[2014] UKFTT 892 (TC)

TC04007

Appeal number: TC/2013/03055

INCOME TAX AND CAPITAL GAINS TAX – negligible value claims made by executors in respect of period before deceased's death – whether claims could be made by executors – purposive interpretation of relevant legislation – appeal allowed in so far as claim used against income and gains arising in lifetime of deceased

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER L DROWN & MRS R E LEADLEY
as Executors of
JEFFREY JOHN LEADLEY DECEASED **Appellants**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 23 July 2014

Mr R Roberts, of Beavis Morgan LLP, for the Appellant

Mr M Boyle, HMRC officer, for the Respondents

DECISION

1. The appellants, as personal representatives of the deceased, Mr Jeffrey John Leadley, appealed against a review decision dated 28 March 2013 which upheld an amendment dated 15 January 2013 of a tax return dated 17 January 2011 for year 09/10. The effect of the amendment was to increase the stated tax liability by £130,385.72.

Facts

2. The parties were agreed that the facts were not in dispute. There was, however no statement of agreed facts, so I take the following summary from the parties' skeleton arguments.

3. Mr Jeffrey Leadley invested £25,000 in a company called Datalase Ltd and another £25,000 in a company called Keronite Ltd. He also made a loan of £334,784 to Rollestone Crown Ltd. I was not told the date of these investments and the loan, as it was not in issue, but the investments and loan were clearly made before the dates on which HMRC accept that they had become valueless.

4. HMRC accept that no later than 5 April 2010 the two shareholdings were valueless and that the loan had effectively ceased to exist as an asset on 3 November 2009 when the borrower company was dissolved (having previous gone into liquidation without repaying the loan).

5. On 6 April 2010 Mr Leadley was served with notice under s 8 Taxes Management Act 1970 ("TMA") to file a tax return for the year 09/10.

6. On 11 May 2010 Mr Leadley was killed in a motoring accident.

The dispute

7. As I have said, Mr Leadley's executors filed in January 2011 a tax return reporting Mr Leadley's chargeability to tax for 09/10. In this return they claimed relief for £384,784 of losses, comprising the £50,000 loss on the shareholding and the £334,784 loss on the loan. £40,000 of the loss on the shares was set against income arising in 09/10, relying on the provisions of s 131 Income Tax Act 2000 ("ITA") which allowed a capital loss recognised under s 24 Taxation of Chargeable Gains Act 1992 ("TCGA") to be set against income. The remaining capital loss of £344,784 was originally claimed to be eligible to be carried forward against capital gains in future years.

8. The return was later amended by the executors to treat the loss of £344,784 as a loss also entitled to relief under s 131 ITA/s 24 TCGA, as they regarded the loan as equivalent to equity, and this explains the size of the assessment. By the time of the hearing, however, the executors had accepted that the loss on the loan was not eligible

for relief under s 131/s 24 so that, therefore, only part of the assessment was in dispute. The remaining issues in dispute were:

(a) was the executors' s 131/ s 24 claim for the loss on the shares to be relieved against against income arising in 09/10 valid?

(b) could the executors make a claim, relying on s 253 TCGA (*relief for loans to traders)*, to carry forward against capital gains in future years the loss on the loan?

9. HMRC's case was that the appellants, as executors, were incompetent to make either claim. The s 131 claim, said HMRC, could only be made by the person who owned the shares at the time they become of negligible value and the s 253 claim by the person who had made the loan. This person was Mr Leadley, who did not make the claims before he died, and obviously could not make the claims afterwards.

The law applicable to the loss on the shares

10. Section 131 Income Tax Act 2007 provides:

> "An individual is eligible for relief under this Chapter ('share loss relief') if –
>
> (a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ('the year of the loss'), and
>
> (b) the shares are qualifying shares.
>
> This is subject to subsections (3) and (4) and section 136(2)."

11. HMRC accepted that the preconditions of s 131 were fulfilled except in two respects. Firstly, on HMRC's case, to make a claim under s 131 the claimant must be "an individual" who had incurred the loss whereas the claim was made by the executors, who were a body of persons and not an individual and who had not incurred the loss. Secondly, on HMRC's case, the pre-condition in subsection (3)(d) was not fulfilled. That subsection provided, so far as relevant:

> "(3) Subsection (1) applies only if the disposal of the shares is –
>
> (a) [not relevant]
>
> (b) [not relevant]
>
> (c) [not relevant]
>
> (d) a deemed disposal under section 24(2) of [the TCGA 1992] (claim that value of the asset has become negligible).

