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ER

The attention paid by HMRC to ER claims continues. A recent cases (TC07811: Guy Holland-Bosworth First-tier Tribunal August 2020) again illustrates the dangers of not keeping an eye on the position on an ongoing basis.

The taxpayer appealed against a closure notice for 2014/15, issued in September 2017, assessing additional tax of £109,957. The issue was whether, when the taxpayer disposed of 50 B Ordinary Shares for £1,350,000 the taxpayer was entitled to ER .

Prior to 2007, the taxpayer and another were 50:50 Ordinary shareholders, each holding 310 ordinary shares. In 2007, the taxpayer sold 273 shares to an unconnected third party, the shares retained being re-designated as B Ordinary Shares.

In April 2013, the taxpayer acquired a further 13 B Shares by way of a bonus issue, so that he held 50 B Shares, 5% of the total ordinary share capital. These shares were sold in December 2014 for £1,350,000. In his self-assessment return, the taxpayer stated that the rights attached to the B Shares, in the Articles of Association, were incorrectly described but it was not possible for the taxpayer or any other B Shareholder to rectify the error and for all intents and purposes the Appellant's B Shares had full voting rights;

Article 4 of the Articles of Association provided that '...the holders of the B ordinary shares shall not be entitled to receive notice of, attend or vote at any general meeting of the company.'

Article 5 states that:

'...all or any of the rights for the time being attached to any class of shares for the time being in issue may from time to time (whether or not the Company [THHGL] is being wound up) be altered or abrogated with the written consent of the holders of not less than three-quarters of the issued shares of that class or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of such shares ... [and] every holder of shares of the class shall be entitled on a poll to one vote for every such share held by him...'

The Tribunal stated that:

'Article 4 could not be clearer. The holders of the B Shares were not entitled to vote at any general meeting of THHGL. Article 5 provides for an "alteration or abrogation" of (here) the B Share rights. An "alteration" or "abrogation" suggests a modification of existing rights, (see the reference to "attached" in Article 5, with the "sanction" of an extraordinary resolution passed at a separate general meeting of the holders of such shares, the rights of which were being "altered or abrogated").

Article 5 provides a protection against the modification of share rights, which the affected shareholders may not want. Article 5 does not provide for the conferral of share rights, effected by shareholders of a particular class of shares, unilaterally as a class. Article 5 applies to all and any modification of existing rights to shares, nothing more. There is no ambiguity as to the effect of Article 4 and Article 5.

Thus the B Shareholders could not, to my mind, unilaterally, as a class, arrogate to the B Shares votes (or any other share rights which had the effect of diluting the share rights of other classes of shares) by any appeal to Article 5. ...Article 5 does not permit the B Shareholders to unilaterally, as a class, arrogate voting rights exercisable in general meeting (or indeed to arrogate any voting rights which affects the votes of other classes of shares, here the A Ordinary shares) to the B Shares.

The relevant voting rights which fall within section 169S(3)(b) are votes exercisable in general meeting of the company. The B Shares do not have such votes.'

The appeal was dismissed.