Neutral Citation: [2023] UKFTT 00650 (TC)

Case Number: TC08871

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2020/02136

CAPITAL GAINS TAX – whether deductions claimed were allowable – no – discovery assessments upheld – penalties – Katib considered – whether there was a reasonable excuse – no – penalties suspension upheld – appeal dismissed

Sitting in Chambers on: 12 July 2023
Judgment date: 25 July 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

JOHN AND JANET BEESLEY

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

DECISION

INTRODUCTION

1. The issues for the Tribunal were:-

(1) The discovery assessments issued, under section 29 Taxes Management Act 1970 ("TMA"), to the second appellant on 21 February 2019 in the sum of £31,498.10 and, to the first appellant, on 26 February 2019 in the sum of £32,043. Both related to the disposal of a jointly owned property ("the Property"), and

(2) The penalties issued under Schedule 24 Finance Act 2007 to the first appellant on 9 April 2019 in the sum of £11,024.33 and to the second appellant in the sum of £11,215.05. On review those were reduced to £4,806.45 and £4,724.71 respectively.

The form of the hearing

2. This appeal was originally listed for a video hearing on 25 March 2022 and was again listed on 10 August 2022. On both occasions, the appellants requested a postponement on the grounds of ill-health and the respondent ("HMRC") did not object. Subsequently, the appellants did not provide any dates to avoid for an adjourned hearing.

3. In an email dated 13 January 2023, the Tribunal told the appellants that if they did not provide dates for a hearing, then the matter would be decided on the papers. As no dates were provided, on 28 March 2023, the Tribunal wrote to the appellants confirming that the appeal would be listed to be decided on the basis of the papers. The appellants were directed to lodge with HMRC and the Tribunal a Statement of why the appellants believed that their appeal should succeed and any letters or other documents which they wished the Tribunal to consider. On 14 April 2023, the appellants' accountant ("the Agent") provided a Summary of Case which had previously been submitted to HMRC on 26 April 2022.

4. Accordingly, having had due regard to Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") the matter has proceeded on the basis of the available papers.

5. I had a hearing bundle extending to 512 pages together with a copy of the Tribunal file which included the Summary of Case and correspondence with the Tribunal, HMRC and the Agent. There was no correspondence from the appellants themselves.

The relevant law in relation to Capital Gains Tax

6. I annex at Appendix 1 the relevant text of sections 2, 38 and 253 of the Taxation of Chargeable Gains Act 1992 ("TCGA"). There is no dispute that the appellants are liable to capital gains tax ("CGT") on the disposal of the Property as even the Agent's various computations concede.

7. In summary, section 38 TCGA provides that the only sums allowable as deductions from the proceeds of a sale, are the purchase price together with incidental costs of purchase, the incidental costs of sale and the amount of any expenditure wholly and exclusively incurred on enhancing the property.

8. The Agent argues that there should be an allowable deduction of £152,061 connected to a personal guarantee. The law in that regard is that, in summary, in terms of section 253 TCGA there needs to be a "qualifying loan" either from an individual to a trader for the purposes of the borrower's trade, or from another lender to a trader for the purposes of the borrower's trade which is guaranteed by the individual wishing to make a claim under section 253(4). That subsection provides that where a payment is made under a guarantee for a qualifying loan, then a valid claim would result as if an allowable loss had arisen when the

payment was made. Section 253(4A) TCGA limits the time for claiming under section 253(4) to four years after the end of the year of assessment in which the payment was made.

9. Section 2 TCGA provides that a loss cannot be carried back to an earlier year of assessment.

Background

10. On 30 January 2017, I assume via the Agent, both appellants submitted their Self-assessment Tax Returns ("SATRs") for the year 2015/16 and those did not include any CGT return.

11. HMRC held Valuation Office Information that the appellants had sold the Property on 28 October 2015.

12. On 15 May 2018, HMRC wrote to each appellant, with a copy to the Agent, in identical terms intimating that HMRC were aware that they had purchased and disposed of a property and not declared the gain or trading profit arising from the disposal. Officer Byrne requested that the detailed information set out in a Schedule attached to the letter be provided to HMRC by 15 June 2018. Nothing was provided.