12. HMRC's position was that the executors could not make a claim under s 24 Taxation of Chargeable Gains Act 1992 ("TCGA") on the grounds that the shares had become of negligible value. The question asked by s 131(3)(d) is not whether the executors could make a claim under s 24 but whether there was a 'deemed disposal' under that section. However, as can be seen below, s 24(2) provides that there is only

a deemed disposal *if* a negligible value claim is made. So HMRC were right to ask the question whether the executors could make a s 24 claim.

13. So there are really two, very similar questions so far as the shares are concerned. Can the executors make the claim under s 24(2) TMA *and* under s 131 ITA?

14. Section 24 TCGA provides:

> (1) ….the occasion of the entire loss, destruction, dissipation or extinction of an asset shall, for the purposes of this Act, constitute a disposal of the asset whether or not any capital sum by way of compensation or otherwise is received in respect of the destruction, dissipation or extinction of the asset.
>
> (1A) A negligible value claim may be made by the owner of an asset ("P") if condition A or B is met.
>
> (1B) Condition A is that the asset has become of negligible value while owned by P.
>
> (1C) Condition B is that –
>
> (a) the disposal by which P acquired the asset was a no gain/no loss disposal…..
>
> (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;

15. It was not suggested the remaining provisions of s 24 TCGA were relevant.

16. HMRC's position was simple. The executors could not make a claim under s 131 because they could not make a claim under s 24 TCGA; and they could not make a claim under s 24 TCGA because the shares had become of negligible value *before* they were owned by the executors: see s 24(1B) which requires that

> "the asset has become of negligible value while owned by P".

17. By s 24(1A) 'P' must be both the claimant and the owner of the asset. The executors were the claimants and the owners of the asset at the date the claim was made. But it was agreed that the shares were of negligible value by no later than 5

April 2010 and Mr Leadley did not die until 11 May 2010. So the shares were already of negligible value at the date that the executors became the owners of them.

18. HMRC accepted that Mr Leadley, had he lived, could have made a claim under s 24 in his 09/10 return. But, said HMRC, the executors could not make the claim as owner of the shares because they did not own the shares at the time they became of negligible value, as explained in the previous paragraph.

19. The appellants' position was that the personal representatives stood in the shoes of Mr Leadley and could make the claims effectively as if they were Mr Leadley.

20. Before dealing with the executors' claim that in law they were to be treated as if they were Mr Leadley, I deal with one aspect of this which is that HMRC's position was that, even if the executors were right on this, s 24 still did not apply as Mr Leadley did not own the shares at the date of the claim was submitted (as he had died).

Does s 24 require Mr Leadley to be alive when claim submitted?

21. The claim was submitted when the tax return was filed in early 2011. HMRC consider the date of the claim was the date of submission and that it was invalid because Mr Leadley was not the owner of the asset at the date of the claim. However, I find that the date of the claim was 5 April 2010 as this was the date set out in the capital gains tax schedule to and filed with the 09/10 tax return. Indeed, it was obvious that the claim was backdated to a date earlier than the date of the submission of the tax return because it was a claim against income tax liability for 2009/10.

22. The date of the claim was 5 April 2010 and under s 24(2)(b) (all other things being equal) that date was capable of being specified: (i) Mr Leadley had owned the asset at that time, (ii) the assets had become of negligible value by that time and (iii) it was not more than two years before the beginning of the year of assessment in which it was actually made (10/11).

23. But HMRC's point is that their interpretation of s 24 is that Mr Leadley must be alive at the time that the claim was submitted (January 2011) because s 24 presupposes he owns the asset at the time the claim is submitted.

