Appeal number: FTC/37/2010
[2011] UKUT 440 (TCC)

Enterprise Investment Scheme relief – when money is "employed" in a qualifying business

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MR CHRISTOPHER O. RICHARDS **Appellant**

and

SKYE INNS LIMITED

- and -

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

TRIBUNAL: THE HONOURABLE MR JUSTICE SALES

Sitting in public at The Royal Courts of Justice on 19 July 2011

MR A CONNELLY for the Appellant

MISS A NATHAN, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents:

DECISION

1. This is an appeal on a point of law to the Upper Tribunal from the decision of the First Tier Tribunal Tax Chamber (Mr. Howard M. Nowlan and Ms. Elizabeth Bridge) ("the Tribunal"), dated 15 December 2009, refusing an appeal by Skye Inns Limited ("Skye Inns") against a notice issued by the Respondents ("HMRC") to Skye Inns to the effect that the shares in that company subscribed for by the First Appellant ("Mr. Richards") should be treated as ineligible for Enterprise Investment Scheme ("EIS") re-investment relief and also refusing an appeal by Mr. Richards regarding related claims for tax relief which had been rejected by HMRC: [2009] UKFTT 366 (TC). The Appellants claim that on a proper approach, as a matter of law, the shares are shares eligible for relief and Mr. Richards is entitled to EIS re-investment relief in respect of a tranche of investment by him of £1,536,684 by way of subscription for ordinary shares in Skye Inns.

2. The argument before me focused on Mr. Richards' appeal. He claims relief against a liability for capital gains tax of £614,673.60, relying on the provisions of paragraph 1 of Schedule 5B to the Taxation of Chargeable Gains Act 1992, entitled "Enterprise Investment Scheme: Re-investment" ("Schedule 5B"). Paragraph 1 of Schedule 5B provides:

> "1.— Application of Schedule
>
> (1) This Schedule applies where—(a) there would (apart from paragraph 2(2)(a) below) be a chargeable gain ("the original gain") accruing to an individual ("the investor") at any time ("the accrual time") on or after 29th November 1994;
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> (b) the gain is one accruing either on the disposal by the investor of any asset or in accordance with section 164F or 164FA, section 169N, paragraphs 4 and 5 below or paragraphs 4 and 5 of Schedule 5C;
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> (c) the investor makes a qualifying investment; and
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> (d) the investor is resident or ordinarily resident in the United Kingdom at the accrual time and the time when he makes the qualifying investment and is not, in relation to the qualifying investment, a person to whom sub-paragraph (4) below applies.
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> (2) The investor makes a qualifying investment for the purposes of this Schedule if—

(a) eligible shares in a company for which he has subscribed are issued to him at a qualifying time and, where that time is before the accrual time, the shares are still held by the investor at the accrual time,

(aza) he subscribed for the shares (other than any of them which are bonus shares) wholly in cash,

(b) the company is a qualifying company in relation to the shares,

(c) at the time when they are issued the shares (other than any of them which are bonus shares) are fully paid up,

(d) the shares are subscribed for, and issued, for a bona fide commercial purposes and not as part of arrangements the main purpose or one of the main purposes of which is the avoidance of tax,

(da) the total amount of relevant investments made in the company in the year ending with the date the shares are issued does not exceed £2 million,

(e) the requirements of section 289(1A) of the Taxes Act (read with section 289(1B) to (1E) of that Act), or the requirements of section 183 of ITA 2007, are satisfied in relation to the company.

(f) the shares (other than any of them which are bonus shares) are issued in order to raise money for the purpose of a qualifying business activity, and

(g) all of the money raised by the issue of the shares (other than any of them which are bonus shares) is, no later than the time mentioned in section 175(3) of ITA 2007, employed wholly for the purpose of that activity, …

and for the purposes of this Schedule, the condition in paragraph (g) above does not fail to be satisfied by reason only of the fact that an amount of money which is not significant is employed for another purpose.

(3) In sub-paragraph (2) above `a qualifying time', in relation to any shares subscribed for by the investor, means—

(a) any time in the period beginning one year before and ending three years after the accrual time, or

(b) any such time before the beginning of that period or after it ends as the Board may by notice allow.

(4) This sub-paragraph applies to the investor in relation to a qualifying investment if—

(a) though resident or ordinarily resident in the United Kingdom at the time when he makes the investment, he is regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom, and

(b) were section 150A to be disregarded, the arrangements would have the effect that he would not be liable in the United Kingdom to tax on a gain arising on a disposal, immediately after their acquisition, of the shares acquired in making that investment.

