**[2018] UKUT 190 TCC**

**Appeal number: UT/2015/0180**
**UTJR/2016/001**

***CAPITAL GAINS TAX – Enterprise Investment Scheme – meaning of “attributable” in section 150A(2) Taxation of Chargeable Gains Act 1992 –whether CGT exemption only available if EIS income tax relief claimed - JUDICIAL REVIEW – whether HMRC adopted flawed methodology in appraising taxpayer’s late claim for relief and exercising powers under section 5(1) Commissioners for Revenue and Customs Act 2005 – whether HMRC acted with conspicuous unfairness***

**IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS**
**AND ON APPEAL FROM THE FIRST-TIER TRIBUNAL (TAX CHAMBER)**

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**BETWEEN:**

**ROBERT AMES**

**Appellant**

**- and –**

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

**Respondents**

**AND BETWEEN**

**THE QUEEN**
**on the application of**
**ROBERT AMES**

**Claimant**

**- and –**

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

**Defendants**

**Tribunal: Mr Justice Fancourt**
**Judge Greg Sinfield**

**Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 26 and 27 April 2018**

**Keith Gordon, counsel, instructed by Mishcon de Reya LLP for the Appellant**

**Tom Richards, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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## DECISION

### Introduction

1. In January 2005, the Appellant, Mr Ames, invested £50,000 in shares in a company which the Respondents ('HMRC') accept were eligible for tax reliefs under the Enterprise Investment Scheme ('EIS'). In January 2006, the company issued Mr Ames with a form EIS3 in which the company certified that the conditions of the EIS, other than conditions which Mr Ames had to satisfy, had been satisfied in relation to the shares and specified the period for which the shares must be held for any gain realised on their disposal to be exempt from capital gains tax ('CGT'). The form EIS3 also explained how Mr Ames could make a claim to reduce his liability to income tax ('EIS income tax relief').

2. Mr Ames did not claim EIS income tax relief, however, because his taxable income for 2004-05 was only £42 which was considerably less than his personal allowance, so he had no tax liability to reduce.

3. In June 2011, Mr Ames sold his shares for £333,200. On or about 18 October 2012, Mr Ames submitted his self-assessment tax return for 2011-12. He attached his form EIS3 relating to the shares. He did not include any gain in relation to the shares in the return because he understood that the gain was exempt from CGT under the EIS. Mr Ames made a note in the white space on his return, referring to the disposal of the shares and stating that it was not taxable.

4. In June 2013, HMRC opened an enquiry into Mr Ames' tax return for 2011-12. HMRC considered that Mr Ames was only entitled to exemption from CGT if he had obtained EIS income tax relief on the acquisition of the shares and, as he had not done so, he was liable for CGT on the gain. After an exchange of correspondence, HMRC issued a closure notice on 28 January 2014 and amended Mr Ames' tax return to include a gain of £272,540 in respect of the shares. After a small adjustment for tax overpaid, Mr Ames' tax liability was recalculated as £72,176.80. Mr Ames appealed the amendment to his return and, following a statutory review, appealed to the First-tier Tribunal ('FTT').

5. The appeal was heard by the FTT (Judge Anne Redston and Tribunal Member Shameem Akhtar) in April 2015. At the hearing, HMRC were represented by one of their presenting officers, Mr Corbett. Mr Ames represented himself. Mr Ames submitted that the legislation contained an anomaly in that, if interpreted as HMRC contended, someone who had income of £1 above the personal allowance that was subject to tax could obtain 100% CGT exemption but someone, like him, with no taxable income could not obtain any CGT exemption.

6. Mr Ames also sought to make a late claim for EIS income tax relief. Section 306(1)(b) of the Income and Corporation Taxes Act 1988 ('ICTA') required any claim for EIS income tax relief to be made no later than the fifth anniversary of the 31st January following the year of assessment. It is common ground that, in Mr Ames' case, this meant 31 January 2011 for relief on the shares.

7. At the hearing, Mr Corbett accepted that Mr Ames had made a late claim for EIS income tax relief on about 18 October 2012, when he submitted to HMRC his form EIS3 relating to the shares, or in subsequent correspondence. Mr Corbett also accepted that if HMRC had agreed to accept the late claim, they would also have agreed that Mr Ames could "disclaim" his 2004-05 personal allowance so as to "uncover" his taxable income

for that year. In addressing the question of whether the Tribunal had jurisdiction to allow a late claim, Mr Corbett indicated that HMRC had a practice of allowing a late claim if a taxpayer has a reasonable excuse for failing to make the claim before the statutory deadline. However, HMRC did not accept that Mr Ames had a reasonable excuse and so refused to accept the late claim.

