[2019] UKFTT 0095 (TC)

TC06978

Appeal number: TC/2017/09132

CAPITAL GAINS TAX – Loss Relief for loans to traders - TCGA 1992 s 253 - Was a payment made by the Appellant towards a company's indebtedness made 'under a guarantee' - Yes - Did the Appellant control the money which was the source of the payment? - Yes - When did the allowable loss arise? - When the payment was made under the personal guarantee, which was in March 2012 - Loss cannot be carried back to earlier years - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GERARD ARTHUR ECCLES **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Tribunal Hearing Centre, 2nd Floor, Chichester Street, Belfast BT1 3JF on 14 January 2019

Mr James Curran, an Accountant and tax agent, of FATS Limited for the Appellant

Mrs Kate Murphy, an Officer of HMRC, for the Respondents

DECISION

Introduction

1. This appeal challenges Closure Notices issued by HMRC against Mr Eccles under sections 28A(1) and (2) of the *Taxes Management Act 1970* in relation to two successive financial years:

(1) For 2009/10, issued on 15 April 2016 (capital gains liability of £4,543.02)

(2) For 2010/11, issued on 27 June 2017 (capital gains liability of £3,546)

2. There are several Notices of Appeal. Insofar as any Notice of Appeal was filed out of time, and permission is needed, this is not opposed by HMRC, and I give it.

3. For 2009/10, HMRC received Mr Eccles' self-assessment return (timeously) on 19 January 2011 and opened an (in-time) inquiry under section 9A of the *Taxes Management Act 1970 on* 1 December 2011.

4. For 2010/11, HMRC received Mr Eccles' self-assessment return (timeously) on 29 January 2012 and opened an (in-time) inquiry under section 9A of the *Taxes Management Act 1970 on* 19 October 2012.

5. Following much correspondence, HMRC decided to disallow, in relation to both 2009/10 and 2010/11, a claimed capital loss arising from the Appellant's investment in MCE Developments Ltd ('**MCE**'), associated with the Appellant's payment of some of MCE's borrowings with Ulster Bank. This was because HMRC's view was that the capital loss did not arise until that payment was made, which was 26 March 2012, which, falling in 2011/12, could not be used to offset any capital gain liability for earlier years.

6. The Closure Notices were upheld by departmental review on 24 August 2017.

7. The Grounds of Appeal, in full, say:

> *"HMRC are disputing date of a capital loss which we had claimed to offset a gain. The loss arose from a personal guarantee given to the bank against a loan to purchase a development site. An overdraft of £1m had been agreed but before work could commence the property crash occurred. The bank froze the development effectively ending the development. The personal guarantee was offset by a £250,000 Money Desk deposit that the bank effectively had a lien on. This was borne out when the bank refused [Mr Eccles] access to this fund for an investment. When the bank called in the guarantee it was outside the time limit to carry back. It is asserted that the bank had control of the deposit and that [Mr Eccles] had no control over the date the bank would call in the personal guarantee. It is our contention therefore that the claim should be allowed and not dictated by the timing of Ulster Bank."*

8. The desired outcome is a finding that the claim for capital loss arose in the year 2009/10.

9. At this early stage, I remind myself that the burden of establishing that the appeals should be allowed, and that the Closure Notices should be set aside, lies with the Appellant. The relevant standard of proof is the balance of probabilities - i.e., likelier than not.

Some remarks on the evidence

10. The Tribunal's directions released on 18 June 2018 included a direction that, by 31 August 2018, Mr Eccles should file witness statements *'from all witnesses on whose evidence they (sic) intend to rely at the hearing, setting out what his (sic) evidence would be'*.

11. No witness statements were filed in support of the appeal, whether from Mr Eccles or anyone else on his behalf. Some confusion crept in about the meaning and effect of this direction. On 11 September 2018, Mr Eccles' representative, Mr Curran, informed HMRC and the Tribunal that, although Mr Eccles would be attending the hearing, he would not be calling any witnesses. Mr Eccles and his advisors had failed to realise that "witnesses" included Mr Eccles himself. The result was that Mr Eccles had not filed a witness statement, but was present at the hearing.

12. In the furtherance of the overriding objective of dealing with cases fairly and justly, I was prepared to hear oral evidence from Mr Eccles. This was not to simply dispense, 'on the hoof', with the Tribunal's earlier directions. Rather, looking at matters in the round, it seemed to me that many of the matters of fact which Mr Eccles could have addressed in a witness statement had already been addressed in the papers which were in the hearing bundle, and in particular in his long email of 28 May 2014.