(5) Shares are not fully paid up for the purposes of sub-paragraph (2)(c) above if there is any undertaking to pay cash to any person at a future date in respect of the acquisition of the shares.

(5A) The reference in sub-paragraph (1)(b) to a gain accruing in accordance with section 169N does not include such a gain so far as it is chargeable to capital gains tax at the rate in section 169N(3).

(6) Section 173A(3) and (4) of ITA 2007 (meaning of "relevant investment") apply for the purposes of sub-paragraph (2)(da).

(7) In sub-paragraph (2)(da), the reference to relevant investments made in the company includes relevant investments made in a company that is, or has at any time in the year mentioned there been, a subsidiary of the company (whether or not it was such a subsidiary when the investment was made)."

3. Section 289(1) of the Taxes Act, referred to in paragraph 1(2)(e) of Schedule 5B, provides:

"289 Eligibility for relief

(1) For the purposes of this Chapter, an individual is eligible for relief, subject to the following provisions of this Chapter, if-

(a) eligible shares in a qualifying company for which he has subscribed … are issued to him and, under section 291, he qualifies for relief in respect of those shares,

(aza) he subscribed for the shares (other than any of them which are bonus shares) wholly in cash,

(aa) at the time when they are issued the shares (other than any of them which are bonus shares) are fully paid up,

(b) the shares (other than any of them which are bonus shares) are issued in order to raise money for the purpose of a qualifying business activity,

(ba) the requirements of subsection (1A) below are satisfied in relation to the company, …

(c) at least 80 per cent of the money raised by the issue of-

(i) the shares, and

(ii) all other eligible shares (if any) in the company of the same class which are issued on the same day,

is employed wholly for the purpose of the activity mentioned in paragraph (b) above not later than the time mentioned in subsection (3) below, and

(d) all of the money so raised is employed wholly for that purpose not later than 12 months after that time."

4. Section 289(3) of the Taxes Act, referred to in paragraph 1(2)(g) of Schedule 5B, provides:

"(3) The time referred to in subsection (1)(c) above is-

(a) the end of the period of twelve months beginning with the issue of the eligible shares, …

(b) in the case of money raised only for the purpose referred to in subsection (2)(a) above, the end of that period or, if later, the end of the period of twelve months beginning when the company or a qualifying 90% subsidiary of that company begins to carry on the qualifying trade,

and for the purposes of this Chapter, conditions in subsection (1)(c) and (d) above do not fail to be satisfied by reason only of the fact that an amount of money which is not significant is employed for another purpose."

5. The critical provision for present purposes is paragraph 1(2)(g) of Schedule 5B, which sets out the requirement that at least 80 per cent of the money raised by the issue of relevant shares "is employed" wholly for the purpose of a relevant activity.

The Factual Background

6. In 1998/99, Mr. Richards made a chargeable gain of £2,895,489 arising on the sale of shares in a catering company run by him. He decided to re-invest the gain in Skye Inns, which proposed to develop a business operating public houses.

7. On 6 January 2000, he subscribed £1 million for shares in Skye Inns. On 26 January 2001, he subscribed a further £358,805 for shares in Skye Inns. It is common ground that Skye Inns is a qualifying company which carries on a qualifying business activity for the purposes of paragraph 1 of Schedule 5B (acquiring and operating public houses) and that the shares for which Mr. Richards subscribed in these first two tranches of investment were issued in order to raise money for the purpose of such a business activity.

8. By January 2001, in pursuance of that qualifying business activity Skye Inns had acquired two public houses for a total consideration of £1,461,000. HMRC accepts that the sums invested by Mr. Richards in these first two tranches satisfied the conditions for EIS re-investment relief under paragraph 1 of Schedule 5B, since they had been wholly employed by Skye Inns within the

relevant timescale given by paragraph 1(2)(g) and (h) of Schedule 5B. Accordingly, Mr. Richards's claim for relief against his charge for capital gains tax has been allowed in relation to those two tranches of investment.

9. On 18 December 2001, Mr. Richards invested the balance of his chargeable gain from 1998/99 (£1,536,684) by subscribing for further shares in Skye Inns. Again, it is common ground that the shares were issued in order to raise money for the purpose of a qualifying activity carried on by Skye Inns.