8. In a decision released on 7 July 2015, [2015] UKFTT 337 (TC), the FTT dismissed Mr Ames' appeal. The FTT held that the CGT exemption under the EIS depended on there having been a claim for EIS income tax relief under the scheme and the grant of relief, and the legislation could not be interpreted to exempt the gain even in a case where no liability to income tax had arisen. In relation to the late claim for EIS income tax relief, the FTT found that it did not have jurisdiction to allow Mr Ames to make a late claim or to consider the way in which HMRC had exercised their power of care and management under section 5 of the Commissioners for Revenue and Customs Act 2005. The FTT suggested in the decision that Mr Ames might wish to ask HMRC to reconsider their refusal to accept the late claim, identifying various factors that appeared to the FTT to be relevant to the question of whether a reasonable excuse existed.

9. Following the release of the FTT's decision, Mr Ames wrote to Mr Corbett on 6 August 2015 and asked HMRC to reconsider his request for a late claim on the ground that he had a reasonable excuse for the reasons set out in his letter, which are discussed more fully below. On 5 October 2015, HMRC wrote to Mr Ames informing him that they had decided to refuse his request to admit his late claim. The letter also stated that Mr Corbett had given incorrect information at the hearing and that reasonable excuse is not something that HMRC consider when deciding whether to accept late claims.

10. Mr Ames now appeals, with permission of the FTT, against the FTT's decision on the following three grounds.

(1) The first ground is that the FTT erred when it failed to construe "attributable" in section 150A(2) of the Taxation of Chargeable Gains Act 1992 ('TCGA') as meaning "able to be attributed" because, properly construed, section 150A(2) provided that a gain on the disposal of shares was exempt where income tax relief was available on the acquisition of the shares even if such relief was not actually claimed.

(2) The second ground, which is in the alternative, is that the FTT erred when it failed to give the TCGA a rectifying construction so as to ensure that exemption from CGT was available if EIS income tax relief was available on the acquisition of the shares (even if not actually claimed) and thereby accord with the clear legislative intention.

(3) The final ground was that Mr Ames' late claim for income tax relief should be admitted on the basis that he had a reasonable excuse for not making it earlier and the claim was made without unreasonable delay after the excuse ceased.

11. The third ground relied on the decision of the Upper Tribunal ('UT') in *Raftopoulou v HMRC* [2015] UKUT 579 (TCC), which concerned a late claim for repayment of tax. The UT held that where a taxpayer has a reasonable excuse for not filing such a claim within the time limit and makes the claim without unreasonable delay after the excuse ceased, section 118(2) of the Taxes Management Act 1970 ('TMA') deems the taxpayer not to have failed to comply with the time limit. That means that the claim is treated as

having been filed within the relevant time limit. However, in *HMRC v Raftopoulou* [2018] EWCA Civ 818, the Court of Appeal allowed HMRC's appeal and overturned the UT's decision. Mr Gordon, who appeared for Mr Ames, accepted that we were bound by the Court of Appeal's decision and did not argue the point before us but reserved his position for a further appeal if one became necessary. Accordingly, we need not address further the *Raftopoulou* ground in this decision, save to reject that ground of appeal, as we are bound to do.

12. Mr Ames also applies for judicial review of HMRC's refusal to allow his late claim for EIS income tax relief. In summary, Mr Ames' case is that the decision maker's methodology was flawed and, in the alternative, that the decision was irrational and/or conspicuously unfair.

**Tax appeal**

13. The tax appeal turns on the meaning to be given to the words "an amount of EIS relief is attributable to the shares" in section 150A(2) TCGA. At the relevant time, section 150A(1) and (2) provided:

> "(1) For the purpose of determining the gain or loss on any disposal of shares by an individual where–
>
> > (a) an amount of EIS relief is attributable to the shares, and
> >
> > (b) apart from this subsection there would be a loss,
>
> the consideration given by him for the shares shall be treated as reduced by the amount of the EIS relief.
>
> (2) Subject to subsection (3) below, if on any disposal of shares by an individual after the end of the period referred to in section 312(1A)(a) of the Taxes Act … where an amount of EIS relief is attributable to the shares, there would (apart from this subsection) be a gain, the gain shall not be a chargeable gain."

The 'Taxes Act' referred to in section 150A(2) is ICTA. There is no dispute that Mr Ames sold the shares after the end of the period referred to in section 312(1A)(a) ICTA.

14. Section 150A(3) provides how much of a gain is exempted from tax. In so far as material, it states:

> "(3) Where—
>
> > (a) an individual's liability to income tax has been reduced … for any year of assessment under section 289A of the Taxes Act … in respect of any issue of shares,
> >
> > (b) the amount of the reduction ('A') is less than the amount ('B') which is equal to tax at the EIS original rate for that year on the amount subscribed for the issue, and
> >
> > (c) A is not found under section 289A(2)(b) of the Taxes Act or (as the case may require) is not within paragraph (b) solely by virtue of section 29(2) and (3) of ITA 2007,
>
> then, if there is a disposal of the shares on which there is a gain, subsection (2) above shall apply only to so much of the gain as is found by multiplying it by the fraction A/B."