13. On 22 June 2018, Officer Byrne wrote to both appellants and copied the letters to the Agent issuing an Information Notice under paragraph 1 of Schedule 36 to the Finance Act 2008 requiring the full information to be lodged by 22 July 2018.

14. On 24 July 2018, the Agent wrote to Officer Byrne stating simply that the property had been "sold for the sole purpose of repaying a personal guarantee to National Westminster Bank …". He stated that he was "chasing up with solicitors who dealt with this matter requesting documents you may require".

15. On 10 August 2018, Officer Byrne wrote to the Agent, copied to the appellants, requesting a CGT computation for the disposal of the Property and allowing an additional 30 days to provide the information from the solicitors. Officer Byrne asked if the appellants would be prepared to sign a mandate to allow her to approach the solicitors directly.

16. On 4 September 2018, the Agent provided a copy of an email from the solicitors, dated 6 April 2016, which stated that the amount required to pay the bank in full as at that date, would have been £144,770.50 but that interest was still accruing.

17. On 3 October 2018, the Agent sent the officer what he described as an amended CGT computation. That showed a sale price of £395,037 from which there were deductions of what was stated to be a "Redeem Mortgage" figure of £186,345 and a "Personal Guarantee" of £152,016 plus legal fees and agent's commission. For each appellant the net gain was stated to be £17,779.50 and the CGT due at 10% was calculated to be £607.95.

18. On 26 November 2018, Officer Byrne replied pointing out that neither the mortgage redemption figure nor the personal guarantee were deductible for the purposes of CGT. She stated that she inferred that the Agent may be wishing to claim "loans to traders relief" in terms of section 253 TCGA.

19. She explained that, if that was the case, the solicitors' email dated 6 April 2016 makes it clear that no guarantee payment was made in 2015/16. Furthermore, it did not purport to be a demand for repayment but, for the purposes of considering the relief, she was prepared to consider it as such. She explained that in terms of section 253(4) TCGA any allowable loss can only be established at the date that the payment was made. Section 2(3) TCGA provided that any allowable loss cannot be allowed as a deduction in an earlier year of assessment. On that basis since she was only dealing with a gain in 2015/16 she would not consider whether or not the appellants met the conditions for the relief in subsequent years.

20. She produced a revised CGT computation which included the deductions for legal fees and added a deduction for Stamp Duty Land Tax ("SDLT"). It also had a deduction for the purchase price (as at 11 June 1998) of £103,000 and showed a net gain for each appellant of £134,945. She asked for a reply by no later than 17 December 2018.

21. On the same day she copied that letter to both appellants and told them that she intended raising penalties. There was no response from either the Agent or the appellants.

22. On 24 December 2018, in relation to penalties, Officer Byrne wrote to both appellants, with a copy to the Agent, asking why the gains had not been returned, what professional advice had been obtained and other questions. She requested a reply by 23 January 2019.

23. On 28 January 2019, apologising for the delay the Agent said that he would revert before the 1st of February. He did not. In a very brief email dated 4 February 2019, he did not answer the questions posed by the officer and went as far as to state that "the reason the sale was not reported until 2016 …" before explaining that the loan had been repaid because of a business loss. As can be seen, the sale was not reported in 2016. He asked a question about how the appellants could obtain tax relief on the business loss that they had incurred.

24. On 15 February 2019, Officer Byrne wrote to the Agent, with copies to the appellants, stating that assessments would be raised to collect CGT of £32,043 in the case of the first appellant and £31,498.10 in the case of the second appellant. In both cases, Officer Byrne asked for more information in relation to the penalties including details of when the loan was repaid and whether or not the Agent had given advice to the appellants and, if so, what advice. In relation to the question about tax relief on a business loss the officer confirmed that she was looking only at CGT and that the Agent should look at section 253 TCGA and perhaps seek further advice from HMRC.

25. On 21 February 2019, the assessments were issued. They were not appealed.

26. There was no response to Officer Byrne's letters and so on 21 March 2019, she wrote to both appellants, with a copy to the Agent, pointing out that she had had no response and that she would be writing further in regard to the penalties.

27. On 9 April 2019, the penalties were issued on the basis that the failure to disclose the capital gain had been a deliberate inaccuracy.