10. At that stage it was contemplated that these moneys would be invested by Skye Inns in acquiring a third public house. However, shortly before contracts were due to be exchanged for that purchase by Skye Inns, the vendor withdrew from the transaction. That left Skye Inns holding the money which was to have been used to complete the purchase. It sought to find other public houses to acquire with that money, but found nothing suitable.

11. I am told that Skye Inns kept the third tranche of investment money in an instant access investment account separate from a current account which it operated, into which current account the trading income from its two public houses was paid and out of which its trading expenses in relation to those two public houses and overall running costs were paid. In the two years to 17 December 2003, Skye Inns' trading expenses and running costs exceeded its trading income – i.e. it traded at a loss. From time to time, Skye Inns would transfer money from its deposit account to its current account to cover the losses. It also transferred sums to meet certain capital expenditure incurred on renovating and extending those two public houses.

12. Leaving Skye Inns' trading income out of account, it appears that Skye Inns' operating expenses for the year to 17 December 2002 amounted to about £663,669, with additional capital expenditure in that period of about £61,273, a total of about £724,942. It appears that the equivalent figures for the year to 17 December 2003 were about £660,246 and £62,377, totalling about £722,623. I do not have the figures for Skye Inns' trading income in those periods.

13. The issue which arises is whether the condition in paragraph 1(2)(g) of Schedule 5B has been satisfied in respect of this third tranche of investment in Skye Inns. According to that condition, 80 per cent of the third tranche investment money (i.e. £1,229,348) would have had to be "employed" wholly for the purpose of Skye Inns' qualifying activity (investing in and operating public houses) by 18 December 2002.

14. HMRC maintain that Skye Inns had not employed the requisite 80 per cent for the purpose of its qualifying activity in the year to 18 December 2002. The Appellants maintain that it had. (It may be added that under the condition in paragraph 1(2)(h) of schedule 5B the remaining balance of the moneys, £307,336, would need to have been "employed" for the purpose of Skye Inns' qualifying activity by 18 December 2003. By agreement between HMRC and the Appellants, the Tribunal was required to assume that by 18 December 2003 the whole of the third tranche of the investment had been so employed.)

15. There was correspondence between HMRC (and H.M. Inland Revenue, their predecessors) and accountancy firms acting for the Appellants which proceeded on a slightly confused basis.

16. By letter dated 4 May 2004, H.M. Inland Revenue stated that Skye Inns: "… does not appear to have spent at least 80 per cent of the money raised from the share issue of 18 December 2001" so the EIS re-investment relief would not be due. It is common ground that the reference to sums being "spent" was not strictly accurate, since the relevant concept in paragraph 1(2)(g) of Schedule 5B is whether sums have been "employed" for a relevant purpose.

17. On 22 June 2004 H.M. Inland Revenue issued a notice (referring to their letter of 4 May 2004) stating that the shares issued on 18 December 2001 were no longer to be treated as eligible shares for EIS purposes on the grounds that "the company has not employed the money raised within the [specified] time limits."

18. Issue was joined in correspondence about this, with a focus on the year immediately following the investment on 18 December 2001 (see paragraph 1(2)(g) of Schedule 5B). The position adopted by those acting for Mr. Richards was that, although a considerable balance remained in the deposit account at 18 December 2002, the whole of Skye Inns' trading and other expenses in that year (some £724,942) should be treated as having been expended out of the investment moneys subscribed on 18 December 2001 (i.e. leaving its trading income out of account) and so "employed" for a relevant purpose for the purposes of paragraph 1(2)(g) of Schedule 5B; and that the balance required to make up the requisite 80 per cent figure for the purposes of that paragraph should be regarded as having been "employed" for a relevant purpose in that period because of the way in which the management of Skye Inns proposed to make use of it in the future.

19. Mr. Connelly, who appeared for Mr. Richards, submitted that in the correspondence it was implicit that those acting for Mr. Richards were asserting that the proper approach to applying the word "employed" as used in paragraph 1(2)(g) of Schedule 5B (and also in section 289(1)(c) of the Taxes

Act) was that a first in, first out approach should be adopted so far as Skye Inns' receipts and payments were concerned. Skye Inns received the subscription moneys on 18 December 2001, before it received trading receipts in the year that followed, and therefore all its expenditure in that year and indeed thereafter should be treated as coming first out of the subscription moneys until they were fully exhausted, and only then out of Skye Inns' trading receipts.

