



## BUSINESS TAX

### 48. EIS AND MIXED MEMBER PARTNERSHIPS

In a recent case the First-tier Tribunal (FTT) decided that the enterprise investment scheme (EIS) was not available to a mixed partnership, ie, one consisting of a mixture of differing entities, both companies and individuals, in the same ownership structure (*Harvey's Jersey Cream Ltd v HMRC* TCO3045).

Harvey's Jersey Cream Ltd became a partner in L & R Harvey Partners which manufactured ice and dairy products. The company applied to HMRC under s306(4), ICTA 1988 to issue EIS certificates in respect of the resultant share issue because, under the EIS, the investor's taxable gains can be set against sums paid for shares in a qualifying company for the purpose of a qualifying business activity.

HMRC refused the application and the company appealed.

The FTT decided that the trade of the partnership was carried on by each partner (s5, Partnership Act 1890). Therefore, because the partnership was trading, so was the company. However, the conditions in paras 1(2)(f) and (g), Sch 5B, TCGA 1992 require the purpose of the share issue to be to raise money for the activities of the trade and for the money to be used in those activities. Increasing its share in the business was not an activity of the trade and so para 1(2)(g) was not satisfied.

This case highlights how complex the tax position of mixed partnerships can be. Harvey's Jersey Cream Ltd was trading by being in receipt of profits. It is an example of the 'corporate partner' dilemma, ie, there may be advantages from including a limited company as a partner within a partnership but you also need to think through all the long-term considerations.

The draft Finance Bill 2014 contains provisions to clamp down on "excessive" diversion of profits in

mixed member partnerships. This is targeting arrangements designed to maximise the fiscal benefits of incorporation including the lower marginal rate of corporation tax. In some cases such diversion of profits has exploited the fiscal advantage of the corporate partner.

There is no doubt that every mixed partnership will have to review the future diversion of profits and the overall structure. Many partnerships do not have up-to-date partnership agreements, and these could be vital when deciding if a profit division is excessive under the new rules.

**Contributed by Julie Butler, Butler & Co**