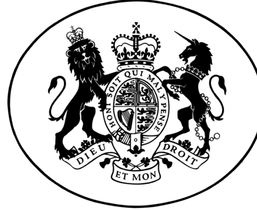

TC0437

Appeal numbers: TC/2012/08988
TC/2012/08990
TC/2012/09115
TC/2012/09286

Income tax – enterprise investment scheme – withdrawal of relief – share for share exchange – whether company became a 51% subsidiary of another company within s 185 Income Tax Act 2007 – whether shares in target company disposed of for the purposes of s 209 Income Tax Act 2007 – meaning of "company" for the purposes of s 185 Income Tax Act 2007 – whether assessing procedure in s 234 and s 235 Income Tax Act 2007 correctly followed – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GREGORY FINN **Appellants**
AVERIL FINN
ANDREW CORNISH
ROBIN MORRIS

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROBIN VOS
TOBY SIMON

Sitting in public at Seacourt Tower, Oxford on 13 March 2015

Mrs Averil Finn did not appear and was not represented
The remaining Appellants in person

Simon Foxwell, senior litigator, appeals and reviews, local compliance, HM Revenue & Customs, for the Respondents

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DECISION

1. It might be expected that, where a company which satisfies the rules for issuing shares which qualify for relief under the enterprise investment scheme ("EIS") is taken over by another company which also satisfies those conditions by way of a share for share exchange, the shareholders in the target company who obtained income tax relief under the EIS in respect of their investment would not lose that relief.

2. The appellants in this case were therefore surprised in exactly these circumstances to receive notices of assessment withdrawing the relief which they had previously claimed. Each of them appeals against those assessments.

3. As each of the appellants had invested in the same company and the withdrawal of relief arose as a result of the same transaction, the Tribunal directed that the appeals should be joined and heard together.

4. The appellant Mrs Averil Finn did not appear and was not represented. Prior to commencement of the hearing, Mrs Finn confirmed to the judge by telephone that she had received notice of the hearing and that she was content for the hearing to proceed in her absence. The Tribunal was therefore satisfied that Mrs Finn had received notice of the hearing and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33.

Evidence/facts

5. The evidence consisted principally of an agreed bundle of documents prepared by HMRC together with a smaller agreed bundle of documents prepared by the appellants. In response to questions put by Mr Foxwell, the appellants also provided some further evidence as witnesses.

6. There was no dispute as to the facts although there was some disagreement as to the inferences which we should draw from some of the evidence. We will come to this later.

7. From the evidence, we find that the relevant facts are as set out below.

8. PhotonStar LED Ltd ("PhotonStar") was a private company set up in March 2007 to design and manufacture low energy, low carbon LED lighting.

9. During the tax years ended 5 April 2009 and 5 April 2010 the appellants subscribed for shares in PhotonStar and obtained EIS relief in respect of the amounts which they had invested. The amounts invested and the tax relief at stake are set out below.

Appellant	Tax Year	Investment (£)	Tax relief (£)
A Cornish	Year ended 5 April 2009	30,000.00	6,000.00
G Finn	Year ended 5 April 2010	7,500.25	1,500.05
A Finn	Year ended 5 April 2010	22,501.00	4,500.20
R Morris	Year ended 5 April 2009	66,749.65	13,350.00
R Morris	Year ended 5 April 2010	33,647.10	6,729.42
Total		160,398.00	32,079.67

10. PhotonStar submitted compliance statements on form EIS1 in respect of each investment and HMRC issued a form EIS2 for each investment authorising PhotonStar to issue a certificate to the appellants on form EIS3 which enabled the appellants to claim income tax relief under the EIS.

11. In total, PhotonStar had 12-15 EIS investors who invested in aggregate approximately £712,000. As can be seen from the table set out above, the appellants invested a total of approximately £160,000.

12. During the latter part of 2010, the management of PhotonStar decided to seek a listing on the Alternative Investment Market ("AIM") in order to raise the company's profile and to secure further funding. In order to do this more quickly and at a lower cost, PhotonStar identified an existing AIM listed company, Enfis Group Plc ("Enfis") and entered into negotiations with Enfis with a view to agreeing what is often referred to as a "reverse takeover" – ie where the weaker company takes over the stronger company but where the shareholders, management and business of the combined group is principally that of the stronger company. Enfis was also in the LED lighting business but in a different segment, providing specialist solutions for film and television production lighting as well as medical applications.