20. Mr. Connelly submitted that in the correspondence HMRC implicitly accepted that this was the right approach to adopt. I have to say I do not think that is right, but in any event it does not matter, since it is clear that the Tribunal did not consider that was the correct approach in law and Mr. Connelly accepted that the Tribunal was not bound by any agreement between the parties as to what approach should be applied when considering whether the condition in paragraph 1(2)(g) of Schedule 5B had been satisfied.

21. It was clear on the material before the Tribunal that there had been substantial trading income for Skye Inns in the two years following 18 December 2001.

The Tribunal's Decision

22. In a carefully reasoned decision, the Tribunal dismissed Mr. Richards's appeal against HMRC's refusal to allow him to claim EIS investment relief in relation to the sum of about £1.54 million, i.e. the part of his chargeable gain in 1998/99 which corresponded to the equivalent amount subscribed for Skye Inns shares on 18 December 2001.

23. At paragraphs 11 to 13 of the decision, the Tribunal dismissed an argument for Mr. Richards based on the desire of the directors of Skye Inns to find another public house to acquire after the proposed transaction to acquire the identified third public house had fallen through. No appeal has been brought against this part of the decision.

24. At paragraph 14 the Tribunal said:

> "The invidious choice faced by the directors
>
> 14. We accept the Appellants' evidence that it remained the directors' intention to employ the funds in the trade, and they certainly never appropriated any of the cash for any non-trade

> purpose. We also obviously note that it was highly unfortunate that the directors were faced with the unenviable choice of making an acquisition in order to satisfy the tax tests, when they were not content that the acquisition was a prudent one, or else they had to fail the tax tests because they could not find a suitable replacement property. The particular officers of HMRC cannot however be blamed for imposing this invidious choice on the directors and the company. The tax test imposes a definite time period within which different percentages of the cash raised by a share issue must be employed in the trade, and they admit of no exception for the situation where the directors wanted to meet the test but were unable to do so."

25. At paragraphs 15 to 23 of the decision, the Tribunal addressed a distinct argument for Mr. Richards, that the requisite 80 per cent of the subscription money had been "employed" in Skye Inns' qualifying activity because the money was held to meet anticipated losses, provide revenue and fund capital improvements to the two existing properties. The argument before the Tribunal in relation to this submission was clouded somewhat by the way in which arguments had been presented in the correspondence, which left out of account Skye Inns' trading income from the two existing public houses. It is helpful to set out the reasoning of the Tribunal in these paragraphs 15 to 23 of the decision in full:

> "*Working capital requirements*
>
> 15. Further and different arguments were advanced along the lines that, by December 2002, the directors had abandoned the intention of acquiring a third property and that the test of employing the moneys in the trade was satisfied because the directors were holding the funds to meet anticipated losses, and revenue and some capital improvements to the two existing properties. There is obviously some conflict between this argument, and one based on the continued policy decision of trying to find a third property to purchase, and we are not convinced that the plan for the third acquisition was in fact dropped until some time after December 2002. This, however, is not particularly critical because we conclude that the Appellants also

fail the test, even if we accept the proposition that by December 2002 the decision had been reached simply to hold the relevant moneys to meet losses, and fund the various changes to the two existing properties.

16. The response of HMRC to the argument mentioned in the previous paragraph was that while moneys held in current account to meet the immediate current requirements of the business could be said to be employed in the trade, this could not be demonstrated in this case for several reasons. It was firstly suggested that if the moneys were placed on a deposit account, that would preclude satisfying the test about holding moneys on current account. We certainly disagree with that suggestion, and in fairness HMRC had dropped this particular contention in the hearing before us. The deposit account in the present case was an Instant Access deposit account, and since no company would leave a substantial amount of money on a non-interest-bearing current account, it must follow that placing the moneys, required for current requirements of the business, in an Instant Access deposit account must enable the tax test to be satisfied provided that the required "current requirements of the business" can be demonstrated.

17. HMRC then suggested that cash held on current or Instant Access deposit accounts could only be said to be employed in the business if it could be shown that it was required to meet business requirements in the next month, or at least in the very immediate future. It seems to us that once HMRC concede (rightly in our view) that cash does not actually have to have been "spent" to justify the conclusion that it is "employed in the business", and once it is accepted that the same conclusion can be reached where the directors hold the cash because they believe that it is required to meet the current requirements of the business, any "one month" or equivalent short term test is unrealistic. Everything must revolve around the facts relevant to the particular business. The business in this case was making considerable losses, and whilst the directors believed that they could turn the business round by making a number of improvements to the existing properties, they still expected to be having to finance the losses for a very much longer period than either one month or, say, three months. It seems to us that it would be appropriate to conclude that cash was employed in the business

when it was held to meet losses for at least a 12-month period, and indeed possibly until the directors projected that they would have turned the business round from loss to profit.

