[2012] UKFTT 521 (TC)

TC02197

Appeal number: TC/2010/06678

INCOME TAX – loss relief for loans to traders - s253 Taxation of Chargeable Gains Act 1992 ("TCGA 1992") – whether payments made by appellant in respect of interest on bank loans to property trading company which appellant had guaranteed were "made under the guarantee" for the purposes of s253(4) TCGA 1992 – no- relevance of demand under guarantee considered – whether relief for outstanding amount of principal on irrecoverable loan available under s253(3) TCGA 1992 – yes – whether loss could be relieved under appellant's general income under s574 ICTA 1988 – no –relevance of HMRC treatment of similar claims considered - whether Tribunal had "equitable jurisdiction" to deal with appellant's affairs in the round – no –appeal against refusal of loss relief claim under 253(3) TCGA 1992 allowed –appeal against refusal to allow relief to be set against general income dismissed – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR PETER GOLDSMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
KAMAL HOSSAIN FCA

Sitting in public at 45 Bedford Square, London on 9 March 2012

Mr Goldsmith in person

Mr O'Reilly, for the Respondents

DECISION

Introduction

1. This appeal concerns payments the appellant made towards a loan which became irrecoverable and HMRC's refusals to allow his claims for:

(1) loss relief for loans to traders under s253 TCGA 1992

(2) negligible value under s24 of TCGA 1992; and also against HMRC's refusal to

(3) allow any loss relief to be set against the appellant's general income under s574 Income and Corporation Taxes Act 1988 ("ICTA 1988").

2. The appellant was a director of a property trading company (Efrussy Trading Company Limited ("Efrussy")). He maintains he fulfils the relevant conditions for the loss relief because the payments were made under a guarantee given to the bank which had lent money to Efrussy or because they were repayments of a loan to the company which became irrecoverable or was of negligible value.

3. HMRC argue the loss relief is not available because the loan was irrecoverable at the outset and therefore did not *become* irrecoverable. Further the statutory condition that the payments were made under the guarantee was not met there being no evidence that repayment was demanded by the bank under the guarantee. Even if loss relief on the payments is allowed for capital gains tax purposes HMRC disagree that there is any basis for setting this amount against general income.

Evidence

4. We were given a bundle of documents produced by HMRC containing correspondence between HMRC and the appellant, including enclosures to the appellant's letters during the period 31 March 1994 to 29 June 2010. This included:

(1) Advice of monthly interest due and payable on 31 October 2010 for £933.45 from Westpac to the appellant at his home address.

(2) Letter relating to a Facility for £204,000 dated 28 June 1989, 24 September 1990 and 30 April 1991 (referring to an earlier Facility Letter of 1 April 1987 and extension letter of 23 May 1988). All letters were addressed to Efrussy. (The signature sections of the letters were unsigned but mentioned the appellant as the guarantor of the loans).

(3) Redacted correspondence the appellant had sent to HMRC in relation to a claim he had made on behalf of a client and which he maintained was similar to his own and which had been accepted by HMRC.

5. At the hearing we also received 2 bundles of correspondence from the appellant. These had not been disclosed to HMRC but HMRC was given the opportunity to review these and did not object to the Tribunal considering them.

6. The further bundles included:

(1) correspondence between Efrussy and Midland Bank PLC dated 6 July 1987 and 8 and 9 October 1987.

(2) correspondence between Efrussy and Westpac Banking Corporation dated 18 April 1994, and 2 letters dated 16 June 1994.

(3) letters from the appellant to his property solicitor, Mr Allan Hooper dated 11 July 1994 and 9 August 1994.