13. On 26 October 2010, the Cardiff office of PKF (UK) LLP wrote to HMRC requesting various clearances. This included a request for confirmation that, assuming the proposed transaction went ahead, Enfis would continue to be a "qualifying company" for the purposes of the EIS and that it would therefore be able to issue certificates to new investors allowing them to claim EIS relief on the amounts invested. HMRC gave the confirmation requested on 10 November 2010.

14. The appellants gave evidence that, although PKF were, historically, the accountants to Enfis, during the period in question, they were effectively representing both Enfis and PhotonStar. We were invited to infer from this that PKF's letter of 26 October 2010 was written on behalf of both Enfis and PhotonStar.

15. HMRC on the other hand drew our attention to the fact that HMRC's reply referred in its heading only to Enfis as well as the fact that the letter came from PKF in Cardiff with Enfis being based in Swansea and PhotonStar being based in Romsey,

Hampshire. HMRC invited us to infer from these facts that PKF's letter was written on behalf of Enfis alone.

16. The reason why this is relevant will become apparent in our discussion below. It is unfortunate that PKF's letter of 26 October 2010 was not included in the bundle of evidence provided to the Tribunal. However, for the reasons put forward by HMRC, we draw the inference from the facts which we have found that the PKF letter was written on behalf of Enfis alone.

17. On 30 November 2010, PhotonStar wrote to its shareholders to tell them that Enfis had made an offer to acquire all of the shares in PhotonStar in exchange for an issue of shares in Enfis, that shareholders holding 73% of the voting shares in PhotonStar had accepted the offer and that the remaining shareholders were therefore required, under PhotonStar's articles, to transfer their shares on the same terms.

18. On 24 December 2010, Enfis acquired all of the shares in PhotonStar issuing 12.609 new 10p shares in Enfis in return for each share in PhotonStar. At the same time, Enfis changed its name to PhotonStar LED Group Plc. Enfis therefore became the owner of all of the shares in PhotonStar.

19. As part of the transaction, Enfis transferred all of its existing business to a new subsidiary then known as MC487 Limited but subsequently renamed PhotonStar Technology Limited.

20. PhotonStar was the dominant party in the negotiations and in the combined group:

(1) The controlling minds were Dr James Mckenzie and Dr Majd Zoorob, Chief Executive Officer and Chief Technical Officer respectively of PhotonStar and, after the reverse takeover, Enfis.

(2) The majority of the Enfis board of directors resigned at the time of the reverse takeover.

(3) For the purposes of the takeover code a concert party existed, made up as to 92% of PhotonStar shareholders.

(4) Following the reverse takeover, 77.5% of Enfis was held by the previous shareholders of PhotonStar and 22.5% by the pre-existing Enfis shareholders.

(5) In the year following the reverse takeover, the Enfis group had 160 employees, only one of which came from the prior Enfis business.

21. HMRC became aware of the reverse takeover and on 5 April 2011 wrote to PhotonStar stating that:

> "The company is no longer considered to be a qualifying company for the purposes of chapter 4, part 5 Income Tax Act 2007, for the EIS …"

The letter went on to say that:

> "To ascertain the effects this transaction has on the EIS investors could you please confirm the following:
>
> (1) the number of shares in issue at the time of the takeover;

> (2) the consideration or share ratio received;
>
> (3) your agreement the company no longer qualifies for the above schemes".

22. By June 2011, HMRC had not received a reply from PhotonStar and on 13 June 2011 wrote a further letter to PhotonStar which purported to be a notice under s 234(3)(b) Income Tax Act 2007 ("ITA 2007") that the shares were no longer eligible shares for EIS purposes. The grounds for this decision were stated to be as follows:

> "On 24 December 2010 a reverse takeover occurred resulting in the company coming under the control of PhotonStar LED Group Ltd. As a result the company no longer meets the requirements of s 181 Income Tax Act 2007 for the purposes of the EIS.
>
> From this date the company did not meet the requirements of chapter 4, part 5 Income Tax Act 2007. Any claims made under the Enterprise Investment Scheme relating to the mentioned shares issued will be reclaimed and any future claims will be refused."