15. So far as material, section 150A(11) TCGA provides:

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

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

16. The first section of Chapter III of Part VII of ICTA is section 289, which sets out the main conditions to be satisfied before an individual is eligible for EIS income tax relief. Section 289A gives relief by reducing an individual's liability to income tax as follows:

> "(1) Where an individual eligible for relief in respect of any amount subscribed for eligible shares makes a claim, then, subject to the following provisions of this Chapter, the amount of his liability for the year of assessment in which the shares were issued ('the current year') to income tax on his total income shall be the following amount.
>
> (2) That amount is the amount to which he would be so liable apart from this section less whichever is the smaller of–
>
>> (a) an amount equal to tax at the lower rate for the current year on the amount or, as the case may be, the aggregate of the amounts subscribed for eligible shares issued in that year in respect of which he is eligible for relief, and
>>
>> (b) the amount which reduces his liability to nil."

17. Section 289B(1) ICTA sets out what is meant by relief attributable to shares as follows:

> "(1) References in this Chapter, in relation to any individual, to the relief attributable to any shares … shall be read, subject to the provisions of this Chapter providing for the reduction or withdrawal of relief, as references to any reduction made in the individual's liability to income tax which is attributed to those shares … in accordance with this section."

18. Mr Ames' first ground of appeal and primary case was that "attributable" in section 150A(2) TCGA means "able to be attributed" rather than "has been attributed". Mr Gordon submitted that, viewed in context, the statutory wording points to an interpretation that there are two stages to the attribution, namely eligibility and quantification. He contended that it is not necessary for a person to make a claim for and be granted EIS income tax relief in order to be entitled to the CGT exemption. If HMRC and the FTT were right in their interpretation of section 150A(2) then it would leave a hidden trap for people in the same position as Mr Ames which, in the context of a relief designed to encourage investments by private individuals, seemed unlikely.

19. Mr Gordon submitted that section 150A(1) TCGA was only concerned with the computation of the chargeable gain or loss and ensuring that a person does not obtain relief twice, ie as EIS income tax relief on acquisition of the shares and again for CGT purposes, where they are disposed of for a loss. He contended that section 150A(1) was not relevant to Mr Ames' case as he had made a gain on disposal.

20. Mr Gordon urged us to focus on the wording of section 150A(2) TCGA which used the term "attributable" and did not, as it could have done, say "has been attributed". The word "attributable" in section 150A(2) should be read as meaning "eligible" rather than "to which income tax relief has been attributed and not withdrawn". He argued that the FTT had been wrong to consider that section 150A(3) TCGA and section 289B(1) ICTA determined the interpretation of section 150A(2). Section 150A(3) did not apply in Mr Ames' case, which should be determined by reference to section 150A(2) alone. Mr Gordon also referred to section 150A(11), which provides a link between the CGT exemption provisions and the EIS income tax relief provisions in Chapter III of Part VII of ICTA. He submitted that section 289B(1) ICTA was concerned with quantification of the amount to be attributed to any shares and did not determine what is meant by income tax relief being attributable to shares. He submitted that section 150A(2) was not concerned with the quantum of EIS income tax relief on the acquisition of the shares, which was dealt with in Chapter III of Part VII of ICTA, but only that relief may be attributable to them, ie the issue of eligibility.

21. The second limb of Mr Gordon's submissions was that the FTT had been wrong to conclude, in [64] of the decision, that individuals must make a claim for EIS income tax relief and their income tax liability must be reduced in order to obtain the CGT exemption. Mr Gordon submitted that, in this case, HMRC accepted that it was theoretically possible for Mr Ames to have claimed EIS income tax relief on his income of £42 for 2004-05 by disclaiming his personal allowance for the year and making a claim. Mr Gordon pointed out that it was hard to disclaim a personal allowance in practice as the online self assessment tax return claimed it automatically. He also noted that it would not be possible for an individual who had no income in a particular year, eg because that person had made a loss, to disclaim the personal allowance. Mr Gordon said that there was no obvious policy reason why a person with no taxable income in the relevant year was not entitled to the CGT exemption on a subsequent sale of the shares where, as in this case, all other conditions had been met. Mr Gordon also pointed out that a person might be tempted to overstate their income in order to claim EIS income tax relief so that they would be able to obtain the CGT exemption if they later realised a gain on a sale of the shares.

22. Mr Gordon then submitted that the FTT had been wrong to hold, in [43], that section 150A(3)(a) TCGA showed that it was a "precondition" of entitlement to the CGT exemption that an individual's liability to income tax has been reduced for any year of assessment under section 289A ICTA. He said that simply begged the question and section 150A(3) only applies to restrict the amount of the gain exempted from CGT in specific cases set out in section 150A(3)(a), (b) and (c), all of which must apply for the subsection to have any effect.

23. Mr Gordon did not suggest that section 150A(3) TCGA should be ignored altogether. He contended that section 150A(3)(a) supported the view that "attributable" did not simply mean "attributed". If obtaining EIS income tax relief was a precondition that had to be met before the CGT exemption would be available, section 150A(3)(a) would have been otiose as that condition would have been met in every case in any event. He also pointed out that if "attributable" in section 150A(2) meant "attributed" then it would be synonymous with the phrase "an individual's liability to income tax has been reduced" in section 150A(3)(a). Mr Gordon submitted that it was highly unlikely that the draftsman would have used different formulations in consecutive subsections if they had been intended to convey the same meaning.