28. There was no response and no appeal of the penalties.

29. On 7 August 2019, the Agent wrote to Officer Byrne stating that the Debt Management Unit had called at the appellants' home with a view to collecting the tax and penalties due. He stated "we have been waiting a response to our letter dated 12 March 2019" and argued that he was "adamant" that the personal guarantee should be deductible.

30. On 12 August 2019, he emailed Officer Byrne attaching a copy of the letter of 7 August 2019 and a copy of a letter dated 12 March 2019. That letter of 12 March 2019 enclosed an email from the appellants' solicitor dated 8 March 2019 stating that the solicitor had had a "quick chat" with the appellants and he argued that it was his understanding that the sale of the property had been to avoid a situation where the bank would have forced a sale. He stated:-

> "I would submit that as this was a forced sale and would have happened had the bank formally sought an Order for Possession on a Judgement there would be no element of Capital Gains Tax payable. I do not see the difference that the clients were given an opportunity of seiling (sic) before the Bank would have appointed a Receiver and raising the cash to meet the liability. I would therefore have thought that the amount of liability that was met from the sale of proceeds should come off any Capital Gains".

31. The Agent also enclosed a photocopy of a page from HMRC's guidance on capital losses.

32. He asked for the case to be "re-opened as a gross mistake has occurred". He stated that he was concerned that "vital information" had not been received by HMRC. His revised CGT computation showed a net gain for each appellant of £17,779.50 and tax due at 28% of £1,870.26 each.

33. On 18 August 2019, he emailed the officer referring to the letters of 26 November 2018 and 15 February 2019 stating that he disagreed with HMRC. He argued that the net gain for each appellant was £17,264 with tax due of £1,109.52. If the personal guarantee was not deducted the tax due by each appellant would be £19,829.77.

34. On 19 August 2019, Officer Byrne replied to the Agent pointing out that the assessments had not been appealed within the statutory time limit of 30 days and if he wished to make a late appeal he would have to provide an explanation of why there was a reasonable excuse for a late appeal. She pointed out that if he was arguing, as he was, that the personal guarantee was deductible in the 2015/16 tax year, he would have to quote the relevant legislation. She asked for a reply by 2 September 2019.

35. On 27 August 2019, the Agent replied stating that the late appeal was "on the grounds of lack of communications and a complete fabrication of the capital gain assessment". He declined to quote any legislation stating:-

> "There is no law which says you can do that; laws are made to say what you can't do".

He enclosed a copy of a formal demand from the bank's lawyers dated 19 December 2014 threatening legal proceedings in the event of failure to repay the balance then outstanding. He also enclosed a revised capital gains tax computation with the personal guarantee now described as being a "compulsory payment". The net gain for each appellant was calculated to be £17,264.40 and the tax due at 10% was £626.44. He relied on the email from the lawyers dated 8 March 2019.

36. On 25 September 2019, Officer Byrne replied accepting the late appeal on the basis that HMRC had not received the letter of 12 March 2019.

37. She pointed out that:-

(1) The reason why and how the property was sold was irrelevant because the appellants had sold the property at a gain.

(2) She rejected his claim that the rate of tax should be 10% as the appellants were a partnership and qualified for Entrepreneur's Relief. She explained the criteria for that relief and pointed out that none of the conditions had been met and there was no evidence in that regard.

(3) The revised computation was incorrect because it still included the mortgage redemption and did not include the purchase costs. The payments under the personal guarantee did not qualify in terms of section 253 TCGA.

(4) The net gain for each appellant was £134,945.

She stated that by a deadline of 25 October 2019, the Agent, and/or the appellants could either send new information or documents that were relevant, accept an offer for a review or appeal to the Tribunal.

38. On 23 October 2019, the Agent replied requesting a review, arguing that the property would not have been sold if the bank had not requested payment of the personal guarantee. He argued that CGT is paid on the profit made on the sale of an asset and the correct method

of computation was to deduct from that the "Redeem Mortgage" figure that he had used of £186,345 and then one deducts what he described as "the basic costs".

39. On 30 October 2019, HMRC wrote to the Agent pointing out that he had only asked for a review in the case of the second appellant and none of his letters had made reference to the penalty assessments.

