[2019] UKFTT 643 (TC)

TC07419

CGT – Qualifying loan under section 253 TCGA 1992 – Appellant claimed allowable loss on the basis that a qualifying loan was made to a trader. No qualifying loan made – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02044

BETWEEN

MR STEVEN FLASHMAN **Appellant**

-and-

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

TRIBUNAL: JUDGE KELVAN SWINNERTON
MR MICHAEL BELL (MEMBER)

Sitting in public at Taylor House, Roseberry Avenue, London on 26 September 2019.

Mr Marks, for the Appellant.

Ms Patel, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents.

DECISION

INTRODUCTION

1. This is an appeal against HMRC's closure notice issued on 13 October 2017 and confirmed on review on 12 March 2018 that the Appellant, Mr Flashman, is not entitled to claim an allowable loss in the sum of £100,000 relating to a qualifying loan under section 253 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"). The allowable loss claimed relates to the self-assessment tax return for Mr Flashman for the year ended 5 April 2015 (the 2014/15 tax return).

BACKGROUND

2. Mr Flashman is an oil derivatives trader who has worked in that field for several decades and who now continues to do so on his own account rather than on an employed basis. Mr Lee Elliott, a former work colleague of Mr Flashman and an oil derivatives broker, introduced Mr Flashman to Mr Lee Farbrace. Mr Farbrace was a director of a company named Emerging Markets Investment Ltd.

3. These three gentlemen had an initial meeting in February 2010. The purpose of that initial meeting was for Mr Farbrace to explain to Mr Flashman a route trading scheme relating to mobile phone charging in respect of which Mr Flashman was to consider becoming involved and potentially committing monies. Another meeting took place about a week later after which Mr Flashman decided to become involved and to commit monies.

4. On 25 February 2010, Mr Flashman made a payment to 'Emerging Markets' of £130,020 which is particularised in a statement from the Royal Bank of Scotland. In September 2011, Mr Flashman was informed by Mr Farbrace that the company had run into financial difficulties.

5. On 23 June 2013, after a chain of communications, Mr Flashman received an amount of £30,000 from Mr Farbrace in relation to the monies of £130,020 that he had advanced three years earlier. That payment is particularised in a bank statement from the Royal Bank of Scotland for Mr Flashman's current account.

6. Mr Flashman contends that the payment that he made of £130,000 to Emerging Markets was a qualifying loan and that, as only £30,000 was returned to him, he has suffered a loss of £100,000 relating to the 'EMI Trading Project' which was included as a supplementary page on his tax return for 2014/15. The tax return for Mr Flashman for 2014/5 was filed on 25 January 2016 and showed net capital gains of £264,314 after deduction of the claimed allowable loss of £100,000.

7. On 17 November 2016, HMRC notified Mr Marks (a chartered accountant and the agent of Mr Flashman) that HMRC was to carry out a check into the 2014/15 tax return of Mr Flashman. On 8 December 2016, Mr Marks informed HMRC that the loss of £100,000 related to an investment in a Telco project acquired on 26 March 2013. Mr Marks also informed HMRC that Mr Flashman had omitted to advise HMRC of a CGT event and a gain of £56,514 in respect of his holding in BEL Holdco Limited (in liquidation) that should have been reported on his 2014/15 tax return.

8. Between January 2017 and September 2017, there were a number of communications between Mr Marks and HMRC. In his letter of 7 April 2017 to HMRC, Mr Marks stated that Mr Flashman invested via a company called EMI Wealth in respect of mobile phone routing charges and that Mr Flashman "*loaned monies to EMI Wealth under the syndication of loans for Route Trading*".

9. In his letter to Mr Marks of 6 July 2017, Mr Paul Brenchley of HMRC stated that no loss relief was available under section 253 of the TCGA 1992 as the monies had not been loaned by Mr Flashman for the purpose of a trade but were an investment. A closure notice was issued on 13 October 2017 and a Notice of Appeal was received on 20 October 2017.

THE LAW

10. HMRC state that Mr Flashman has not made a qualifying loan as defined in section 253(1) TCGA1992.

11. Section 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, and

(b) the borrower is resident in the United Kingdom, and

(c) the borrower's debt is not a debt on a security as defined in section 132;

and for the purposes of paragraph (a) above money used by the borrower for setting up a trade which is subsequently carried on by him shall be treated as used for the purposes of that trade.

(2) In subsection (1) above references to a trade include references to a profession or vocation; and where money lent to a company is lent by it to another company in the same group, being a trading company, that subsection shall apply to the money lent to the first-mentioned company as if it had used it for any purpose for which it is used by the other company while a member of the group.