24. Mr Gordon submitted that section 150A(3)(c) was inserted by the Finance Act 1995to deal with an unintended error in the provision as originally enacted. Before the amendment, the legislation did not allow those who were unable to use the potentially available EIS income tax relief in full to obtain full CGT exemption because, for example, the relief was more than their income or they had other reliefs. The amendment corrected the error and allowed a person full CGT relief even where only a small amount of the available EIS income tax relief is used. He said that it was inconceivable that Parliament could have intended that a person with no income would not be able to obtain the CGT exemption while a person with taxable income of 20p could obtain the CGT exemption.

25. In summary, Mr Richards, who appeared on behalf of HMRC, submitted that the provisions relating to the EIS in ICTA and TCGA were all introduced by Schedule 15 to the Finance Act 1994 and form part of a single coherent scheme. He contended that section 150A(11) TCGA made it clear that the words "where an amount of relief is attributable to the shares" in section 150A(2) must bear the same meaning as in section 289B ICTA and the whole of chapter III of Part VII of ICTA. He submitted that the essence of Mr Gordon's submission was that "attributable" should be interpreted as "eligible" but that was not what Parliament said in the legislation.

26. Mr Richards also submitted that the history of the amendment to section 150A(3) TCGA showed that Parliament had intended that the CGT exemption should be anchored to a claim for EIS income tax relief that had been given. As introduced by Schedule 15 to the Finance Act 1994, section 150A(3) did not contain subsection (c). As a result, the CGT exemption was restricted whenever a person had been unable to claim full EIS income tax relief, even where this was because a person had insufficient income tax liability to utilise the full EIS income tax relief. This oversight was corrected and other changes introduced in the Budget of 29 November 1994. The relevant Budget Press Release set out "a number of proposals to ensure the scheme works as intended". The changes were all backdated to 1 January 1994, which was the start date of the EIS scheme. The Press Release said that the reason for the change was so that "the capital gains tax exemption will not be restricted where an investor has insufficient income tax liability to make full use of the relief." Mr Richards submitted that the FTT had been correct to observe, in [64], that when section 150A was amended to add section 150A(3)(c) "Parliament … did not detach the CGT exemption from the EIS income tax relief (although it could have solved the problem in that way) but rather retained the same mechanism: there has to be a claim, and the individual's income tax must be reduced as a result".

27. The first ground of appeal turns on the meaning of the words "where an amount of relief is attributable to the shares" in section 150A(2) TCGA. This, in our view, is a matter of interpreting the actual words of the subsection in light of the context and scheme of the EIS provisions and the discernible purpose of the provision. That context includes not just section 150A but also sections 289 to 289B and the other provisions of Chapter III of Part VII ICTA.

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

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

29. As for section 150A(3), this applies where, for reasons other than low income, only part of the potential EIS relief available in respect of shares has been given. It uses the words "where an individual's liability to income tax has been reduced". Although, again, section 150A(3) did not apply to Mr Ames, that does not mean that it is irrelevant to the interpretation of section 150A(2). Mr Gordon argued that the draftsman would not have used these words in subsection (3) to mean the same thing as "where an amount of relief is attributable to the shares" in subsection (2), and so the words in issue must mean something other than that an individual's liability to income tax has been reduced. Although that argument has some force, we consider that the explanation is simply that section 150A(3) is dealing with a different point (the calculation of the proportion of the gain that can be exempted where the amount of the EIS income tax relief is less than the tax at the EIS rate at the time on the amount invested). In order to apportion the amount of a reduction in para (b) it is necessary first to identify the amount of the reduction in income tax, either actual or deemed. It is for that reason that a specific reference to a reduction in income tax is made in subsection (3)(a), which also extends to deemed reductions under section 304 ICTA and section 245 ITA 2007.

30. Given that the subject matter of both subsections is the CGT exemption, we consider that they should be interpreted, if possible, to be consistent. In our view, the use of terms in section 150A(3) such as "an individual's liability to income tax has been reduced" and "the amount of the reduction" supports the interpretation of "an amount of relief is attributable" in section 150A(2) as relief "has been attributed and the individual's income tax liability reduced as a result". We also agree with the FTT that the fact that the insertion of section 150A(3)(c) into the original legislation by amendment under Schedule 13 to the Finance Act 1995 left the link between a claim for EIS income tax relief and the CGT exemption in place indicates that Parliament intended there to be such a requirement.

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

32. For those reasons, we reach the same view as the FTT and, accordingly, we refuse Mr Ames' appeal on the first ground.