18. Whilst we, and certainly it seemed the Appellants and the Respondents, were still labouring under the misapprehension that at least 50% of the cash had been "employed" in the business by December 2002, we then faced the difficult question of whether, in considering future business requirements that could lead to the satisfaction of the tax test, we could pay regard not just to the projected cash requirement in financing expected losses, but also the cash requirements for making revenue and some capital improvements to the existing properties. We do not now strictly need to consider that question but we will say that if we could have been persuaded that the spending requirements on the existing properties were all required in order to turn the business round from loss to profit, we would have been inclined to conclude that the cash fund genuinely thought to be required to meet that objective could be said to be required to satisfy the relevant test.

19. The Appellants contended that, having already demonstrated that 50% of the cash raised in the relevant share issue had been employed in the business by December 2002, they could bridge the remaining gap and demonstrate that 80% had been so employed if they could pay regard to financing the losses, and paying for the revenue and capital improvements just mentioned. This seemed a reasonable contention until we sought to reconcile it with the facts that the moneys shown in the Balance Sheets to be "deposited at bank" were £1,229,071 at 31 March 2003, and still even £560,863 at 31 March 2004. Moreover the 2003 accounts indicated that between March 2002 and March 2003 the cash at bank had been reduced from £1,516,169 to £1,229,071 largely by the 2003 net operating loss of £161,771, and a considerable increase in debtors, there being virtually no change in turnover and stock levels. Working capital requirements had not, in other words, resulted in either 50% or 80% of the cash being employed in the business.

20. Since the hearing, we have reviewed the earlier exchanges of correspondence in order to ascertain how it was shown, and seemingly accepted, that 50% of the

cash had, on any test, been employed in the business by December 2002. The origin of this acceptance appears to us to derive from the following two paragraphs, which we quote, from the 11 April 2006 letter to HMRC from BDO Stoy Hayward LLP:

"*In this case the EIS funds raised were not held in a separate bank account. The approximate amounts the Company* ***spent*** *in the twelve-month period in question were, cost of sales £209,000, administration expenses £453,000 and, as already noted, repairs and capital improvements of approximately £106,000. The Company therefore* ***spent*** *a total of £768,000 on qualifying expenditure in the twelve-month period since the funds were raised and the requirement is that £1.2 m (i.e. 80%) must be* ***employed*** *in that period. As you can see of the £1.2m which must be employed £768,000 was actually* ***spent*** *and we believe the balance of £461,000 was* ***employed*** *in the business in the period in question.*

We accept that the Company had significant funds on hand at the end of the period in question but a large amount of these funds arose from the Company's sales and as already noted these funds were not held as an investment but were required for the Company's trade and in particular the anticipated acquisition of a new business."

21. This argument was one that was repeated before us in the hearing, in that in calculating the funds required to meet losses and the projected amounts of revenue and minor capital expenditure, we were again given a list of gross costs, with no regard to the reality that the business was generating income of significant amounts, albeit marginally below the amount of the gross costs. Accordingly the extraordinary argument was advanced, just as it was advanced in the two paragraphs just quoted, that the test of "employing" the cash raised by a share issue in the business could be satisfied by suggesting that the whole of the cash would have been "spent" and so employed if there were sufficient gross costs and expenses, all of which were to be treated as met out of the subscription moneys, with the corresponding gross income being altogether disregarded.

> 22. We reject the argument referred to in paragraph 20 and the similar argument that was advanced in the hearing. Quite regardless of whether or not the cash funds raised by the share issue were amalgamated in a single deposit account with the ever fluctuating receipts and payments of the current trading, we reject any argument along the lines that the share subscription moneys should be treated as having been "spent" and so "employed in the business" by treating every gross cost of the business as having been met out of the share subscription moneys, with all gross income remaining "unspent" on the deposit account. The only realistic approach is to treat funds raised in the share issue as having been "employed in the business" only when actually spent on realistic net increases to the net trading assets or when reserved to supplement the current receipts of the trade, either in funding losses or meeting expenses that can be ranked as "current business requirements".
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> 23. It thus seems to us that the basis on which it was assumed by both the Appellants and Respondents that 50% of the cash funds raised had been employed in the business within the 12-month period, and 100% employed in the business in the 24-month period were both wrong, and that it certainly follows that 80% of the funds raised had not been employed in the business in the 12-month period."