40. On 12 November 2019, the Agent confirmed that both the assessments and the penalties for both appellants should be reviewed. He argued that the penalty was "very high and exorbitant and should not be imposed on both appellants".

41. On 29 November 2019, Officer Byrne wrote to both appellants with her view of the matter and copied that to the Agent. She pointed out that her questions in regard to the penalty included in her letter of 15 February 2019 had never been answered.

42. On 20 January 2020, the Review Conclusion Letters were issued to both appellants with a copy to the Agent. In summary those letters confirmed that:-

(1) The mortgage redemption of £186,345 was not an allowable deduction. Section 38 TCGA states that the sums allowable are restricted to the amount or value of the consideration to purchase the property and incidental costs only.

(2) The £152,016 personal guarantee is not an allowable deduction. Section 253 TCGA was explained again. The officer accepted that where an individual guarantees a qualifying loan and makes a payment under that guarantee, then there could be a valid claim but any allowable loss arises only when the payment is made. It was not made in 2015/16. Even if evidence were produced that it was a qualifying loan, any loss could not be carried back.

(3) No evidence had been produced to vouch a claim for Entrepreneur's Relief.

(4) The assessments were upheld.

(5) As far as the penalties were concerned, the reviewing officer disagreed with Officer Byrne and decided that the penalties should be on the basis that the appellants' behaviour was careless but not deliberate. Whilst it was accepted that the appellants had used an agent, no gain had been disclosed in the SATRs. She reduced the quantum of the penalties as described in paragraph 1 above. The officer found that there were no special circumstances. It was remitted to Officer Byrne to consider the question of suspension.

(6) She pointed out that the appellants had 30 days within which to appeal the Review Conclusion Letters.

43. On 14 April 2020, Officer Byrne wrote to the appellants, with a copy to the Agent, pointing out that there had been no response to the Review Conclusion Letters. She enclosed letters offering suspension conditions whereby the penalties were suspended in full.

44. On 30 April 2020, the Agent emailed the officer stating that he had been waiting for legal advice about the Review Conclusion Letter, he had been absent in February and Coronavirus had impeded matters in March 2020.

45. On 4 May 2020, Officer Byrne replied pointing out that no further review of the decision was possible.

46. On 8 May 2020, the Agent replied to Officer Byrne enclosing a letter written to the Review Conclusion officer on 14 April 2020 which argued that the net proceeds of sale were £196,020 less the purchase price of £103,000, incidental costs of £9,475 and a payment of £100,000 on 5 April 2016. Accordingly there was a loss of £16,455 and no capital gain to

report. He argued that the £100,000 together with the original mortgage had created "the huge redemption figure on the sale". He also argued that the appellants had four properties and conducted their business through those properties so should be entitled to Entrepreneur Relief.

47. On 15 May 2020, the Review Conclusion officer responded to the Agent, with copies to the appellants, pointing out that no further review was possible and that an appeal should be made to the Tribunal Service with an explanation as to the reason why it was late.

48. On 1 June 2020, the Agent wrote to Officer Byrne referring to the Review Conclusion officer's letter of 15 May 2020, asking why the capital losses were not being allowed and asking for an explanation as to why the calculations were different for the two appellants.

49. On 15 July 2020, Officer Byrne replied pointing out that she had explained the position in regard to capital losses in the letters dated 26 November 2018 and 29 November 2019 and those had been upheld by the Review Conclusion officer. She explained that the difference in the tax assessments was attributable to the variation in the income received by each individual appellant.

50. On 9 July 2020, the Agent lodged an appeal on an appeal form for the First-tier Tier Tribunal Asylum Support Chamber indicating that the appeal should be determined on the papers, referenced both appellants but included only the decision letter for the first appellant. It was subsequently clarified that it was intended to be an appeal to the Tax Chamber in respect of both appellants.

51. On 27 July 2020, the Agent again wrote to Officer Byrne arguing that the letter of 26 November 2018 had been issued before any explanation of the losses had been given so could not be an adequate explanation of HMRC's stance. As far as the November 2019 letter was concerned, he suggested that it had not been received and said "Please send copy to validate".

52. On 4 August 2020, Officer Byrne sent the Agent a further copy of the November 2019 letter sent to the first appellant.