33. In relation to Mr Ames' second ground of appeal, Mr Gordon submitted that if we felt constrained to interpret section 150A(2) as the FTT had done then we should apply a rectifying construction so as to ensure that the gain was exempt from CGT if EIS income tax relief was available on the acquisition of the shares even if not actually claimed or obtained. Mr Gordon submitted that there was no obvious policy justification to exclude those who had no income or insufficient income fully to use their personal allowance from obtaining CGT exemption on the disposal of shares. He referred us to the judgment of Lewison LJ in *Pollen Estate Trustee Company Ltd v HMRC* [2013] EWCA Civ 753; [2013] STC 1479 which, at [25], cited the guidance in relation to rectifying construction given by the House of Lords in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, per Lord Nicholls at 592:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. …
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

34. Mr Gordon also referred us to paragraphs 22 and 23 of Lewison LJ's judgement in *Pollen Estate* where he said:

> "The position then, in my judgment, is that no policy justification has been advanced for the anomalous position in which these three charities find themselves. The Upper Tribunal concluded (at [20]):
>
> > 'We therefore approach the question of construction of the legislation on the footing that there was no policy of any sort which would have led Parliament deliberately to exclude exemption in the cases under appeal.'
>
> I agree. If Parliament did not deliberately exclude exemption in the cases under appeal, then it seems obvious that, if it did so, it did so by mistake."

The decision in *Pollen Estate* therefore shows that a rectifying construction may be appropriate where the mistake is of the scope of the statutory provision and not merely in

the case of a linguistic error. Nevertheless, the three conditions identified by Lord Nicholls must be clearly satisfied.

35. Mr Gordon submitted that, in the absence of a policy reason to exclude (in this case) persons without any or sufficient income from the CGT exemption it is clear that it was a mistake and we can apply a rectifying construction. In Mr Ames' case, the EIS income tax relief and CGT exemption offer different kinds of incentives aimed at individual small investors, not businesses, and the rules should be capable of being understood by such investors. He submitted that if Parliament had intended that there must have been a claim for EIS income tax relief before an individual could obtain CGT exemption, it would have done so in clear terms. He also pointed out that, at the time, the guidance issued by HMRC, then the Inland Revenue, did not say that a person must have income and claim EIS income tax relief before being entitled to the CGT exemption and there was nothing in the notes to the form EIS3 that told the individual investor that they must claim income tax relief in order to claim CGT exemption subsequently.

36. Mr Richards submitted that there was no basis on which the Tribunal could suppose, let alone be abundantly sure, that Parliament intended to create an entitlement to CGT exemption that operated independently of a valid claim to income tax relief. Subsequent press releases emphasised that the exemption was not restricted in the case of an investor who had insufficient income to make *full* use of the tax relief, and correspondingly that a loss made on a disposal of eligible shares to which *some income tax relief* was attributable would be an allowable loss. He submitted that the third precondition of Lord Nicholls was not satisfied either, since a decoupling of CGT exemption from income tax relief could have been done in a number of ways; and finally that it would be constitutionally improper to 'correct' a part of section 150A that Parliament did not take the opportunity to correct in the Finance Act 2005. He added that Mr Ames could have made a valid claim for EIS income tax relief in the relevant year, and that therefore Mr Gordon's example of a person with no income was purely hypothetical and took the matter no further in this case.

37. We accept Mr Richards' submissions on this point. We do not consider that we can be "abundantly sure", to use Lord Nicholls' term, that the intended purpose of section 150A(2) was to allow CGT exemption on the disposal of shares where no EIS income tax relief had been obtained. Parliament could have decoupled the two tax reliefs in a way that would have benefited those who paid no income tax in the relevant year, but equally Parliament could have intended the question of eligibility for CGT exemption to be determined at the earlier stage of claiming and receiving income tax relief. It is not obvious that no policy justification could justify linking the two types of tax relief in that way, given the initial minimum holding period of 5 years to qualify for relief. It is therefore not obvious that such a link was a mistake, even if it may have had anomalous results for subscribers of EIS shares who had no income tax liability. Further, the fact that Parliament retained the link between an EIS income tax relief claim and the CGT exemption when amending the legislation in 1995 to correct an error shows, in our view, that the link was a deliberate and intended feature of the EIS. If such a link was an error then we consider that it would have been detected in the review of the legislation that led to the insertion of section 150(3)(c). It seems to us to be unlikely that the draftsman and Parliament would have, by inadvertence, failed to give effect to the purpose of section 150A(2) not merely once but twice.

38. We also consider that it is not abundantly clear what provision Parliament would have made in section 150A had it intended to extend the benefit of CGT exemption to those who had no relevant income tax liability. It is uncertain whether Parliament would have left the matter as a question of eligibility for relief or whether a claim for relief would have had to be made, in order to establish the eligibility, even if no actual relief could be obtained.

39. Accordingly, we do not consider that we would be entitled to apply a rectifying construction.

40. For the reasons given above, we dismiss Mr Ames' tax appeal.

**Judicial review**

41. It is common ground that HMRC has jurisdiction under their care and management responsibilities in section 5(1) of the Commissioners for Revenue and Customs Act 2005 to admit a late claim for EIS relief. This discretion is unfettered.