23. On 4 July 2011, Mr Ceri Jones (the company secretary and chief financial officer of PhotonStar) wrote back to HMRC. Mr Jones' letter was stated to be:

> "Further to your letter of 5 April 2011"

and proceeded to provide the information which HMRC had requested in that letter. Mr Jones answered the three questions relating to the EIS asked by HMRC in their letter of 5 April 2011 and, in response to the third question, stated:

> "We agree that the company no longer qualifies for the EIS scheme."

24. Mr Jones resigned from the company in about October 2011 and finally left in about April 2012. We had no evidence from Mr Jones.

25. HMRC replied to Mr Jones on 14 July 2011 requesting some additional information about the shares issued by Enfis in exchange for the shares in PhotonStar. PhotonStar provided the information requested by HMRC on 26 September 2011.

26. During the period March – May 2011, the group had acquired a further company called Camtronics Vale Ltd. This acquisition put the combined headcount over the EIS threshold of 50 employees. With this background and on the basis that Mr Jones in his letter stated that "the company *no longer* qualifies for the EIS scheme" (our emphasis) the appellants suggested that we should infer that, in agreeing that the company no longer qualifies for the EIS scheme, Mr Jones had in mind the fact that the number of employees of the group now exceeded 50 rather than the fact that PhotonStar was now wholly owned by Enfis.

27. We find this highly improbable. Mr Jones' letter was clearly a response to HMRC's letter of 5 April 2011. That letter was clear that the reason HMRC considered that PhotonStar no longer qualified was because of the reverse takeover. Mr Jones' statement that the company "no longer" qualified simply tracked the wording of the question asked by HMRC. We therefore infer that Mr Jones did in fact accept that, as a result of the reverse takeover, PhotonStar ceased to qualify for the EIS.

28. On 1 November 2011, HMRC issued notices of assessment to each of the appellants. The notices were all in the same form and stated:

> "On 24 December 2010 the company's shares were acquired by PhotonStar LED Group Ltd resulting in the company no longer meeting the criteria set out by chapter 4, part 5 Income Tax Act 2007."

The Law/issues

29. The legislation setting out the conditions which need to be satisfied in order for EIS relief to be available is contained in part 5 ITA 2007. Some of those conditions have to be satisfied by the company and some by the investor.

30. The conditions to be satisfied by the company are set out in chapter 4, part 5 ITA 2007. The following provisions of that chapter are relevant:

(1) Section 180 ITA 2007 summarises the conditions which have to be satisfied.

(2) Section 181 ITA 2007 sets out various conditions which must be satisfied in relation to the trade carried on by the company if it is to qualify for relief.

(3) Section 185(2)(a)(i) ITA 2007 denies relief if, at any time within the period of three years beginning with the issue of the shares, the company is a 51% subsidiary of another company with a limited exception for certain share-for-share exchanges described in s 247 ITA 2007 (see below).

31. Section 1154(2) Corporation Tax Act 2010 ("CTA 2010") (applied by s 989 ITA 2007) explains that one company is a 51% subsidiary of another if more than 50% of that company's ordinary share capital is owned directly or indirectly by the other company.

32. A company is defined in s 992(1) ITA 2007 as:

> "any body corporate or an unincorporated association, but does not include a partnership, a local authority or a local authority association".

33. Chapter 6, part 5 ITA 2007 deals with the withdrawal or reduction of EIS relief. The following provisions are relevant:

(1) Under s 209 ITA 2007, relief is to be withdrawn or reduced if the investor disposes of any shares to which EIS relief is attributable within the period of three years after they were issued. Again, s 247 ITA 2007 provides an exception for certain share-for-share exchanges. If the disposal is a bargain at arm's length, the relief is withdrawn entirely if the value of the consideration received for the disposal exceeds the amount originally invested. If the consideration is less than the amount invested, the relief is reduced pro rata.

(2) Section 234 ITA 2007 sets out various provisions which are relevant where (as HMRC say is the case here) relief is subsequently found not to have been due. It provides as follows:

> "**234 Relief subsequently found not to have been due**
>
> (1) Any EIS relief obtained by the investor which is subsequently found not to have been due must be withdrawn.