7. In addition we heard oral evidence from Mr Goldsmith which was subject to cross-examination.

Law

8. Section 2(3) TCGA 1992

> **"2 Persons and gains chargeable to capital gains tax, and allowable losses**
>
> (1) …
>
> (2) …
>
> (3) Except as provided by Section 62, an allowable loss accruing in a year of assessment shall not be allowable as a deduction from chargeable gains accruing in any earlier year of assessment, and relief shall not be given under this Act more than once in respect of any loss or part of a loss, and shall not be given under this Act if and so far as relief has been or may be given in respect of it under the Income Tax Acts.
>
> …"

9. Section 24 TCGA 1992

> **24 Disposals where assets lost or destroyed, or become of negligible value**
>
> (1)…
>
> (2) Where a negligible value claim is made:
>
> (a) this Act shall apply as if the claimant had sold, and immediately reacquired, the asset at the time of the claim or (subject to paragraphs (b) and (c) below) at any earlier time specified in the claim, for a consideration of an amount equal to the value specified in the claim.
>
> (b) An earlier time may be specified in the claim if:
>
> (i) the claimant owned the asset at the earlier time; and
>
> (ii) the asset had become of negligible value at the earlier time; and either

(iii) for capital gains tax purposes the earlier time is not more than two years before the beginning of the year of assessment in which the claim is made; or…

10. Section 253 TCGA 1992

253 Relief for loans to traders

(1) In this section "a qualifying loan" means a loan in the case of which—

(a) the money lent is used by the borrower wholly for the purposes of a trade carried on by him, not being a trade which consists of or includes the lending of money…

(2) …

(3) Where a person who has made a qualifying loan makes a claim and at that time —

(a) any outstanding amount of the principal of the loan has become irrecoverable…

then… this Act shall have effect as if an allowable loss equal to that amount had accrued to the claimant at the time of the claim or (subject to subsection (3A) below) any earlier time specified in the claim.

(3A) For the purposes of subsection (3) above, an earlier time may be specified in the claim if:

(a) the amount to which that subsection applies was also irrecoverable at the earlier time; and either

(b) for capital gains tax purposes the earlier time falls not more than two years before the beginning of the year of assessment in which the claim is made; or…

(4) Where a person who has guaranteed the repayment of a loan which is… a qualifying loan makes a claim and at that time—

(a) any outstanding amount of, or of interest in respect of, the principal of the loan has become irrecoverable from the borrower, and

(b) the claimant has made a payment under the guarantee (whether to the lender or a co-guarantor) in respect of that amount, and…

this Act shall have effect as if an allowable loss had accrued to the claimant when the payment was made; and the loss shall be equal to the payment made by him in respect of the amount mentioned in paragraph (a) above less any contribution payable to him by any co-guarantor in respect of the payment so made.

…

11. Section 574 ICTA 1988

574 Relief for individuals

> (1) Where an individual who has subscribed for shares in a qualifying trading company incurs an allowable loss (for capital gains tax purposes) on the disposal of the shares in any year of assessment, he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on—
>
> (a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or
>
> (b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;
>
> but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.
>
> Where such relief is given in respect of the loss or any part of it, no deduction shall be made in respect of the loss or (as the case may be) that part under the 1992 Act.
>
> (2) Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection; and any relief claimed under either paragraph in respect of any income shall be given in priority to any relief claimed in respect of that income under section 380 or 381.
>
> (3) For the purposes of this section—
>
> (a) an individual subscribes for shares if they are issued to him by the company in consideration of money or money's worth; and
>
> (b) an individual shall be treated as having subscribed for shares if his spouse did so and transferred them to him by a transaction inter vivos.

12. We were also referred to the following cases:

Harper v HMRC Commissioners [2009] UKFTT 382 (TC)

Robson v Mitchell (Inspector of Taxes) [2005] EWCA Civ 585; [2005] STC 893

Facts

13. From the evidence before us we found the following:

(1) Efrussy was registered at Companies House on 1 July 1985.

(2) The appellant was a director of Efrussy.

(3) Westpac Banking Corporation ("Westpac") made loans to Efrussy. These included loan facilities which were available in the period 1 April 1987 to 16 June 1994.

(4) The appellant was a guarantor of the Westpac loans.

(5) The loans were used to acquire two flats in June 1987 for £120,000 each with a view to selling them on at a profit. Offers had been received

respectively for £165,000 and £182,500 and that it was hoped that exchange would take place by 21 July 1987.

(6) Efrussy sold one flat and received rent from the other.

(7) Rental income was received into the business bank account used for the appellant's accountancy practice.