42. On 6 August 2015, Mr Ames wrote to Mr Corbett referring to the decision of the Tribunal and in particular the jurisdiction to extend time limits if a taxpayer has a reasonable excuse for not meeting the time limit. He said: "This has prompted me to ask HMRC to consider my request for a late claim on the basis of my reasonable excuse, which I will explain fully in this letter."

43. Mr Ames then set out in considerable detail his unfortunate personal circumstances, during and after the tax year in question, and the medical treatment that he underwent. While admitting a mistake in not claiming relief, Mr Ames explained that HMRC's guidance on EIS in guidance leaflet IR137 was unclear about the importance of claiming income tax relief in order to be able to claim CGT exemption later. He also claimed that he did not realise until March 2015 that a personal allowance could be disclaimed, which would have allowed him to make a claim for EIS income tax relief. He explained that had he known these matters he would have made a claim by the statutory deadline.

44. The remainder of the letter is concerned with the extenuating personal circumstances on which Mr Ames relied. The letter does not say anything about his telephone conversations with officers of HMRC in April and May 2011. In the later of those conversations, with a Mr McKenzie, Mr Ames provided detailed information about his personal circumstances, including the absence of any income tax liability in the relevant tax year, and was told that despite not having made an EIS income tax relief claim he would be fully exempt from CGT. Mr McKenzie identified the published guidance that he believed supported his advice and told Mr Ames to rely on that guidance in due course, should he ever be challenged about CGT liability. Mr Ames relied on that advice when he sold the shares in June 2011 and crystallised a large capital gain.

45. On 5 October 2015, HMRC informed Mr Ames of their decision to refuse his request to admit his late claim. The decision letter was signed by John Clarke, as Officer of HM Revenue and Customs. The first paragraph indicated that he had consulted a colleague in Central Policy regarding the late claim. The decision letter states:

> "HMRC will not accept a later claim or election unless the reasons it was late were beyond the person's control. Late claims are not accepted when there is negligence or oversight, misinterpretation of legislation,

> illness or absence of an agent, but in very specific circumstances a late claim can be accepted if the person could not deal with their tax affairs due to illness or other good reason and the illness prevented them making the claim or election within the time limit time [*sic*] and prevented them from seeking assistance. This is set out in HMRC's Self Assessment Claims Manual guidance at SACM10040."

46. As will be seen, that paragraph corresponds with point three of the Guidance identified in it.

47. The decision letter then refers to the personal circumstances on which Mr Ames relied and states "in my colleague's opinion none of them prevented you from making your claim on time or from seeking assistance to make the claim".

48. The decision letter then addresses the complaint that guidance leaflet IR137 did not make sufficiently clear the need to obtain EIS income tax relief in order to obtain CGT exemption and quotes from parts of that guidance and other guidance on Venture Capital Schemes.

49. The decision letter rejects the contention that Mr Ames' illness prevented him from submitting a claim for EIS income tax relief. It refers to the telephone conversations in April and May 2011 but rejects these as being of any relevance because they came after the deadline for making a claim had already expired. It proceeds to reinforce the point that incorrect interpretation of guidance and legislation is not a reason to accept a late claim.

50. The letter then refers to what was said at the FTT hearing:

> "Unfortunately the Tribunal was given to believe that HMRC would consider a late claim if an individual had a reasonable excuse for the claim being late and you have submitted your letter on that basis. I am afraid this is incorrect and the concept of reasonable excuse does not come into consideration in accepting late claims. Time limits for making claims cannot be extended unless there is a specific legislative provision. There is no such provision in s.202 Income Tax Act 2007. I am sorry for the misleading comments at the Tribunal hearing in this respect."

51. The decision letter therefore acknowledges that Mr Ames was misled and that he submitted his request for a late claim to be admitted on a basis that was, as a result, incorrect.

52. The decision letter then refers to HMRC's care and management powers under section 5(1) of the 2005 Act and that these permit it to consider, in exceptional circumstances, whether late applications can be accepted. It continues:

> "The way HMRC exercises these discretionary powers in relation to late applications is to consider whether a case falls within any of the three categories- [1] whether the notification was late because of an error by HMRC or another Government department, [2] whether there was a clear intention to apply that was notified to HMRC before the deadline (when in exceptional cases the deadline may be extended for a short period), and [3] where the notification was late for reasons beyond the person's control. The exercise of these powers must be

> consistent across the taxes for which HMRC is responsible." (numbering added)

53. This paragraph identifies three numbered categories, which correspond with points one, two and three in the Guidance Note SACM10040. It also shows that the decision maker considered that the exceptional circumstances justifying admission of a late claim were limited to these three cases.

54. In Guidance Note SACM10040, there are two further points made. The first relates to the relevance of there being an avoidance scheme, which is of no relevance to this case. The second, headed "other considerations", states:

> "There may be exceptional cases that do not meet these conditions and are not covered by guidance concerning the particular claim or election, where it may still be unreasonable for HMRC to refuse a late claim or election."