(2) EIS relief obtained by the investor in respect of the relevant shares may not be withdrawn on the ground-

a. that the requirements of sections 174 and 175 (the purpose of the issue and use of money raised requirements) are not met in respect of the shares, or

b. that the issuing company is not a qualifying company in relation to the shares (see Chapter 4),

unless the requirements of subsection (3) are met.

(3) The requirements of this subsection are met if either-

a. the issuing company has given notice under section 241, or paragraph 16(2) or (4) of Schedule 5B to TCGA 1992, (information to be provided by issuing company etc) in relation to the relevant issue of shares, or

b. an officer of Revenue and Customs has given notice to that company stating the officer's opinion that, because of the ground in question, the whole or any part of the EIS relief obtained by any individual in respect of shares included in the relevant issue of shares was not due.

(4) In this section 'the relevant issue of shares' means the issue of shares in the issuing company which includes the relevant shares."

(3) Section 235 ITA 2007 contains the assessing procedure where relief is withdrawn or reduced. It provides as follows:

"**235 Assessments for the withdrawal or reduction of EIS relief**

If any EIS relief which has been obtained falls to be withdrawn or reduced under Chapter 6, it must be withdrawn or reduced by the making of an assessment to income tax for the tax year for which the relief was obtained."

(4) Under s 241 ITA 2007, the issuing company is required to provide information to HMRC in certain circumstances. In particular, if an event occurs as a result of which the issuing company ceases to be a qualifying company, the issuing company must notify HMRC "within 60 days of the event".

34. As we have mentioned, there is a limited exemption from the disqualifying provisions in s 185 and s 209 ITA 2007 for an exchange of shares which falls within s 247 ITA 2007. Section 247 ITA 2007 only applies if certain conditions are satisfied. The first condition (in s 247(1)(a) ITA 2007) is that, at the time of the acquisition, the only issued shares in the acquiring company are "subscriber shares". It is accepted by the appellants that Enfis did not satisfy this condition and that s 247 ITA 2007 does not therefore apply.

35. The issues we have to determine are as follows:

(1) whether PhotonStar has become a 51% subsidiary of another company within s 185(2)(a)(i); or

(2) whether the appellants have disposed of their shares in PhotonStar so that their EIS relief should be reduced or withdrawn under s 209 ITA 2007;

and, in either case

(3) whether the assessments have been validly issued.

The Appellants' Arguments

36. The appellants' arguments fell into two categories:

(1) A substantive argument that PhotonStar had not become a 51% subsidiary of another company and that relief could not therefore be withdrawn.

(2) Various procedural arguments, as a result of which the appellants say that the notices of assessment are defective or are not validly issued.

51% subsidiary

37. The appellants say that PhotonStar has not become a 51% subsidiary *of another company* (our emphasis) as required by s 185(2)(a)(i) ITA 2007.

38. They argue that, in substance, the transaction which took place on 24 December 2010 was a takeover of Enfis by PhotonStar even though it took the legal form of an acquisition by Enfis of all of the shares in PhotonStar. This is clear they say from the facts which we have found in paragraph 20 above. They contend that it is also supported by various statements contained in Enfis' accounts. For example, the 2010 accounts state that:

> "The group is required to treat PhotonStar LED Ltd as the acquiring company."

39. The appellants' main argument however is that Enfis and PhotonStar are, in effect, a single "company" so that PhotonStar is not a subsidiary of *another* company. They referred to the definition of "company" which, as mentioned above, is defined in s 992 ITA 2007 as meaning "any body corporate …".

40. In the absence of any definition of "body corporate" in the tax legislation, the appellants turn to the Oxford English Dictionary which defines a "body corporate" as "an entity legally authorised to act as a single individual and having legal rights and duties; a corporation". A "corporation" is defined in the Oxford English Dictionary as "a body corporate legally authorised to act as a single individual".

41. They accept that these definitions are somewhat circular but refer also to s 832 Income & Corporation Taxes Act 1988 which provided (it was repealed in 2010) that the definition of "company" in that section "does not apply where the context otherwise requires because some other definition of 'company' applies". This, they say, indicates that the meaning of "company" is fluid and open to interpretation particularly, in the absence of any satisfactory definition of "body corporate".