Year Ended	Rent received
31/03/1988	£0
31//3/1989	£1,223.29
31/03/1990	£15,836.59
31/03/1991	£8,334.31
31/03/1992	£1,513.98
31/03/1993	£7,237.33
	Total: £34,155.50

(8) Interest was paid in respect of the loans from Westpac to Efrussy. The interest was in the following amounts in the period 1987-88 to 1992-3:

Year Ended	Interest paid
31/03/1988	£19,862.00
31//3/1989	£27,467.35
31/03/1990	£42,088.24
31/03/1991	£36,171.61
31/03/1992	£6,495.18
31/03/1993	£1,750.00
	Total: £133,834.38

(9) The interest payments exceeded the rents received for every accounting period that the company existed. The shortfall was made up by the appellant. The majority of the interest payments were paid directly by the appellant to the bank.

(10) The amounts owed by Efrussy to the appellant resulted in credits to the appellant's Director's Account with Efrussy.

(11) On 31 March 1994 the appellant wrote to HMRC to make a claim to offset the payments he had made in respect of interest against other income.

(12) On 18 April 1994 Westpac wrote to the appellant. The letter explained that in exchange for the appellant continuing to assist with the Westpac's strategy of selling the remaining flat to an as yet undisclosed party, Westpac would not pursue the appellant's personal guarantee with regard to any shortfall arising.

(13) On 16 June 1994 Westpac wrote to the Directors of Efrussy on a letter headed with the flat's address and "Legal Mortgage Dated 26 June 1987" to demand immediate payment of the outstanding balance of the sum due (£155,503.86). The letter stated that

> "in the event of our not receiving such repayment we shall proceed to exercise our rights under any security we may hold."

(14) On the same date a letter headed with the address "Facility Letters dated 1 April 1987 and 5 June 1987 subsequently amended on 23 May 1988, 28 June 1989 and 2 September 1991" gave notice of events of default pursuant to those facility letters. The events of default were stated as being non-payment of interest and capital repayment instalments. The facility was declared to be cancelled and the principal together with interest and other amounts due immediately due and payable.

(15) On 11 July 1994 in a letter to his solicitor the appellant refers to Westpac not having exchanged contracts on the property yet. The appellant asked the solicitor to hand over the keys in return for a signed agreement being handed over from Westpac via their solicitor.

(16) In a letter dated 9 August 1994 from the appellant to his solicitor. The letter states:

> "..the company only had one asset, the flat which had substantial negative equity after taking off the debt to Westpac Banking Coproration…I would also make the point that I paid the last amounts due personally but have no intention of doing so again."

(17) Efrussy was dissolved on 21 March 1995

(18) HMRC refused the loss relief claim on 19 April 2006.

(19) The appellant's appeal was on 28 March 2007 was accepted as a late appeal by HMRC.

Appellant's arguments

14. In relation to the refusal of loss relief under s253(4) TCGA 1992 the bank loans were not irrecoverable from the outset and the payments which had been made had been made under the guarantee. The fact the appellant did not have letters of demand from the lender was irrelevant. It was enough to show the appellant was the guarantor and that payments had been made. There could be no other reason why the payments had been made.

15. The loss relief should be available to be set off against general income. The appellant who was a chartered accountant had, on behalf of a client, made a negligible

value claim involving a directors loan account for a property trading company and that had been accepted by HMRC. HMRC's treatment of the client's claim and the appellant's claim was inconsistent.

16. HMRC had an "equitable jurisdiction" to look at matters in the round and should exercise this to allow the appellant's claim.

Respondent's arguments

17. The appellant's claim under s253(4) TCGA 1992 fails because

(1) There was no evidence the appellant was called upon in his personal capacity by the lender to make payments as guarantor

(2) The loan was irrecoverable at the outset, it was not a loan which had *become* irrecoverable.

(3) The case of *Robson* supports the view that no relief is due.

18. In relation to setting any loss relief against the appellant's general income there was no statutory basis for this. Section 574 ICTA 1988 only applied to disposals of shares in a qualifying trading company so whether there was a loss relief claim under s253 TCGA 1992 or a negligible value claim under s24 TCGA 1992 there was no route to establishing that the loss could be set against general income.

19. As for the similar claim the appellant maintained he had successfully brought on behalf of a client it appeared the client's circumstances were distinguishable as there appeared to be an issue over payments for breach of a shareholder agreement and consequential damage to shareholders. In any case if HMRC had given an incorrect decision in relation to that matter that did not bind it to also give appellant an incorrect decision in this matter.