24. I consider that this is an overly literal interpretation of s 24. In an earlier version of this legislation, Vinelott J was reluctant to adopt an overly literal interpretation in relation to another aspect of s 24:

> "Upon a literal construction the word 'thereupon' most naturally relates back to the words 'he may allow'. That literal construction may give rise to arbitrary consequences if, for instance, as a result of delay on the part of the Inspector, a claim made in one tax year is allowed in a subsequent tax year. In practice, as it apparent from the statement that I have read, the Revenue have always construed subsec (4) as if the word 'thereupon' related back to the words 'on a claim by the owner of the asset'. That, I think, is a permissible construction, and I

> can see great force in the argument that if it is a permissible construction it should be preferred to a construction which fixes the possibly arbitrary date when the claim is allowed." *Williams v Bullivant* [1982] BTC 384

25. Since that case, HMRC's concession in allowing claims to be back dated for two years has been enshrined in the legislation at s24(2). Whereas in that case the judge considered it an overly literal to require the deemed disposal and re-acquisition to be the date the claim was accepted by HMRC, I think here too it is overly literal interpretation of the current legislation to require P to remain the owner of the asset after the date on which the claim is to have effect. It is obviously the purpose of the relief that 'P' should own the asset at the time it became of negligible value and at the date of the claim; no purpose is fulfilled by requiring 'P' to remain the owner of the asset after that date. Such a restriction could well give rise to arbitrary results: what if the taxpayer specified a time say one year earlier in his claim but at the date of actually making the claim he was no longer the owner of the asset (say if the company had been dissolved so the shares no longer existed)? Should that prevent the claim? On HMRC's construction it would do so. I do not think that that was intended by Parliament.

26. So where s 24(1A) requires the claim to be made by the owner of the asset, a purposive construction is that P should be the owner of the asset at the date the claim is to have effect, which under s 24(2) is either the date the claim is submitted or an earlier time specified in the claim (being within the two years calculated as per s 24(2)(b)(iii)).

27. The effect in this case is that, as the date specified in the claim was 5 April 2010, s 24 only required Mr Leadley to be the owner up to 5 April 2010. Mr Leadley was the owner at that date (he died about five weeks later). He was not required to own the shares at the date of submission.

28. But the main objection to the executors' reliance on s 24 and s 131 is that it was not Mr Leadley himself who submitted the claim. The claim was submitted by the executors. The appellants' position is that they should be treated as if they were Mr Leadley as, in submitting the 09/10 return, which entirely covered the period when Mr Leadley was still alive, they were merely representing him. So in what capacity did the executors submit the 09/10 return?

Personal representatives' capacity

29. Everyone was agreed that as a matter of common law, the personal representatives of a deceased person become the owner of the deceased's assets at the moment of his death. Any income arising on those assets after that date is the liability of the personal representatives because it is their income.

30. It is perhaps not so obvious that the personal representatives would have any liability for tax on the income which arose *before* the death and while the assets were still owned by the deceased. Section 74 TMA puts it beyond doubt by providing:

> "s 74(1) If a person chargeable to income tax dies, the executor or administrator of the person deceased shall be liable for the tax chargeable on such deceased person……"

31. How is the chargeability of the deceased person assessed? Bearing in mind that death is an everyday occurrence, it is surprising how little provision is made for it in TMA. Persons <u>chargeable</u> to income and capital gains tax are required to notify their liability (s 7 TMA) and may be issued (as Mr Leadley was) with a notice to complete a tax return under s 8. But personal representatives are only <u>chargeable</u> to tax on the income arising after death on the assets of the estate, when they become the owner of them. So it seems s 7 and s 8 TMA do not apply to personal representatives for the period prior to death. And while s 74 provides they are liable for the deceased's pre-death tax, it does not require them to file a return.

32. Section 8A is of no relevance as it relates to settlements. 'Settlement' is not a defined term but it must require at least legal ownership to reside with the trustees. It is arguably inapplicable to personal representatives after death (as there is no true settlement while the estate is administered) but is clearly inapplicable to the personal representatives for periods before the death, when they do not even own the assets.

33. So there is nothing, it seems, in TMA to require personal representatives to file returns for the pre-death period, although no doubt they normally do so because it is clear from s 74 TMA that they are <u>liable</u> to pay the tax. And they did so in this case, signing as 'representative of Mr JJ Leadley dec'd'.

34. Mr Leadley was *chargeable* to the tax incurred before his death but the executors are *liable* to pay it.

Relevance of s 72 TMA – incapacitated persons

35. Mr Roberts' view was that the executors submitted the return in a representative capacity under s 72 TMA (now repealed but in force for tax year 09/10) and could claim any relief which the deceased could claim. That section provided:

> "The trustee, guardian, tutor, curator or committee of any incapacitated person having the direction, control or management of the property or concern of any such person, …shall be assessable and chargeable to income tax in like manner and to the like amount as that person would be assessed and charged if he were not an incapacitated person.
>
> …."