42. In order to support this argument, they referred to various cases.

43. The first case the appellants referred us to was *Littlewoods Mail Order Stores Ltd v IRC* [1969] 3 All ER 855. In that case, Littlewoods effectively tried to get a deduction against its profits for the purchase of the freehold of their flagship store in Oxford Street. A subsidiary of Littlewoods acquired the freehold but then granted a lease back to the original freeholders who in turn granted a new lease to Littlewoods

at an inflated rent. HMRC argued that a part of the new rent was not deductible as it was, in reality, the purchase price for the freehold interest acquired by the subsidiary.

44. Lord Denning gave the leading judgment in the Court of Appeal. He said (at F on page 860):

> "I decline to treat [the subsidiary] as a separate and independent entity. The doctrine laid down in *Salomon v Salomon & Co Ltd* has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit."

45. The second case which the appellants referred to was *Smith, Stone & Knight Ltd v Lord Mayor of Birmingham* [1939] 4 All ER 116. In that case, the Corporation of Birmingham compulsorily acquired a factory owned by Smith, Stone & Knight but occupied by its wholly owned subsidiary. Smith, Stone & Knight claimed compensation for disturbance of the business carried on by the subsidiary. The parent company could only succeed in this claim if it was carrying on the business rather than the subsidiary. Atkinson J (at B-E on page 121) identified six points relevant to the determination of the question: who was really carrying on the business?

(1) Were the profits treated as the profits of the parent?

(2) Were the persons conducting the business appointed by the parent company?

(3) Was the parent company the head and the brain of the trading venture?

(4) Did the parent company govern the venture, decide what should be done and what capital should be embarked on the venture?

(5) Did the parent company make the profits by its skill and direction?

(6) Was the parent company ineffectual and in constant control?

The appellants contend that all of these questions can be answered in the affirmative and, as a result, PhotonStar and Enfis should be treated as one and the same company.

46. Finally, the appellants rely on *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] All ER 462. This was another case where a parent company was seeking compensation following a compulsory purchase order. In that case, the business was carried on by the parent company whilst the subsidiary held legal title to the premises. Lord Denning gave the lead judgment in the Court of Appeal. He said (at b-d on page 467):

> "We all know that in many respects a group of companies are treated together for the purposes of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'There is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every

movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v Caddies*. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on the technical point. They should not be deprived of the compensation which should justly be payable for the disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So DHN are entitled to claim compensation accordingly."

Based on these cases, the appellants argue that PhotonStar and Enfis are the same economic unit carrying on the same business and can therefore be viewed as the same company for the purposes of s 185(2)(a)(i) ITA 2007 so that PhotonStar did not become a 51% subsidiary of *another* company.

Validity of the notices of assessment

47. The appellants say that HMRC has not followed the correct procedure for a withdrawal of relief under chapter 4 of part 5 ITA 2007.

48. The starting point is s 234 ITA 2007. The appellants point out that, under s 234(2)(b) ITA 2007, EIS relief may not be withdrawn on the ground that the issuing company is not a qualifying company unless the requirements of sub-s 3 are met.

The requirements of sub-s 3 are met if either:

(1) the issuing company is given notice by the company under s 241 that it ceases to qualify; or

(2) HMRC has given notice to the company stating that:

> "because of the ground in question, the whole or any part of the EIS relief obtained by any individual in respect of shares included in the relevant issue of shares was not due".

49. The appellants expressed some uncertainty as to whether PKF's letter of 26 October 2010 might be a notice on behalf of PhotonStar under s 241 ITA 2007. Ultimately, their conclusion was that it was not such a notice.

50. HMRC's letter of 13 June 2011 is expressed to be a notice under s 234(3)(b) ITA 2007. Unfortunately it contains an error. It states that:

> "The company no longer meets the requirements of s 181 Income Tax Act 2007".

51. Section 181 ITA 2007 contains certain requirements in relation to the company's trade. It is common ground that PhotonStar continued to fulfil the requirements of s 181 ITA 2007 following the reverse takeover.

52. Section 236 ITA 2007 provides a mechanism for the company to appeal against a s 234(3)(b) ITA 2007 notice. In this case, the company did not appeal against the notice.