53. On 16 April 2023, the Agent sent to the Tribunal and HMRC the Summary of Case, as I have noted in paragraph 4 above, and stated that the appeal should succeed because:

> "The Appellants … should succeed because they have genuine claims for tax losses which were included in their initial calculation for capital gains tax but Hmrc (sic) have never acknowledged their existence or attempted to include them in Hmrc calculation. These tax losses should have been agreed by Hmrc before they produced their claim to the tribunal. Despite many attempts by the appellants to get HMRC to agree to the claims nothing has transpired".

The appellants' Summary of Case

54. The agent argues that:-

> (1) The sole reason for the disposal of the property was to clear the outstanding debts borrowed to ease the financial burden on a family business which went into liquidation in June 2015.
>
> (2) For the first time it was argued that there are two claims. One is for £83,345 and the second is for £144,770.50. The former sum was money borrowed from the Bank of Ireland which was the original loan used to mortgage the property. It had been increased by four further loans totalling £100,000 all of which were paid into the family company's bank account. As at 31 March 2014 the total balance outstanding was £185,154.59. The original mortgage in 1998 when the property was purchased had

been £98,000. The latter claim is the amount required to settle the personal guarantee as at 6 April 2016 (see paragraph 16 above).

(3) It is argued that both those claims fall into the 2015/16 tax year as the former was a loan, taken out before 5 April 2016 and the second related to monies allegedly held by the appellants' solicitors as at 5 April 2016 and subsequently paid to the Bank. Accordingly 2015/16 would be the correct year for assessment.

(4) It was argued that the appellants had received "shabby treatment" from Officer Byrne in that she had allegedly failed to investigate the mortgage redemption figure because the figure quoted of £186,345 could never have been required to redeem a mortgage of £98,000 in respect of a purchase of a property for £103,000. Officer Byrne's other alleged failing was that:-

> "… she failed to give the complete case to the Reviewing Officer. There was no information supplied from Mr and Mrs Beesley."

(5) The Agent questioned paragraph 6 of Officer Byrne's witness statement where the gain was described as being £123,845.

Discussion

55. I have set out the detail of the correspondence both before and after the appeal was lodged with the Tribunal at such length because the key issue here is that it is apparent that the Agent has never understood the basic principles of CGT. He is entirely incorrect in stating that the law simply tells you what you cannot do. Section 38 TCGA is absolutely clear in its terms and provides for the only deductions which can be made in a CGT computation. Redeeming a mortgage is simply not included in the deductions allowed by statute.

56. On the subject of mortgage redemption, not only was Officer Byrne entirely correct to refuse to allow the costs of repayment of the mortgage but she was under absolutely no obligation to question the Agent's "Redeem Mortgage" figure. This is a self-assessed tax.

57. Disregarding the letter to the Review Conclusion officer of 14 April 2020, even on the Agent's calculations, which are wrong, there was a CGT liability for 2015/16. The sale of the property was not disclosed to HMRC. In terms of section 29(1)(a) TMA, Officer Byrne was entitled to make an assessment for a tax year where she discovered that an assessment is insufficient and, even in terms of the Agent's computations (with the exception of the one latterly sent to the Review Conclusion officer on 14 April 2020) there was a loss of tax. There was no CGT return for either appellant.

58. I have recorded but disregarded the said letter of 14 April 2020 since it is after the issue of the Review Conclusion letter and the net proceeds of sale figure is completely wrong.

59. Section 29(3) TMA provides that where a taxpayer has made and delivered a return for the year in question, an assessment shall not be made unless one of the conditions at section 29(4) or (5) is fulfilled. Section 29(4) is that the inaccuracy was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. In this instance, given that it is clear that the Agent clearly believes that there would have been very little CGT, I agree with the Review Conclusion officer that, at a minimum, the inaccuracy was as a result of careless behaviour.

60. Section 34(1) TMA allows an assessment to be issued within four years of the end of the relevant tax year which in this case was 2015/16. The assessments were issued on 21 February 2019 and I agree with HMRC that the assessments were both timeously and competently issued.

61. That being the case, the next issue is the question of quantum. I have already dealt with the mortgage redemption and the £186,345 should not be deducted from the net sale price. Officer Byrne did deduct the purchase price and incidental costs both of the purchase and sale including the SDLT.

