as I had in mind that some issues failed in part and I was unclear about the effect on the relief and I wondered if the result of one issue could affect another. I am grateful for their submissions (and I must agree that my reference to “issue” in paragraph 48 above was loosely worded, but I hope the meaning was clear from the context) which have identified four payments where there was disagreement.

These relate first, to the consideration of £25,938 comprised in the issue of 144,998 shares; and secondly, to the payments of £90,000, £20,000 and £144,000 comprised in the issue of 350,000 shares. They raise similar points since part of the total subscription money (the £110,000 in the first case, and the total of £96,000 made in March and April 2000 in the second) was paid before the application for shares and created a debt unrelated to the issue of shares that was caught by the value received provisions. The question is whether this prevents any part of the issue qualifying.

50. Mr Way contends that it does not and the whole of both issues qualify.

- (1) In relation to the first, the shares issued for £110,000 were issued unconditionally on 28 September 1998, while the balance was conditional and issued when the money was paid on 30 September 1998. Although the applications were made on the same day and the share register was written up on the same day this does not prevent there being two separate issues. Suppose that Mr Blackburn had become bankrupt on 29 September he would have been entitled to the 110,000 shares but not the remainder.
- (2) In relation to the second, the payment of £96,000 (before the application for shares) resulted in unconditional issues of shares when the register was written up on 9 May 2000; the payments of £90,000 on 2 May 2000 and £20,000 on 5 May 2000 (after the application) also resulted in unconditional issues when the register was written up on 9 May 2000; the payment of £144,000 on 15 May 2000 was for a conditional issue of shares. These are four independent issues, one conditional, one unconditional with payment before the application for shares, and two unconditional with payment after the application for shares.
- (3) At the time they were issued all the shares were fully paid up. Although there was a “technical” debt discharged by the issue of shares, all the money was in fact used for a qualifying business activity.

51. Mr Gibbon contends that in both cases there was on the facts a single issue of shares.

- (1) in the first case there was a single issue of 144,998 shares (the initial subscription of £110,000, the skip hire and parking of £76, some other expenses on which relief is not now claimed, and the £25,862.85 paid on 30 September 1998, see paragraph 11(12) above). Of these, the £110,000 paid to the vendor of the property was caught by the value received provisions (which is common ground), and the £76 was not a subscription in cash.
- (2) In the second case the payments totalling £96,000 made in March and April 2000, which it is common ground are caught by the value received provisions, were made in respect of part of the single issue of 350,000, the whole issue fails to qualify.
- (3) By para 1(2)(a) the investment must be for “eligible shares in a company for which he has subscribed wholly in cash...” and by para 1(2)(f) “all the shares comprised in the issue are issued in order to raise

money for the purpose of a qualifying business activity.” These were not satisfied in relation to the whole issues.

52. I find that there was in each case a single issue of shares. In the first, the board resolution on 27 September 1998 resolved to allot 149,998 shares to Mr Blackburn on receipt of £149,998 from him, and in the second he applied in writing on 8 May 2000 for 350,000 shares and on the same day there was a board resolution allotting him 350,000 shares on receipt of £350,000 from him. Both issues were treated as single issues in the return of allotments, the share certificates and the original writing up of the share register. In my view the effect of the resolutions was that he had to pay the full £149,998 and £350,000 respectively otherwise he would receive no shares. Part of the two single issues may have been conditional and part unconditional but that does not make each part a separate issue; until the condition was satisfied the issue was not complete.
53. Paragraph 1(2)(f) requires that “all the shares comprised in the issue are issued in order to raise money for the purpose of a qualifying business activity.” Since part of the shares in each of the two issues was issued by set-off of the existing debt, he shares were in part issued not to raise money for the purpose of a qualifying business activity but in substitution of the existing debt. Mr Way contends that this is only a “technical” debt and I should consider the reality that all the money was in fact used for the qualifying business activity, but I am afraid the fact of the debt means that the paragraph is not satisfied. The result is that these two issues do not qualify and so no part of them qualifies.
54. The result is as follows:
- (1) 110,000 shares: caught by the value received provisions;
  - (2) 25,938 shares: part of an issue that not qualify in full, see paragraph 53 above so does not qualify;
  - (3) 140,000 shares: qualifies for EIS relief;
  - (4) 210,000 shares: qualifies for EIS relief;
  - (5) 100,000 shares: qualifies for EIS relief;
  - (6) 96,000 shares: caught by the value received provisions;
  - (7) 90,000 shares: part of an issue that not qualify in full, see paragraph 53 above so does not qualify;
  - (8) 20,000 shares: part of an issue that not qualify in full, see paragraph 53 above so does not qualify;
  - (9) 144,000 shares: part of an issue that not qualify in full, see paragraph 53 above so does not qualify;
  - (10) 240,000 shares: caught by the value received provisions so does not qualify;

and I allow the appeal in principle to the extent of the three issues that qualify.