53. The appellants however argue that an investor is not bound by the company's failure to challenge the notice. They say that, as the notice is treated as a "decision" for the purposes of the Taxes Management Act 1970, it must be correct and that, if it is not correct, it is not a valid notice.

54. The appellants therefore argue that the requirements of s 234(3) ITA 2007 have not been met as the company did not give a notice under s 241 ITA 2007 and HMRC did not give a valid notice under s 234(3)(b) ITA 2007. The result of this is that under s 234(2) ITA 2007, EIS relief cannot be withdrawn on the ground that PhotonStar is not a qualifying company.

55. Whilst the appellants accept that they have disposed of their shares in PhotonStar they also say that the notices of assessment are not valid assessments for the purposes of withdrawing or reducing relief under s 209 ITA 2007 as a result of that disposal. They make the point that the assessments clearly refer to chapter 4 of part 5 ITA 2007 which relates only to the question as to whether the company is a qualifying company. The assessments make no mention of the possibility that relief could be withdrawn or reduced as a result of the shares having been disposed of. Indeed, they say HMRC did not raise this as a possible grounds for withdrawing or reducing relief in any of the correspondence either with the company or with the appellants. The first time it was raised was in HMRC's Statement of Case.

56. The appellants rely on s 30A(4) Taxes Management Act 1970 ("TMA 1970") (previously s 29(6) TMA 1970) which provides that:

> "After the notice has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts".

This, they say, would prohibit HMRC from amending the notices of assessment which they have issued in order to assess the appellants on the basis that they had disposed of their shares so that relief should be reduced or withdrawn under s 209 ITA 2007.

57. To summarise, the appellants' case is that:

(1) PhotonStar and Enfis are essentially the same company so that PhotonStar has not become a 51% subsidiary of another company.

(2) Even if this is incorrect, the requirements of s 234(3) ITA 2007 have not been met and so HMRC cannot withdraw their EIS relief on the basis that the company no longer qualifies.

(3) Even if the appellants have disposed of their shares, they have not been assessed on that basis and HMRC cannot now alter the assessments.

HMRC's arguments

51% subsidiary

58. Mr Foxwell on behalf of HMRC made the point that, prior to the merger in December 2010, PhotonStar and Enfis were clearly separately entities with different businesses, separate staff, separate management, different registered offices and different customers. On 24 December 2010, the appellants disposed of their shares in

PhotonStar and received shares in Enfis in return. This was not an internal reorganisation. PhotonStar ceased to be an independent entity and became a 100% subsidiary of Enfis. The fact that the Enfis shareholders continued to own 22.5% of Enfis makes it clear, in Mr Foxwell's view, that PhotonStar and Enfis are not the same entity.

59. Mr Foxwell made little comment on the cases referred to by the appellants. He argued that PhotonStar was not acting as the agent of Enfis in carrying on its business (as was found to be the case in *Smith, Stone & Knight*). Even if it were, he says that this would not make any difference to the question as to whether PhotonStar had become a 51% subsidiary of Enfis contrary to s 185 ITA 2007. He also referred to the recent Supreme Court decision in *Prest v Petrodel Resources Ltd* [2013] UKSC 34. Whilst he helpfully drew the Tribunal's attention to the fact that this case constituted a much more recent authority on piercing the corporate veil, he was not able to explain any specific principles from that case which might support his arguments.

Procedural issues

60. Although Mr Foxwell argued that it was significant that Mr Ceri Jones (the former CEO of Enfis) accepted (in his letter to HMRC of 4 July 2011) that the company no longer qualified for the EIS, he accepted that neither this nor PKF's letter of 26 October 2010 constituted a Section 241 notice for the purposes of s 234(3)(a) ITA 2007.

61. On the other hand, he argued that HMRC had given a valid notice under s 234(3)(b) ITA 2007. Whilst there may have been a mistake in that notice (which he accepted), the company's remedy was to appeal against the notice which it failed to do. Even though the notice had a mistake, notice had been given and HMRC was therefore within its rights to issue the assessments on the appellants.