55. As Mr Richards accepted, this additional point is important. But for its presence, Guidance Note SACM10040 would be inappropriately fettering the broad discretion that HMRC accepts that it has under section 5(1) of the 2005 Act. It is an important residual category of case, where particular or exceptional circumstances may make it unreasonable for HMRC to refuse a late claim.

56. The judicial review claim form was issued on 22 December 2015. The grounds relied on, as set out in a Statement of Facts and Grounds dated 11 January 2017, are that the Decision Letter deployed a flawed methodology and, in the alternative, that the decision was irrational and/or conspicuously unfair, there being in the circumstances no rational basis for refusing to admit Mr Ames' claim out of time.

57. As to the first ground, the particular complaints made by Mr Ames are that the decision maker:

(1) Misapplied guidance SACM10040 by failing to consider the fifth point; or alternatively

(2) The decision maker fettered HMRC's discretion by considering only three points set out in the Guidance, and

(3) Failed to take into account material considerations that should have been taken into account.

58. It is accepted by Mr Ames that, although HMRC had an unfettered discretion whether or not to admit an out of time claim for relief, Guidance Note SACM10040 provided appropriate guidance on how the exercise of discretion should generally be approached. The complaint is rather that the Guidance was not followed, in that the decision maker referred to and applied only three of the five points there set out (no complaint is made in relation to the fourth). It is clear that the decision maker was applying the terms of SACM10040 in writing the decision letter: some of the wording is identical. As stated above, the residual fifth point is of importance. If the decision maker effectively treated the guidance as comprising only points one to three then he failed to follow the Guidance and so, absent a consideration of the residual fifth point, HMRC's discretion was exercised on a wrongly restrictive basis.

59. Mr Richards submits that it is clear that the decision maker had the relevant guidance in mind and was purporting to follow it. That may be so, but it is equally evident from the decision letter that the decision maker did not follow it fully, in particular by failing to consider the fifth point. This is clear from the paragraph cited above, starting: "The way HMRC exercises these discretionary powers…", and from a later paragraph referring to Mr Ames' personal difficulties which states: "However this does not fall into any of the categories outlined above". The fact that a broader consideration of the merits was not carried out is also shown by the contention that "the concept of reasonable excuse does not come into consideration in accepting late claims". Although reasonable excuse might not be a criterion in itself for admitting a late claim, it would clearly be likely to be a relevant factor when considering other circumstances that justified late admission.

60. In short, it cannot be inferred, in the light of the terms of the decision letter, that the decision maker had the residual discretion in mind and decided not to exercise it.

61. A second argument relied upon by Mr Richards is that Mr Ames' letter dated 6 August 2015 does not refer to or rely upon any other circumstances beyond the matters that are addressed in the decision letter, and so no further consideration was needed in relation to the exercise of discretion. We do not accept this. First, the letter does expressly refer to Mr Ames' lack of knowledge that he could disclaim his personal allowance in order to make a claim for relief. This was potentially significant, in identifying unusual or exceptional circumstances in Mr Ames' case. It also meant that a claim for relief would be no more than a formality, in Mr Ames' case, with no financial consequences in terms of income tax due. That strikes us as a very material point.

62. Second, and in any event, in view of Mr Ames having been misled by Mr Corbett, it is understandable that the letter focused on Mr Ames' personal circumstances prior to 31 January 2011 and did not refer to what occurred after that date. Having misled Mr Ames into making a claim for relief on a wrong basis, HMRC was bound in fairness to him to enquire further into the circumstances surrounding Mr Ames and his claim and not merely confine itself to the terms of his letter.

63. A note on Mr Ames' self-assessment files, readily available to the decision maker, contains an entry for 23 May 2011 as follows:

> "TELI COND/Possible disposal 10/11 of EIS shares/Confirmed exempt from CGT if all criteria for EIS Disposal Relief satisfied – referred to HS297 also VCM30150 – covers situation where no tax relief given when shares bought because NNL that year (04/05)"

64. The facts set out in the FTT's decision, which make clear that Mr Ames had virtually no taxable income in the relevant tax year, and the last part of this note on his file, should have alerted the decision-maker to the possibility that Mr Ames might have been led to believe that CGT exemption was available even if a taxpayer obtained no tax relief in the relevant year because he had no tax liability. As is now known and accepted, the transcripts of the conversation between Mr Ames and Mr McKenzie do indeed show very clearly that Mr McKenzie understood that full CGT relief would be available and confirmed this to Mr Ames. These transcripts were not before Mr Clarke when he made his decision.

65. Mr McKenzie's understanding and advice is relevant in two ways. First, it demonstrates that even an expert and conscientious tax advisor retained by HMRC

misunderstood HMRC's Guidance as it applied to Mr Ames' circumstances. Second, it demonstrates that Mr Ames was given (wholly unintentionally) misleading information at a time when he was seeking confirmation of the tax consequences prior to selling his shares.