62. The remaining contentious issue is the £152,061 connected to the personal guarantee.

63. I agree with HMRC that no evidence has been produced as to whether or not there was even a "qualifying loan" in terms of the legislation. Beyond an assertion that £100,000 was paid into the family business, there is no evidence as to who the business account belonged to and indeed there is a suggestion, for the first time in the Summary of Case, that there were three balances totalling £185,154.59 as at 31 March 2014. There is no evidence in relation to whether or not the money was used for the purposes of the appellants' trade or indeed that they were trading themselves.

64. In any event it is abundantly clear that the payment was not made until on or after 6 April 2016 which is not in the tax year 2015/16. The Agent is entirely incorrect in suggesting that the fact that there was an outstanding liability in 2015/16 makes it a qualifying payment. It simply is not when one looks at the very clear terms of section 253(4)(b) which are that "The claimant has made a payment under the guarantee … in respect of that amount" (emphasis added).

65. No evidence has ever been provided as to when the payment was actually made beyond an acknowledgement by the Agent that it was paid in 2016/17 but in any event it cannot be carried back into the 2015/16 year because of the provisions of section 2(3) TCGA.

66. The Agent has made a vague reference to Entrepreneur Relief but that it is only available when a person sells all or part of their business. The sale of assets can qualify but only if they are linked to the sale of at least 5% of the person as part of the business partnership in a personal company or the assets were owned by the person making the disposal and the person let the business partnership or personal company use them for at least one year up to the date of the sale of the business or share or the date the business closed. Absolutely no evidence has been furnished.

67. For all these reasons the computation of the capital gains made by Officer Byrne is correct and the assessments are correctly calculated and validly issued. The assessments are therefore upheld and the appeals in that regard dismissed.

68. Although the penalties have all been suspended, I must consider whether or not they were raised correctly. Schedule 24 Finance Act 2007 states that a penalty is chargeable where a person gives HMRC an inaccurate return or other document which satisfy two conditions, namely that there is an inaccurate document which either amounts to or leads to an understatement of the person's liability to tax and the inaccuracy was careless or deliberate.

69. As far as penalties are concerned, as I have indicated, I find that there were inaccuracies in the appellants' SATRs in that there were no returns of any gains and even the Agent's various calculations have some gains. I find that the reason for the inaccuracies is that the Agent has not understood CGT and nor did the lawyer who gave advice in 2019.

70. In *HMRC v Katib* [2019] UKUT 189 (TCC) ("Katib"), the Upper Tribunal had to consider the extent to which reliance on an adviser was a justifiable reason for failing to make an appeal on time. However, *Katib* is also relevant in the context of penalties in considering whether there is a reasonable excuse for the inaccuracy. In that case, the adviser did not provide competent advice to Mr Katib, misled him as to what steps were being taken to appeal and failed to appeal on his behalf. That is more extreme than the situation in this case.

71. On the facts of that case, the Upper Tribunal concluded that the failings by the appellant's agent could not be relied upon by the appellant.

72. At paragraph 56 the Upper Tribunal observed that:-

> "…we consider that the correct approach in this case is to start with the general rule that the failure of [the adviser] to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland* [the reason for the delay]….".

73. They went on to say at paragraphs 58 and 59:-

> "…the core of Mr Katib's complaint is that [the adviser] was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.
>
> 59. [Mr Katib's counsel] urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against [the adviser] or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of [the adviser's] failings and, if he wishes, pursue a claim in damages against him or [the adviser's business] for any loss he suffers as a result."

74. The lawyer's advice in the email dated 8 March 2019 is irrelevant since it was long after the event.

75. As can be seen, the appellants have never co-operated with HMRC. They should have been aware that they had a gain. They do not appear to have questioned whether the disposal of the property should have been included. They have declined to reply to the letters asking them what advice they acted upon or indeed give any information in regard to penalties. As can be seen from paragraph 46 above, the Agent states that they operate a business or businesses through four properties.

76. HMRC rightly rely on *David Collis v HMRC* [2011] UKFTT 588 (TC) where Judge Berner stated at paragraph 29 that:-

> "… [a] penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person given the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question".