62. On the issue as to whether the assessments were valid assessments on the basis of a disposal of shares within s 209 ITA 2007 as opposed to the company ceasing to be a qualifying company within chapter 4 of part 5 of ITA 2007, Mr Foxwell referred to s 114 TMA 1970. This provides that, in certain circumstances, an assessment cannot be quashed or deemed to be void as a result of a mistake or defect in the assessment. He accepted however that this was intended to deal with relatively minor mistakes and would not cure a defect such as this were it found to be one which invalidated the assessment. Mr Foxwell however submitted that the assessments are valid irrespective of the reason why relief should be withdrawn.

Discussion

51% subsidiary

63. There is no doubt that, as a matter of fact, Enfis became the owner of all of the shares in PhotonStar.

64. Section 1154 CTA 2010 defines the circumstances in which "a body corporate ("B") is a 51% subsidiary …. of another body corporate ("A")". Section 1154(2) CTA 2010 provides that "B is a 51% subsidiary of A if more than 50% of B's ordinary share capital is owned directly or indirectly by A".

65. In this case, B is PhotonStar and A is Enfis. Enfis became the owner of all of the shares in PhotonStar. Each of Enfis and PhotonStar is a "body corporate" and so on the face of it, the condition in s 1154(2) CTA 2010 is satisfied.

66. Whilst superficially attractive, the appellants' argument that Enfis and PhotonStar should be treated as a single body corporate would introduce a great deal of uncertainty into what is otherwise a very clear test. That test is one which applies not just in the context of EIS relief but for many other purposes within the tax legislation as well.

67. In our view, the cases referred to by the appellants do not provide authority for the proposition that two companies can be treated as a single company/body corporate. In *Smith, Stone & Knight*, the question was whether the subsidiary was carrying on its business as agent for the parent. On the facts, the court found that it did. There was however no suggestion that the parent and subsidiary were a single company or body corporate. Indeed, a relationship of principal and agent could not exist if there were in reality a single entity rather than two separate entities.

68. The *Littlewoods* and *DHN* cases were similar. In both cases, the issue was whether the business and/or assets of the parent and subsidiary could be treated as a consolidated whole. The question was not whether the subsidiary was or was not a separate company/body corporate, the shares in which were owned by the parent.

69. In the *Littlewoods* case, it was the very fact that the subsidiary was "the wholly owned subsidiary of the taxpayers" which allowed Lord Denning to effectively treat the freehold interest held by the subsidiary as, for the purposes of the legislation in question, having been acquired by the parent.

70. He followed exactly the same line of reasoning in the *DHN* case. It was the fact that the parent company owned all the shares of the subsidiaries so that the "subsidiaries are bound hand and foot to the parent company and must do just what the parent company says" which allowed Lord Denning to conclude that "the three companies should, for present purposes, be treated as one". The "purposes" in that case however were that there should be one entity which both carried on the business and had an interest in the premises and not that the existence of the subsidiaries could be ignored completely so that the parent should be treated as not owning any shares in the subsidiaries.

71. In *Prest v Petrodel* Lord Sumption, giving the leading judgment in the Supreme Court, said (at 16):

> "'Piercing the corporate veil' is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company."

Lord Sumption goes on to conclude that (at 35):

> "There is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control".

The other judges in the Supreme Court were in broad agreement with Lord Sumption's formulation. Even if it were permissible to pierce the corporate veil, Lord Sumption's view (at 35) was that this could be done:

> "only for the purpose of depriving the company or its controller of the advantage they would otherwise have obtained by the company's separate legal personality".

72. Lord Sumption's analysis does not sit comfortably with Lord Denning's decision in *DHN* which is not mentioned in Lord Sumption's judgment. There were however two other grounds in *DHN* on which Lord Denning found in favour of DHN and it might perhaps be assumed that, on the basis of Lord Sumption's test, DHN is not a true case of piercing the corporate veil.

73. We would note in passing that in *Adams v Cape Industries plc* [1990] Ch 433 (at 543) the court said that:

> "… in *Wallersteiner v Moir* [1974] 1 WLR 991 Buckley LJ, at p 1027, and Scarman LJ, at p 1032, expressly declined to tear away the corporate veil. In the *Littlewoods* case [1969] 1 WLR 1241, 1255, Sachs LJ expressly disassociated himself from the suggestion that the subsidiary was not a separate legal entity and Karminski LJ refrained from associating himself with it. We therefore think that the plaintiffs can derive little support from those dicta of Lord Denning MR."