36. HMRC did not accept that the return was made in a representative capacity as Mr Leadley was dead and could not therefore be represented. I agree that a deceased person is not an 'incapacitated person'. So, whatever was put on the return, I think the (voluntary) return was made by the personal representatives in their capacity as the persons under s 74 liable to pay the unpaid tax arising in the deceased's lifetime.

37. Nevertheless, it is Mr Leadley's *chargeability* to tax that was being returned by the personal representatives when they submitted the tax return for 09/10. Mr

Leadley's chargeability depended on whether a claim was made for assets becoming of negligible value.

38. Which brings me full circle to the point raised above. The executors say that they make the claim in the shoes of Mr Leadley; HMRC say that they cannot make the claim.

The relevance of s 77 TMA.

39. This provides:

> "(1) This Part of this Act (except section 76 above) shall apply in relation to capital gains tax as it applies in relation to income tax, and subject to any necessary modifications.
>
> (2) This Part of this Act as applied by this section shall not affect the question of who is the person to whom chargeable gains accrue, or who is chargeable to capital gains tax, so far as that question is relevant for the purpose of any exemption, or of any provision determining the rate at which capital gains tax is chargeable."

40. That 'Part' of the Act to which s 77(1) refers is s 71 to s 77 itself. So the effect of s 77 is that sections 72 and 74 above apply to capital gains tax as much as to income tax.

41. The import of S 77(2) is that, while ss 72 and 74 may alter chargeability to tax, so far as 'exemptions' and 'rate' of tax are concerned, the entitlement or rate must be considered as if chargeability had not been shifted. In other words, those in a representative capacity are charged on the same basis as the person they are representing.

42. S 77(2) does not apply to income tax but s 74(1) indicates similarly to s 77(2) that personal representatives are liable to the tax that was chargeable on the deceased, which clearly implies that exemptions and rates applicable to the deceased would determine the amount of the personal representatives' liability.

43. However, these sections do not, literally, provide that personal representatives can make claims that a deceased person could have made, but had not made. It would have been open to Mr Leadley to opt to claim his s 24 relief in a later year. His chargeability to tax for 09/10 could only be affected if a valid s 24 claim was actually made for that year.

44. Nevertheless, both s 74 and s 77 indicate a clear intention by Parliament that personal representatives should be liable to the tax to which the deceased was chargeable. It is just that these sections do not expressly make provision for the situation where the deceased had the right to make (optional) claims. Indeed there is nothing in any of the relevant Acts that expressly provides that personal representatives can, or cannot, make claims in respect of the deceased's chargeability which the deceased could have made had he lived to file his return.

45. HMRC's position relies on a literal reading of s 24 and s 131 that (in the case of the former) the claim must be made by the owner 'P' who bought the asset and owned it when it became of negligible value and (in the case of the later) the claim must be made by the 'individual' who actually incurred the loss.

46. I have already commented that statutes should be given a purposive rather than literal construction, and a purposive rather than literal construction has (in a different context) already been given to s 24 (see [24]). So the question is whether Parliament intended only the deceased to submit the s 24/s131 claims or whether it intended a personal representative, liable for the deceased's tax, to be able to submit the claim that the deceased could have made to reduce his liability had he submitted the return before he died.

The relevance of s 62 TCGA

47. I was referred to s 62 TCGA which provides:

> 62(1) For the purposes of this Act the assets of which a deceased person was competent to dispose –
>
> (a) shall be deemed to be acquired on his death by the personal representatives or other person on whom they devolve for a consideration equal to their market value at the date of the death, but
>
> (b) shall not be deemed to be disposed of by him on his death (whether or not they were the subject of a testamentary disposition).
>
> 62(2) Allowable losses sustained by an individual in the year of assessment in which he dies may, so far as they cannot be deducted from chargeable gains accruing in that year, be deducted from chargeable gains accruing to the deceased in the 3 years of assessment preceding the year of assessment in which the death occurs taking chargeable gains accruing in a later year before those accruing in an earlier year.
>
> …."

48. This section is not directly relevant to the question at issue in this case, but I consider it is also relevant in indicating Parliament's intent.