20. In advance of the hearing HMRC argued that no evidence had been supplied to show that Efrussy had satisfied the criteria laid out in Schedule 6 Paragraph 1 TCGA 1992 and in particular because the business appeared to receive rental income, per s15(1) and s18(3) ICTA 1988 this income as Schedule A income was not profits of a trade. However upon reviewing the documents produced by the appellant at the hearing which indicated the properties had been purchased with a view to resale rather than rental Mr O'Reilly was prepared to accept that Efrussy could be classified as a trading company and so this contention was dropped.

Discussion

Loss relief claim for payments made under guarantee of a loan which became irrecoverable (s253(4) TCGA 1992)

Were the outstanding amounts irrecoverable from the outset?

21. The first issue in contention is whether as HMRC argue s253(4) cannot apply because the loan did not *become* irrecoverable.

22. HMRC's argument as to why the loan was always irrecoverable rests largely on a statement the appellant had made in correspondence with HMRC. In a letter dated 24 February 2005 from HMRC to the appellant HMRC pointed out that a claim to relief could only be made after the loan had become irrecoverable and as the appellant had continued making payments until at least 31 March 1993 the loan could only have become irrecoverable after that date. In a letter dated 28 February 2005 the appellant had replied:

> "In fact, the true situation was that the loan was in effect irrecoverable as soon as the payments were made…there was not enough income coming into the company for the payments to be made to the bank that provided the loans. I had to make these payments almost from day one in the knowledge that the money would never be paid back…Therefore my contention would be that the relief should be given each year that the payments were made on the basis that they would never be recovered."

23. The appellant was not able to throw any light on his statement at the hearing but questioned the relevance of the statement as the real issue was whether as a matter of fact the interest was irrecoverable.

24. Whether the interest was recoverable to begin with but then became irrecoverable is, we would agree, a matter of objective fact. We do not agree that the appellant's statements are irrelevant; they are in our view a factor which it is right to take into account but also one whose weight we should consider. In view of the context in which the appellant gave his reply, namely answering a letter which was effectively alleging the appellant's claim had been premature (rather than a letter which required an answer to an allegation that the loan was never recoverable in the first place), and the fact that the appellant's letter was written close to 18 years after the first payments were actually made, we find the statement to be of limited weight and certainly not conclusive of the loans being irrecoverable from the outset.

25. The documentary evidence put before us showed that in 1987 a commercial lender had been prepared to lend money to a company which had bought two properties and which had offers on the table for the resale of the property at a profit. That does not indicate to us that outstanding amounts on those loans would be irrecoverable as a matter of objective fact at the outset.

26. In fact the main asset of the company, a property bringing in rental income and carrying with it the hope that it could be sold at a profit if the market turned was not disposed of until 1994. In our view it was only when it became clear the property would be disposed of at a loss that sums paid in respect of interest on the loans would be known to be irrecoverable. We therefore do not agree with HMRC's submission that the loss relief claim should be denied on the ground that the outstanding amount had not *become* irrecoverable.

Were the payments in respect of the outstanding amounts made "under the guarantee"?

Relevance of evidence on whether guarantor called to pay

27. It was not disputed that the appellant was a guarantor the loans. What was in dispute was whether the payments were made "under the guarantee" for the purposes of s253(4)(b) TCGA 1992. HMRC point to the lack of any evidence that the appellant made the payments in his capacity as guarantor and in particular point to lack of any evidence the appellant was called upon by the lender to make the payments as the guarantor of those payments. The appellant had not been able to find any further documents relating to the guarantee and could not recall whether demands had been made. We were asked to infer from the fact that the appellant was a guarantor and the payments had been made that either the appellant must have received demands, or if he had not, then there was no other explanation for him having made the payments apart from them being made under the guarantee.

28. We find it helpful to return to the words of the legislation which require that the payments are made "under the guarantee" rather than to couch the question in terms of the capacity in which the person making the payment was acting. While the presence of evidence that a guarantor has made a payment pursuant to a call from the creditor to do so would make it very easy to be satisfied that a payment was made "under the guarantee" we do not think the absence of evidence that such a call was made is necessarily conclusive.