Although DHN was not mentioned in *Adams*, Lord Denning's reasoning was essentially the same as in *Littlewoods*. It would seem that Lord Denning's approach to piercing the corporate veil is no longer good law (if it ever was).

74. In any event, it is clear both from Lord Denning's analysis and from Lord Sumption's decision in *Prest v Petrodel* that, disregarding the separate personality of a company, is not the same thing as ignoring the existence of a company entirely.

75. In our view, whilst it may well have been the case that, in some sense, PhotonStar and Enfis were together carrying on the same business, with the same management, this does not allow them to be treated as the same company for the purposes of s 185 ITA 2007 or s 1154 CTA 2010. PhotonStar did therefore become a 51% subsidiary of Enfis within the meaning of s 185(2)(a)(i) ITA 2007.

The procedural issues

76. Having decided that PhotonStar ceased to be a qualifying company (as a result of becoming a 51% subsidiary of Enfis), we now have to consider whether the notices of assessment are valid.

77. This turns on whether HMRC have given a valid notice under s 234(3)(b) ITA 2007.

78. The purpose of s 234(3) ITA 2007 which requires either that the company must have notified HMRC that it no longer qualifies or alternatively that HMRC must notify the company that, in HMRC's opinion, the company no longer qualifies seems clear – i.e. that it is the company rather than the investor which is in the best position to assess whether it continues to be a qualifying company and that HMRC should not

be able to withdraw relief from an investor unless the company has either accepted that it no longer qualifies or alternatively that it has been notified by HMRC that it is no longer thought to qualify and therefore has an opportunity to persuade HMRC that it does still qualify.

79. Section 236(1) ITA 2007 treats a notice given by HMRC to the company under s 234(3)(b) ITA 2007 as a decision disallowing a claim by the issuing company. This allows the company to appeal against the decision. The investors have no right to appeal against this decision. What then is the position if the company fails to appeal? Can it be the case that relief can be withdrawn even if the company in fact continues to qualify just because it has failed to appeal against an incorrect notice?

80. However, under s 235 ITA 2007, a notice of assessment can only be issued if relief "falls to be withdrawn or reduced". Therefore, if the company continues to be a qualifying company, no assessment can be issued as the relief does not fall to be withdrawn.

81. The position is different here. PhotonStar ceased to qualify within the three year period after the shares were issued and the appellants' relief does therefore fall to be withdrawn. The company could have challenged this by appealing against the s 234(3)(b) ITA 2007 notice. However, despite the defect in that notice, it chose not to do so. This may very well have been because the company knew that it ceased to qualify even though the reason was not the one stated in the notice. Whatever the reason, it does not allow the appellants to challenge the validity of the notices of assessment if, as we have found, the company ceased to qualify.

82. Given our decision on the other issues and, as we did not have detailed submissions on the point, we do not express a view as to whether the assessments would be valid had we found that PhotonStar did not in fact become a 51% subsidiary of Enfis so that the only ground on which relief would be withdrawn or reduced was that the appellants had disposed of their shares within s 209 ITA 2007.

83. If it were the case that the existing assessments are not valid for the purpose of withdrawing relief on the basis of the disposal of shares under s 209 ITA 2007, HMRC would not in our view be entitled to amend the assessments to cover a withdrawal of relief under s 209 ITA 2007 as a result of the restriction in s 30A(4) which prohibits any amendment to an assessment after notice of the assessment has been served on the person assessed.

84. It is not necessary for us to express a view as to whether HMRC would be able to issue new assessments in respect of a withdrawal or reduction of relief under s 209 ITA 2007 should the existing assessments be ineffective for this purpose.

Decision

85. As will be apparent from the foregoing discussion, we dismiss the appeals on the basis that:

(1) PhotonStar became a 51% subsidiary of Enfis.

(2) The assessments are not invalidated by the defect in the s 234(3)(b) ITA 2007 notice issued by HMRC to PhotonStar.

86. To return to our original comment, it is surprising and, for the appellants, very unfortunate that relief should be withdrawn in these circumstances. However, it is a matter for the legislature to decide whether the law should be amended to remedy what is perhaps an unintended consequence of the restrictions contained in the existing legislation.

87. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 13 April 2015