66. It is not necessary for us to determine that the decision maker had before him (in the sense of being reasonably available to him, such that he should have accessed it) the detail of the conversation between Mr Ames and Mr McKenzie. Putting that to one side, it is nevertheless clear that the decision maker wrongly fettered his discretion, by treating the relevant Guidance as if it comprised only points one to three. As a result, there was no consideration of whether Mr Ames' case was an exceptional case that did not fall within points one to four, but where it might still be unreasonable for HMRC to refuse a late claim. The decision making process was flawed. This conclusion is no arid procedural technicality: there seem to us to be particular circumstances of the taxpayer here that are unusual, possibly extremely unusual, for a claimant of EIS relief, even apart from his unfortunate personal difficulties.

67. We consider that two very relevant matters were evidently not considered at all by the decision maker. The first is that, by reason of Mr Ames' virtually non-existent income for the relevant tax year, claiming relief would result in no income tax relief being obtained by him. It would be a pure formality simply in order to preserve his entitlement in principle, in future, to CGT exemption. The late claim would not result in any reduction in Mr Ames' income tax liability nor a refund of income tax previously paid.

68. The second point is that it was perfectly reasonable and understandable for Mr Ames to believe that, given his very small income, he did not have to make a claim for relief. That is demonstrated by the fact that Mr McKenzie so understood the legislation and guidance. There is no guidance dealing specifically with Mr Ames' unusual circumstances, namely that he had no income on which he would pay income tax in the tax year in question. Not just a claim but actual relief against income tax is required in order to benefit from CGT exemption. In order to achieve that, Mr Ames would have had to waive in whole or in part his personal allowance. That is entirely counter-intuitive and was not dealt with in any guidance. Mr Ames' circumstances were therefore different from the usual type of EIS investor, who has relatively high income on which relief against tax was being sought. The legislation has created an anomaly, for investors with taxable income below the personal allowance and there was no HMRC guidance on this point at the relevant time. In these unusual circumstances, recourse by HMRC to the principle that misunderstanding of legislation or guidance does not justify a late claim is too inflexible and mechanical an approach.

69. Accordingly, we conclude that the decision making process was flawed in that the decision maker misapplied HMRC guidance, thereby in effect fettering the exercise of his discretion, and failed to take into account at least two very material facts.

70. The second ground on which judicial review is claimed is that the decision made was irrational and/or conspicuously unfair. This particular formulation derives from the case of *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681. In that case, the Commissioners had consistently, year after year, ignored a deadline for the taxpayer to seek group tax relief. It then suddenly and without warning sought to rely on the deadline. Unsurprisingly, its decision to do so was held to be unlawful. Sir Thomas Bingham MR held that reliance on the time limit in such circumstances, without any

advance notice, was so unfair as to amount to an abuse of power. He went on to consider whether the decision was "so unreasonable as to satisfy the public law test of irrationality". His conclusion was:

> "I cannot see that any decision-maker fully and fairly applying his mind to this history, and in particular to factors (1)-(10) listed in section IV above, could have concluded that the legitimate interests of the public were advanced, or that the Revenue's acknowledged duty to act fairly and in accordance with the highest public standards was vindicated, by a refusal to exercise discretion in favour of Unilever. I share the judge's conclusion that this refusal, if fully informed, was so unreasonable as to be, in public law, irrational."

71. Simon Brown LJ agreed that unfairness amounting to an abuse of power existed where it was "either… illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power"

72. In effect, Mr Gordon contends that any decision-maker properly directing itself as to the relevant facts and consideration of this case, must come to a conclusion in Mr Ames' favour, and that the contrary conclusion would be perverse.

73. We bear in mind that the question is to be decided on the basis of the relevant facts and considerations reasonably available to the decision-maker on 5 October 2015. Those circumstances included the file note of the conversation of 23 May 2011 but arguably not the transcript, on the basis that a reasonable decision-maker could decide that it was unnecessary or inappropriate to cause a full transcription of the conversation to be made in order to reach a decision.

74. On the basis that the detail of the McKenzie conversation is not to be treated as available and the file note is ambiguous, we are unable to conclude that Mr Ames has surmounted the very high hurdle to establish that the decision was an abuse of power in the sense indicated in the *Unilever* case. It is not for us to decide what a reasonable decision would be if the matter is reconsidered by HMRC. However, the matters that we have referred to in paragraphs [68] and [69] above are clearly relevant considerations. So too will be the full terms of the McKenzie conversation, given that, as a result of HMRC's advice, Mr Ames lost the chance to put in a much earlier claim for relief (that would have been only three months or so late) or to avoid or at least defer a liability to pay CGT for the 2011/12 tax year, or both.

75. Accordingly, we will not declare the decision made to be irrational but we quash it and remit it to HMRC for re-consideration in the light of this judgment.

**Disposition**

76. For the reasons given above, Mr Ames' appeal against the FTT's decision is dismissed but we quash HMRC's decision of 5 October 2015 and remit it to HMRC for re-consideration.

**Costs**

77. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**The Hon Mr Justice Fancourt**

**Upper Tribunal Judge Greg Sinfield**

**Release date: 25 June 2018**