29. We were not referred by the parties to any authorities on the point but the Tribunal notes that various relevant authorities are set out in *Law of Guarantees 6th Ed. Andrews; Millett*. The question of whether a demand needs to be made will depend on the contract and how that is construed. In considering whether a creditor may enforce liability against a guarantor without a demand Dillon LJ in *M.S Fashions Ltd. v B.C.C.I* [1993] Ch. 425 at 447 quoted from a judgment of Atkin LJ in *N. Joachimson v Swiss Bank Corporation* [1921] 3 K.B 110,129 which said:

> "The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract?..."

30. Further there is authority to suggest that where there are provisions in a guarantee that the creditors make a demand on the guarantor these can be waived by the guarantor who is not bound to wait for a demand before paying. (See *Stimpson v Smith* [1999] Ch. 340 per Peter Gibson L.J. at [349]). There was no evidence before us which suggested that the appellant waived any such requirement but the point

serves to emphasise that the mere lack of evidence of a demand is not in and of itself a solid foundation for refusing a s253(4) claim.

Did the lender call for payment under the guarantee / was such a call required?

31. In terms of the evidence before us while we had before us unsigned copies of later Facility letters between Westpac and Erfussy which referred to terms and conditions as set out in earlier facility letters dated 1 April 1987 and 23 May 1988 we did not have those earlier letters and the terms and conditions in them.

32. We also noted a copy of a document from Westpac entitled "Advice of monthly interest due and payable on 31/10/87" which had been addressed to him personally and not the directors of Erfussy at Erfussy's company's address (which was different to the personal address). The document simply states the amount due and the date for payment. The appellant had provided this in response to a request from HMRC for evidence that he had paid the interest amounts under the guarantee.

33. In the absence of evidence speaking to the context in which this document was produced by Westpac we are not persuaded that this document was a demand or further that this type of document was generated for all of the payments in issue. It makes no reference to the default by Erfrussy or to the appellant's guarantee obligations. It also contrasts in its informal nature with the correspondence shown to us from Westpac to Erfussy in April and June 1994 which is set out in more formal terms and mentions specific events of default and makes explicit demands.

34. On the other hand as discussed above the absence of demands does not establish the payments were not made under the guarantee. As there is insufficient evidence of the terms and conditions of the guarantee were were unable to consider whether the guarantee required a demand to be given. We do not think, therefore, too much store can be placed on the lack of evidence of demands to pay under the guarantee.

What else could the payments be made for if not under the guarantee?

35. Given we are not persuaded that demands were made but equally not persuaded that the terms of the guarantee required there to be a demand, we must then consider whether it is to be inferred, as the appellant invites us to do, that the mere fact that payments were made when the appellant was a guarantor is enough to establish that those payments were made "under the guarantee".

36. Even though it is possible from what is stated above that a payment may be made under the guarantee (depending on the terms of the guarantee and how those are construed) even if the creditor has not issued a demand we do not agree it follows that any payment made by a guarantor will fall within the term "made under the guarantee". That will need to be determined according to the particular circumstances of the payment in question. It may be that for whatever reason the guarantor wishes to forestall their guarantee obligations from arising in the first place by enabling the debtor to meet its obligations to the creditor. In that situation we do not think it can be said that the payments are made "under the guarantee". It might be that they are

payments that would not otherwise be made if it were not for the guarantee but that does not in our view mean they are made under the guarantee.

37. In contrast the payment might be made only once the debtor has defaulted on its obligation to pay and the guarantor's liability is thereby triggered (assuming there are no other relevant pre-conditions). Here there clearly is scope to argue that the payment is "made under the guarantee".

38. In assessing which side of the line the appellant's payments fall on we are hampered by there being no evidence before us on the timing of Erfrussy's debt obligations as compared with the timing of the payments made by the appellant or there being any evidence that Erfrussy repeatedly defaulted on its payments to Westpac.

39. We think it is for the appellant to establish that the payments were made under the guarantee but there is inadequate evidence before us to reach that conclusion. We accept the appellant may genuinely have been motivated to make the payment in the knowledge that if there was a shortfall he would be pursued for it under the guarantee but this cannot answer the test posed in the legislation which we think is an objective one. We also note that the appellant was a director of Erfrussy. As such this may have been another reason why he may have been incentivised not to let the company fall repeatedly into default with its lender.