77. In this instance the appellants do not appear to have questioned whether the disposal of the property should have been included and there was undoubtedly a gain, albeit the quantum was in dispute. I therefore agree with the Review Conclusion officer that that behaviour was careless and that there is no reasonable excuse.

78. HMRC have given the maximum reduction for co-operation.

79. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances and indeed Officer Byrne has given the appellants every opportunity to explain the position.

Decision

80. For all these reasons the appeal is dismissed and the assessments and penalties upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

81. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 25th July 2023

2 Persons and gains chargeable to capital gains tax, and allowable losses

(1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom.

(2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—

(a) any allowable losses accruing to that person in that year of assessment, and

(b) so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1965-66).

(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.

38 Acquisition and disposal costs etc

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c) the incidental costs to him of making the disposal.

(2) For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty) together—

(a) in the case of the acquisition of an asset, with costs of advertising to find a seller, and

(b) in the case of a disposal, with costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by this Act.

(3) Except as provided by section 40, no payment of interest shall be allowable under this section.

(4) Any provision in this Act introducing the assumption that assets are sold and immediately reacquired shall not imply that any expenditure is incurred as incidental to the sale or reacquisition.

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) If, on a claim by a person who has made a qualifying loan, the inspector is satisfied that—

(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, and

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

this Act shall have effect as if an allowable loss equal to that amount had accrued to the claimant when the claim was made.

(4) If, on a claim by a person who has guaranteed the repayment of a loan which is, or but for subsection (1)(c) above would be, a qualifying loan, the inspector is satisfied that—

(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

(c) the claimant has not assigned any right to recover that amount which has accrued to him (whether by operation of law or otherwise) in consequence of his having made the payment, and

(d) the lender and the borrower were not each other's spouses, or companies in the same group, when the loan was made or at any subsequent time and the claimant and the borrower were not each other's spouses, and the claimant and the lender were not companies in the same group, when the guarantee was given or at any subsequent time,

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.

(5) Where an allowable loss has been treated under subsection (3) or (4) above as accruing to any person and the whole or any part of the outstanding amount mentioned in subsection (3)(a) or, as the case may be, subsection (4)(a) is at any time recovered by him, this Act shall have effect as if there had accrued to him at that time a chargeable gain equal to so much of the allowable loss as corresponds to the amount recovered.

(6) Where—

(a) an allowable loss has been treated under subsection (4) above as accruing to any person, and

(b) the whole or any part of the amount of the payment mentioned in subsection (4)(b) is at any time recovered by him,

this Act shall have effect as if there had accrued to him at that time a chargeable gain equal to so much of the allowable loss as corresponds to the amount recovered.

(7) …

(8) …

(9) For the purposes of subsections (5) to (8) above, a person shall be treated as recovering an amount if he (or any other person by his direction) receives any money or money's worth in satisfaction of his right to recover that amount or in consideration of his assignment of the right to recover it; and where a person assigns such a right otherwise than by way of a bargain made at arm's length he shall be treated as receiving money or money's worth equal to the market value of the right at the time of the assignment.

(10) No amount shall be treated under this section as giving rise to an allowable loss or chargeable gain in the case of any person if it falls to be taken into account in computing his income for the purposes of income tax or corporation tax.

(11) Where an allowable loss has been treated as accruing to a person under subsection (4) above by virtue of a payment made by him at any time under a guarantee—

(a) no chargeable gain shall accrue to him otherwise than under subsection (5) above, and

(b) no allowable loss shall accrue to him under this Act,

on his disposal of any rights that have accrued to him (whether by operation of law or otherwise) in consequence of his having made any payment under the guarantee at or after that time.

(12) References in this section to an amount having become irrecoverable do not include references to cases where the amount has become irrecoverable in consequence of the terms of the loan, of any arrangements of which the loan forms part, or of any act or omission by the lender or, in a case within subsection (4) above, the guarantor.

(13) …

(14) In this section—

(a) "spouses" means spouses who are living together (construed in accordance with section 288(3)),

(b) "trading company" has the meaning given by paragraph 1 of Schedule 6, and

(c) "group" shall be construed in accordance with section 170.

(15) …