49. Everyone was agreed that the effect and purpose of s 62(1)(a) was to re-value the deceased's assets at death, wiping out any pre-death gain, in order to avoid what would otherwise be a double charge to tax, as inheritance tax is charged on the estate at death. It meant also, of course, that unrealised losses as well as unrealised gains were wiped out so far as the personal representatives and ultimately the beneficiaries were concerned.

50. Mr Boyle saw this wiping out of losses as a 'quid pro quo' for the wiping out of any gains. I agree. Where there is increase in an asset's value since acquisition, the charge to inheritance tax necessarily is on both the acquisition cost and the gain, as the two comprise the asset's current value. Where there is a decrease in an asset's value since acquisition, the charge to inheritance tax necessarily gives credit for the

loss since acquisition because the charge is only on the current (diminished) value. It appears it was Parliament's intention that for future CGT purposes, the base cost for the personal representatives should be the market value at date of death and that their post-death tax liability should not be affected by gains or losses arising in the deceased's lifetime.

51. Section 62(2) goes on to provide for losses incurred during the last tax year of the deceased's life to be deductible from gains arising in previous years. This is because, as I have just said, it was not intended by Parliament that the pre-death losses should be carried forward and used by the personal representatives against gains arising after death to which they are chargeable. The entire scheme of s 62 is that the date of death is a cut off: losses and gains are wiped out on death. Losses before death are only available against liability on pre-death gains.

52. The point is that the logic of this legislation is that the cut off is *death*. In so far as the executors seek to carry forward losses from before the death to set off against their gains or income arising after the death they cannot do so. The chargeability and liability to tax on income arising post death belongs to the personal representatives and there is no provision to set pre-death losses against such post-death income or gains.

53. The same logic suggests that *pre-death losses* were intended to be available to reduce the *deceased's* chargeability to tax, on income and gains arising in his lifetime, irrespective of the fact that it is the personal representatives who are liable to pay the pre-death tax and irrespective of the fact that only personal representatives can complete any outstanding returns for the pre-death period and make any claims.

Section 62(1)(b)

54. Mr Roberts suggested that s 62(1)(b) was also relevant. It provided that the deceased was not deemed to have disposed of his assets when he died. Mr Roberts suggested that the deceased should therefore be treated as the owner of his assets even after he died. I understand Mr Roberts suggested this as an answer to HMRC's point that Mr Leadley was not the owner of the shares at the date the claim was made in January 2011, which I have disposed of at [21-27] above.

55. In any event, I do not accept this argument. All s 62(1)(b) does is to confirm that, although the personal representatives are deemed to purchase the assets at market value at the moment of death (s 62(1)(a)), there is no parallel deemed sale of the assets by the deceased. In other words, the purpose of the provision is to confirm that the uplift (or downlift) in value at date of death is without a tax cost/benefit to the estate of the deceased.

56. The provision does not, and it does not purport, to alter common law. And as a matter of common law, a deceased person cannot own assets. Ownership of his assets passes on his death to his personal representatives as a matter of operation of common law, and not because there was a sale or deemed sale of them. Mr Leadley was not the owner of the shares in January 2011, nor does s 62(1)(b) TCGA deem him to be

the owner of them. But as I have said at [27], this fact does not prevent a s 24 claim by the executors.

Conclusions on statute

57. But it follows from what I have said above is that the clear inference from s 62 of Parliament's intent is that losses available to the deceased in his lifetime would be available after his death to be offset against gains in his lifetime. It would seem remarkable that losses should be held to be unavailable simply because the deceased was not alive to personally submit the claim. It also seems contrary to Parliament's intention: s 24 and s 131 should not be given a literal interpretation where it defeats Parliament's intention.

Common law

58. I was not referred to the common law provisions affecting personal representatives, which is not surprising as neither party was represented by lawyers. While I have been without the benefit of submissions on the point, it seems to me that as a matter of common law the personal representatives do represent the deceased in respect of all assets. They are his heirs and assigns. The right to make a claim must under common law transfer on death to the personal representatives, and it seems to me that under common law the executors would be able to make on behalf of Mr Leadley any claim which he could have made, unless the taxing statute expressly provided that the claim died with Mr Leadley. There is no such express provision.

Conclusion

59. In conclusion, a purposive interpretation of s 24 TCGA and s 131 ITA is that the personal representatives of the deceased are treated *as* the deceased in so far as they are returning the deceased's own tax liability. While s 72 applies only to representatives of incapacitated persons rather than deceased persons, that must be because the drafters assumed as a matter of common law no provision needed to be made for personal representatives who automatically acquire the rights of the deceased person.