(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, and

(b) the claimant has not assigned his right to recover that amount,

(c) the claimant and the borrower were not each other's spouses [or civil partners], or companies in the same group, when the loan was made or at any subsequent time,

[then, to the extent that that amount is not an amount which, in the case of the claimant, falls to be brought into account as a debt given for the purposes of [Part 5 of CTA 2009] (loan relationships),] 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.]

12. HMRC, in its Statement of Case, state that no evidence has been provided to show that Mr Flashman acquired an asset in return for his investment, such as shares. Reference was made to Section 21(1)(b) of TCGA 1992 and to the investment of sterling of Mr Flashman not being an asset for capital gains purposes.

13. *Section 21 – Assets and Disposals.*

(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including –

(a) options, debts and incorporeal property generally, and

(b) currency, with the exception (subject to express provision to the contrary) of sterling,

(c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.

THE HEARING

14. Mr Flashman was represented at the hearing by Mr Marks, his agent and accountant with whom HMRC have had a large number of communications relating to this matter. The bundle of documentation provided for the hearing included a witness statement from Mr Flashman dated 7 March 2019 and a witness statement from Mr Lee Elliott also dated 7 March 2019. We were informed that Mr Elliott was unable to attend the hearing due to work commitments.

15. The statement of Mr Flashman refers to the initial meeting that he attended with Mr Elliott and Mr Farbrace and to Mr Farbrace having "detailed the investment opportunity to make unsecured loans to his company in return for which the entity would pay a monthly rate of interest. Mr Farbrace explained that the company undertook trading on mobile usage routes involving fixed line termination costs on mobile networks via a telephone carrier Telco. He produced a marketing pack (which referred to EMI Wealth and which marketed the scheme) explaining in more detail the route trading programme and that it produced significant profits for Emerging Market Investment Limited".

16. Included within the documentation for the hearing was the marketing pack of EMI Wealth for the scheme entered into by Mr Flashman which consists of five pages. On the front page of the document, it is stated: 'Technical Trading Information ….. Process and Risk Assessment'.

17. The second page of the document, in the section entitled 'Background', refers to an alternative investment opportunity that provides unique scope to unparalleled low risk returns and states that the "basic concept of this investment revolves around trading mobile call termination routes". It goes on to add that if a person wishes to make a call from landline, mobile or VOIP (Voice over Internet Protocol) services to another network, then that person has to be connected via a termination route operated by another carrier. In order to do this, carriers need to sign interconnect agreements with other carriers. Route prices are fixed for seven days and carriers can buy routes operated by other carriers and potentially trade them to another carrier at a margin.

18. The fourth page of the guide is entitled: 'What Is The Typical Flow Of Funds?' and states: "Our model is structured around an investment centric approach. Your money is placed in trading Escrow with Telco, a UK based niche carrier specialising in the VOIP market". Other steps in the flow of funds are detailed and it goes on to state: "Once funds have been transferred in full and received in the Trading Escrow, Telco executes their trade with the carrier for the surplus minutes".

19. At the hearing, Mr Flashman gave evidence on cross-examination that he did not receive any contractual documentation relating to the scheme that he entered into and that he did not receive any asset other than currency. He did not know who had carried out the trading activity

when asked if Telco had done so and admitted to being vague and having little understanding as to how the trading activity worked and little knowledge of the entities involved.

20. He accepted that there was no evidence that EMI Wealth or Emerging Markets Investment Ltd had carried out any trading activity. Mr Flashman was not able to remember what documentation, if any, that he had seen prior to committing monies and no note of either of the meetings that Mr Flashman attended with Mr Farbrace has been made available to us.

21. On behalf of Mr Flashman, it was submitted that EMI Wealth had engaged in trading, that Mr Flashman had made a qualifying loan and had suffered an allowable loss. In its skeleton argument, HMRC state that for the purposes of capital gains tax there must be an asset and, in this case, there is no asset other than currency as Mr Flashman made a payment in sterling and was to be repaid in sterling. Apart from there being no chargeable asset, HMRC submit that if there was any trading activity then it would have been carried out by Telco and not by EMI Wealth Ltd.

FINDINGS OF FACT

22. EMI Wealth Ltd is a UK registered company incorporated on 26 September 2009. The director of the company is Mr Lee Farbrace. The annual return (form AR01) for EMI Wealth Limited dated 26 October 2010 states, in respect of the principal business activity of the company, that it is a 'Marketing Consultancy'. The letter dated 1 September 2011 from EMI Wealth, explaining the premature closure of the Route Trading Program, also refers to their 'consultancy'.

23. Emerging Markets Investment Ltd is a UK registered company incorporated on 23 September 2009. The director of that company is Mr Lee Farbrace. The annual return for Emerging Markets Investment Ltd dated 23 September 2009 states, in respect of the principal business activity of the company, that it is a 'Marketing Consultancy'. There is no evidence to demonstrate that EMI Wealth Ltd and Emerging Markets Investment Ltd are members of a group of companies. No such evidence was provided to us at the hearing. We find that EMI Wealth Ltd and Emerging Markets Investment Ltd are not members of a group of companies.