The Appeal

26. Mr. Connelly criticises this part of the Tribunal's decision. He submits that the proper approach to analysing whether money is "employed" for a qualifying activity for the purposes of paragraph 1(2)(g) of Schedule 5B is to apply a first in, first out analysis in respect of a company's funds, both with respect to actual expenditure (so that Skye Inns should be treated as having actually spent some £724,942 in the year following the investment on 18 December 2001 and so to that extent as having "employed" that part of the investment money in its qualifying activities) and also with respect to assessing a company's future planned expenditure (so that Skye Inns should be treated as having "employed" within the year ending 18 December 2002 additional sums which could be foreseen at that time as having to be spent by it in the following 12 months on trading expenses and capital expenditure –

sums of the order of £722,623 as it transpired). He submitted that on any view, using this approach, the Tribunal should have found that the condition in paragraph 1(2)(g) of Schedule 5B was satisfied in relation to the investment of 18 December 2001. In support of his submission, he sought to rely on the rule in Clayton's Case (1861) M&R 529 at 572ff, that payments into and out of an account are to be treated as being made on a first in, first out basis.

27. I do not accept Mr. Connelly's submissions. In my judgment, the approach of the Tribunal was correct as a matter of law and its application of the law to the facts of the case cannot be faulted.

28. The word "employed" in paragraph 1(2)(g) of Schedule 5B and section 289(1)(c) of the Taxes Act is not defined in the legislation. In my view, it is a word which requires the money in question actually to be used in some way for the purposes of carrying on the qualifying activity within the relevant one year period. Clearly, if the moneys are spent in carrying out the qualifying activity in that period, they will have been "employed" for the purposes of that activity; but, as the Tribunal correctly recognised, the concept of being "employed" for the purpose of an activity extends more widely than this.

29. Moneys will also be "employed" for the purposes of an activity if the company has earmarked them in the relevant period for some specific purpose (which does not necessarily have to be a purpose calling for expenditure in that period) and is keeping them in reserve for that purpose. In such a case, the company may be found to have "employed" the moneys for that purpose within the relevant period. Whether moneys have been notionally set aside with sufficient precision for a specific purpose so that they can be said to have been "employed" for the purpose of a qualifying activity at the time they are so notionally set aside will be a matter for assessment by a tribunal on the particular facts of an individual case.

30. Contrary to the submission of Mr. Connelly, in making an assessment on the facts a tribunal is not obliged to follow the rule in Clayton's Case. Nor is it obliged to adopt a first in, first out analysis of a company's funds. Indeed, I think it is very unlikely in most cases that such an analysis will be found to be appropriate on the facts. In the present case, for example, Skye Inns was operating two public houses which had significant income as well as expenditure. It was only necessary to dip into the subscription moneys held in the investment account to the extent that the business in respect of those two properties made trading losses. The subscription moneys were not "employed" in Skye Inns' qualifying activities until in some sense committed to that activity. The Tribunal was fully entitled to find at paragraphs 22 to 23 of the decision that that only occurred as and when Skye Inns suffered net losses (i.e., after taking account of its trading income), and that accordingly the condition in paragraph 1(2)(g) of Schedule 5B was not satisfied.

31. I therefore dismiss the appeal.

32. I add two comments for completeness. First, I would in any event have rejected Mr. Connelly's argument based on Clayton's Case on the facts of this case. In my view, Clayton's Case only provides guidance regarding the approach to allocation of payments into and out of a single account, but Skye Inns operated two accounts, the investment account and the current account. The subscription moneys were paid into the deposit account, but its business expenses were paid out of the current account into which trading income was also paid. It would not be permissible, in my view, to amalgamate the two accounts for the purpose of application of the rule in Clayton's Case. In this case, a payment into the deposit account could not be treated as matched by a payment out of the current account.

33. Secondly, I agree with the comment of the Tribunal at paragraph 23 of the decision that the suggestion that 100 per cent of the subscription moneys had been employed in the business by 18 December 2003 (paragraph 1(2)(h) of Schedule 5B) is also questionable. It is not necessary to explore that further, since the failure to satisfy the condition in paragraph 1(2)(g) of Schedule 5B is sufficient to lead to this appeal being dismissed.

TRIBUNAL JUDGE:
MR JUSTICE SALES
RELEASE DATE: 8 November 2011