Relief under s253(3) TCGA 1992 for outstanding amount of principal on irrecoverable loan

40. Loss relief under s253 TCGA 1992 is also available under paragraph 3 of that section where a person who has made a qualifying loan makes a claim and at that time any outstanding amount of the principal of the loan has become irrecoverable.

41. While we were not specifically addressed on these provisions at the hearing we think we must also consider relief under this provision as we are satisfied from reviewing the appellant's claim and the subsequent correspondence between the appellant and HMRC that a claim was also being made under this provision in relation to loans the appellant had made to Efrussy through his loan account with the company. Although HMRC had in a letter dated 8 February 2005 indicated that the payments might qualify for loss relief (as against future capital gains only) HMRC subsequently came to the view that the relief under s253(3) TCGA 1992 was not available as the loans had not *become* irrecoverable but were irrecoverable at the time they were made. HMRC's view was based on the statements made by the appellant in his letter of 28 February 2005 (discussed above at [22]).

Loans from appellant to Efrussy and relief under s253(3) TCGA 1992

42. While it was not clear from the evidence before us whether some or all of the payments of interest on the Westpac loans were paid direct by the appellant to Westpac on Efrussy's behalf, or paid to Efrussy first and then on to Westpac either way we accept that the payments amounted to there being a loan between the

appellant and the company which was reflected in the appellant's directors loan account with the company.

43. The question arises as to whether such a loan would fulfil the requirement that the money lent is used by the borrower "wholly for the purposes of trade carried on by him". We find that this requirement is satisfied, the money paid by the appellant being wholly used to pay for interest on a loan which was itself for the purposes of the trade of Efrussy.

44. This is consistent with the approach endorsed by the Court of Appeal in *Robson*, a case which considered the "wholly for the purposes of trade" test in s253(1) TCGA 1992 where Neuberger LJ (as he then was) at [22] [2005] STC 893 endorsed the following arguments put forward by the Revenue:

> "[w]here money lent is used to repay an existing indebtedness, the purpose served by the use of that money is characterised by the purpose of the existing indebtedness. This interpretation ensures that where money lent has actually been used for a wholly trading purpose, the taxpayer is not precluded from relief where he simply wishes to refinance that loan. It also ensures that a refinancing exercise does not convert a non-qualifying loan into a qualifying loan"

45. In relation to HMRC's argument that the payments toward the loan were irrecoverable from the outset given what the appellant had stated in his letter of 28 February 2005 our views as set out in para [24-26] above are relevant. We find the statements in that letter to be of limited assistance in establishing whether the outstanding amounts, in this case outstanding amount of principal on the appellant's loan to the company were recoverable at the time the loan was made. Although the appellant, unlike Westpac was not a commercial lender and therefore might have been more prone to making a loan which was irrecoverable the point remains that until it became clear the remaining property of the company was going to be sold at a loss we do not think it can be said that a claim under s253(3) TCGA 1992 fails on the grounds the amount was outstanding from the outset and therefore did not *become* irrecoverable.

46. We therefore find that the appellant should be entitled to his claim under s253(3) TCGA 1992 for outstanding amounts of principal of the loans he made to Efrussy. As to the quantum of the outstanding amounts it is our view that the outstanding amount of principal of loans the appellant made to Efrussy is represented by the shortfall between the interest payment the appellant made and the rental payments he received as set out in paragraphs [13(7) and (8)].

47. Before moving on from the issues on s253 TCGA 1992 we note that HMRC had in their submissions invited us to reach a view that *Robson* assisted with their arguments that it was right to refuse the s253 TCGA 1992 claim. At the hearing HMRC were not able to elaborate further on the particular aspects of the case which assisted them and, although we were grateful to Mr O'Reilly to have been referred to the case, it being one of the few higher authorities on that provision, we were unable to discern the reasons why the case supported HMRC's position on s253 TCGA 1992.