24. The RBS bank statement details that Mr Flashman made a CHAPS transfer to 'Emerging Markets' on 25 February 2010. The documentation made available to us includes an invoice which has EMI Wealth at the top of the document and Emerging Markets Investment Ltd (and its company registration number) at the bottom of the document.

25. It appears to us that EMI Wealth Ltd and Emerging Markets Investment Ltd are used interchangeably in the communications from Mr Farbrace. The invoice is dated 26 March 2013 and is from Emerging Markets Investment Limited to Mr Steven Flashman. With respect to description, it states: 'Telco Project Investment Commissions @100% Capital'. The amount of the invoice is £130,000. The invoice is, therefore, dated about three years after the payment was made by Mr Flashman detailed in the RBS bank statement. We find Mr Flashman made a payment to Emerging Markets Investments Ltd in February 2010 in the sum of £130,020.

26. It was contended on behalf of Mr Flashman that EMI Wealth engaged in trading activity. Mr Flashman, in his evidence at the hearing, readily admitted that his knowledge and understanding is very vague as to which entity did what and, similarly, he was unable to specify what, if any, documentation he had seen prior to deciding to commit monies to the scheme

proposed to him by Mr Farbrace. The evidence of Mr Flashman was of little assistance to us in determining what activity the various entities involved actually undertook.

27. In respect of any trading activity of EMI Wealth, we were not provided with any documentation to support that contention. HMRC contend that EMI Wealth was merely a marketing consultant or agent and did not engage in any trading activity. HMRC have referred to the marketing pack for the scheme referring specifically to monies being transferred to a trading escrow, to Telco then executing a trade and to there being no reference to EMI Wealth executing any trade. We accept that contention.

28. We find that EMI Wealth Ltd and Emerging Markets Investment Ltd were both controlled by Mr Farbrace and that reference to both of these companies appears to have been used interchangeably. We find that neither EMI Wealth Ltd nor Emerging Markets Investment Ltd engaged in any trading activity. We find that their primary role was that of marketing activity and to propose the scheme to potential investors and then to sign up those investors who were attracted, as confirmed by Mr Flashman at the hearing, by the potentially high returns.

29. The skeleton argument provided on behalf of Mr Flashman states, amongst other things, that the mechanics of the loan arrangements for the loan to Emerging Markets Investment Ltd were explained to Mr Flashman at a meeting with Mr Farbrace and Mr Elliott and that Mr Flashman appreciated that the loan was high-risk but that the projected monthly interest returns compensated for the risk exposure. It is also stated that, regardless of the absence of a formal loan agreement, Mr Flashman contends that "the supporting documents in the bundle should be construed in a commercial way".

30. HMRC maintain that Mr Flashman did not enter into a loan but made an investment and, in its Statement of Case, make reference to the marketing pack (or guide) of EMI Wealth stating that: "Your only commitment is to maintain your original investment for a minimum period of 12 months. At the end of the 12-month period, you can choose to withdraw your investment completely or extend your contract".

31. Based upon the available documentation and the evidence given and submissions made at the hearing, we do not find that Mr Flashman made a loan to Emerging Markets Investment Ltd or to EMI Wealth Ltd. It follows that we do not find that Emerging Markets Investment Ltd or EMI Wealth Ltd borrowed monies from Mr Flashman for the purposes of a trade carried on by either of those companies. We find therefore that Mr Flashman did not make a qualifying loan.

32. We note that HMRC maintain that, although it appears that monies were converted from sterling into US dollars in the course of various transactions, that is not relevant in determining the nature of any asset acquired by Mr Flashman. HMRC submit that the evidence shows that Mr Flashman made a payment in sterling and lost sterling and there is, therefore, no asset in this case other than sterling which is excluded from the type of property on which a chargeable gain or loss can arise.

33. The detailed workings of the scheme are, we find, not clear based upon the available documentation which is not helpful in determining this point with clarity. In any event, regardless of the issue as to whether there is a chargeable asset, even if there is then we have found that there is no qualifying loan.

DECISION

34. We agree with HMRC that Mr Flashman has not made a qualifying loan as defined in section 253(1) TCGA 1992.

35. We find that Mr Flashman has failed to evidence that there is an allowable loss of £100,000 as claimed on his tax return for 2014/15.

36. We disallow the claim of Mr Flashman for an allowable loss of £100,000 for capital gains tax purposes.

37. We dismiss the appeal of Mr Flashman.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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.

KELVAN SWINNERTON
TRIBUNAL JUDGE

RELEASE DATE: 21 OCTOBER 2019