60. As the executors do stand in the shoes of the deceased person in so far as his pre-death tax chargeability is concerned, for the purposes of s 131 the executors are an 'individual' (as representatives of Mr Leadley) making the claim; for the purposes of s 24 the executors are treated as representing Mr Leadley, who was the owner of an asset which became of negligible value while owned by him.

61. However, such a purposive interpretation of s 24 TCGA would not permit the personal representatives to make a claim covering a period after the date of death, because the 'P' at that time would be the personal representatives themselves, as it is their own liability and not the deceased which they would be returning, and the asset would not have become of negligible value while owned by the personal representatives. Similarly, no s 131 claim could be made by any personal representatives returning their own chargeability to tax in relation to income and gains

arising in the estate post the death but utilising losses arising in the deceased's lifetime, as the executors, who would be representing themselves rather than the deceased, have not incurred the loss.

62. On the facts of this case, as the claim is made in relation to Mr Leadley's chargeability to tax, it means that the appellants' appeal is allowed in so far as it relates to the shareholdings. I move on to consider the question of the loan.

The law on the loan

63. It is accepted that Mr Leadley's loan fulfils all the other requirements of s 253 TCGA, and was in particular within the definition of a 'qualifying loan', so I do not repeat those sub-sections here. The relevant sub-section is (3) which provides as follows:

> "Where a person who has made a qualifying loan makes a claim and at that time –
>
> (a) any outstanding amount of the principle of the loan has become irrecoverable, and…
>
> (b) [irrelevant condition], and
>
> (c) [irrelevant condition]
>
> Then, …[irrelevant qualification]….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; ….

64. So far as subsection (3A) is concerned, the executors did specify an earlier time in the Schedule to the tax return, where the date of "disposal" of the loan was stated to be 28 May 2009. This date might be a typographical error: HMRC have accepted the loan was of no value as at 3 November 2009. Had 3 November 2009 been specified, it would have fulfilled the requirements of s 253(3A). In any event, although HMRC have not expressly stated that they accept the loan was irrecoverable as at 28 May 2009, they do accept that the borrower was placed in liquidation on 28 November 2008 so I find it more likely than not that the loan was irrecoverable as at 28 May 2009 too.

65. On that basis, are the personal representatives entitled to make a s 253 claim in the 09/10 return and (as there were no capital losses incurred in that year) carry it forward against any future capital gains liability incurred by the personal representatives?

66. While the wording of s 253 differs from that of s 24 TCGA and s 131 ITA, the same point arises. Mr Leadley made the loan. At the date of the claim the loan had become irrecoverable. But the ‘claimant’ is the personal representatives in the sense that it was the executors who completed the 09/10 return, Mr Leadley having died.

67. All the same considerations arise as I have set out above. I consider that a purposive reading of s 253 TCGA should be the same as I have given s 24 TCGA: in other words, the personal representatives are representing Mr Leadley when submitting a return of the deceased’s tax chargeability and, as representing Mr Leadley, are able to make, effectively on his behalf, the claims which he could have made had he lived.

68. So it seems to me that the executors could make the s 253 loss claim in the return, and could carry it forward against any future losses incurred by Mr Leadley. I was not informed whether in fact Mr Leadley did incur any losses in the short period after the end of the 09/10 tax year and before his death. However, for the period following his death, Mr Leadley has no tax liability so the tax benefit of the losses to which he was entitled can not be carried forward any further. In particular, they cannot be used to offset any gains incurred by the executors during the period of their executorship.

69. In other words, by virtue of their common law legal status as his personal representatives, the executors stand in the shoes of Mr Leadley and are treated, and were intended by Parliament to be treated, in so far as Mr Leadley’s chargeability is concerned, as if they were Mr Leadley. So the s 253 claim could be made in the 09/10 return which returned Mr Leadley’s chargeability to tax. But there is no provision to enable a s 253 claim by Mr Leadley (or, as in this case, executors representing him) to be used against the executors’ chargeability. So the executors can not use Mr Leadley’s (deemed) s 253 claim against their own liability to tax arising out of any gains in the period of their executorship.

70. To that extent the appeal fails.

71. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 11 September 2014