Does s574 ICTA allow the appellant to use the loss relieved under s253 TCGA 1992 against his general income

48. While s574 ICTA 1988 does indeed allow an individual's losses for capital gains purposes to be set against an individual's income tax the provision clearly applies to losses on the disposal of shares the individual has subscribed for in a qualifying trading company. This provision does not provide any basis for the appellant to use the loss relief he has obtained under s253 TCGA 1992 in respect of outstanding principal on loan amounts for capital gains tax purposes as a relief against his income tax.

Negligible value claim under s24 TCGA 1992 and use of relief against general income

49. We do not see how even if were argued that the loan account, being an asset in the hands of the appellant, became of negligible value, that this would support the claim that the loss obtained under s24 TCGA 1992 for capital gains purposes could be used as a relief against the appellant's general income. As set above at [49], although s574 ICTA does enable relief from income tax this only applies to losses on the disposal of shares the individual has subscribed for. We have no evidence before us in relation to whether the appellant was issued with shares, their value and in any case no indication that there has been a claim, refusal or appeal which would give us jurisdiction to consider the issue.

Relevance of HMRC granting relief sought to the appellant's client who was in similar circumstances

50. We were referred to redacted correspondence in relation to a negligible value claim made by the appellant on behalf of a client whose company was trading in property. Claims appear to have been made both in relation to shares and in relation to a loan. Having reviewed the correspondence while it appears a negligible value claim was accepted in relation to the shares and a loss accepted in relation to the loan it is not clear to what extent it was accepted the losses, in particular the losses on the loan could be set against general income.

51. In any case even if the correspondence was clear in showing that HMRC had accepted a negligible value claim on a loan, and that the loan was similar to the loan the appellant had made to Efrussy, HMRC's acceptance of the claim would have been wrong in law given the limitation of s574 ICTA 1988 to shares.

52. This Tribunal must determine the appeal according to the relevant law, and we can see no authority relevant to appeals against refusals of claims such as the ones before us which would bind the Tribunal to apply and perpetuate a decision by HMRC to accept the claim on the basis a similar claim had been erroneously accepted for another taxpayer. If there has been inconsistent treatment it is no doubt uncontroversial that this is unsatisfactory but the taxpayer's remedy lies through other avenues such as complaints procedures and actions for judicial review.

Equitable liability / jurisdiction

53. The appellant, following up requests he had made in correspondence with HMRC, argued that it should be possible for the relief he was seeking to be granted on the basis that HMRC had an equitable jurisdiction to look at a taxpayer's affairs and the way they had been dealt with in the round.

54. There was no legislation put before the Tribunal on the point but the appellant helpfully drew the Tribunal's attention to his recollection that this approach, which was something he had encountered in his practice, had recently been codified.

55. Upon further research subsequent to the hearing it appears to the Tribunal that the appellant may have been referring to provisions in paragraph 3A of Schedule 1AB of the Taxes Management Act 1970 and which were inserted by the Enactment of Extra-Statutory Concessions Order SI 2011/1037 with effect from 1 April 2011. These enable a person to claim for relief for repayment or discharge of tax they are liable to pay which they believe is not due as long as various conditions are met (including whether, in the opinion of HMRC, it would be unconscionable for HMRC to recover the amount).

56. In terms of the appeal before the Tribunal, the Tribunal's authority is limited to making determinations according to the law and there is no legal provision enabling the Tribunal to alter the conclusions it has come to according to the law on any kind of equitable jurisdiction in the manner suggested by the appellant.

57. To the extent the appellant had in mind the statutory provisions referred to above it is not clear to us that HMRC have made any decision or given any opinion on their applicability, and what, if any, jurisdiction the Tribunal has in relation to such claims. The appellant has raised the issue of whether HMRC could exercise its "equitable jurisdiction" in correspondence for instance in his letter 14 April 2010 to HMRC. HMRC had replied that they were not aware of this term. It appears to the Tribunal that HMRC ought to clarify whether the appellant had in mind these provisions or similar extra-statutory concession when he made his request and if so consider the matter further and provide him with a response.

Conclusion

58. The appellant's appeal against the refusal of his claim for loss relief of under Section 253(3) TCGA 1992 is allowed in the amount of £99,678.88 being the shortfall between the rent received and the interest payments made.

59. The appellant's appeal against HMRC's refusal to allow relief against his general income is dismissed.

60. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 15 August 2012