13. Whilst it would have been better for Mr Eccles to have filed a witness statement, adjourning the hearing (perhaps for many months) simply so that Mr Eccles could produce a witness statement dealing with matters which were already largely set out in other documents, and where the scope of the dispute was narrow, would have introduced unnecessary delay and would not been a sufficiently flexible response.

14. Having made the above observations, I should make it clear that I have regarded the failure to file a witness statement simply as a procedural matter, and I have not given it any further regard in arriving at my decision on the merits of this appeal.

15. I have no hesitation in finding Mr Eccles' evidence to have been given truthfully and honestly. But the overall reliability of his evidence suffers from serious shortcomings. This does not arise from any lack of honesty. It is not his fault. During a large part of the period in question, he was seriously ill, on large amounts of medication, and (as he put it) "out of it". He put the everyday conduct of his financial affairs in the hands of one David Bell, who was a former colleague and friend. Although Mrs Eccles is named on the bank accounts, I did not hear any evidence from her, and she did not attend the hearing. Mr Eccles told me that Mrs Eccles did not

make any decisions about the money held in their joint names, and that is consistent with the documents which I have seen.

16. Mr Eccles had no detailed knowledge of the terms upon which money was being held by the Bank. Nor was Mr Eccles - due to his ill health - present at any of the meetings which took place between Mr Bell and Mr Rooney, a Manager of Ulster Bank's Global Restructuring Group.

17. But, and as I shall set out at more length below, Mr Eccles was sufficiently aware of the events which were taking place in March 2012 and in particular the payment of £295,700 from an Ulster Bank Money Desk account in Mr and Mrs Eccles' name to Ulster Bank in discharge of Mr Eccles' personal guarantee of MCE's borrowings.

18. I also heard evidence from Jenny Gray, who is a Higher Officer of HMRC in the Individuals and Small Business Compliance Complex and Agents section. She confirmed that the facts and matters set out in her witness statement dated 29 August 2018 were true. Her evidence (which is mainly a recapitulation of the correspondence) was (unsurprisingly) not substantially challenged. She was not the officer who had issued the Closure Notices for 2009/10, but she was the officer who had issued the Closure Notice for 2010/11. Although she is the fourth successive officer to have dealt with Mr Eccles' affairs, I am satisfied that she carefully reviewed the file, and she was able to speak in detail and with authority as to the progress of the enquiries. Where her evidence is evidence of fact, I accept it.

The law

19. The issue which I have to decide concerns the correct application of section 253 of the *Taxation of Capital Gains Act 1992* which, insofar as material, reads:

> "**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.
>
> [...]

(4) Where a person who has guaranteed the repayment of a loan which is, or but for subsection (1)(c) above would be, a qualifying loan makes a claim and at that time—

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

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

(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.

20. The conditions in sections 253(4)(a)-(d) are cumulative ('and'). All must be met in order for a claim for allowable loss under the subsection to be made.

21. Section 253 is subject to the operation of section 2(3) TCGA 1992 which reads:

"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..."

22. Section 62 TCGA deals with death, and is not relevant in the circumstances of this case.

MCE Developments Ltd

23. I am told on behalf of the Appellant (in Appendix 1 to his Statement of Case) that MCE Developments Ltd (which is also described in some documents as 'MCE Developments (NI) Ltd') was a company incorporated in Northern Ireland with number NI63208 on 20 February 2007, being a venture between Mr and Mrs Eccles and some others with the aim of purchasing and developing a certain site on Belfast Road in Glenavy.

24. It is said in correspondence that MCE obtained planning permission for this site, but was then *"unable to continue with the planned development due to the slump in property prices."* It is also said in correspondence that "*the property crash took place in 2008 before development took place and the bank put a hold on the development loan."*

25. I am also told that MCE spent over £1.5m on developing that site in the y.e. 28.2.08 and thereafter incurred no further costs on the site. I have seen spreadsheets for MCE for years ending 28.2.08 and 28.2.09.

26. However, beyond that, there is very little evidence before me about MCE. I do not know anything further of any substance as to its financial affairs or the precise reasons it came to encounter financial difficulties, and difficulty in repaying its borrowings from Ulster Bank.

The Personal Guarantee

27. In a letter dated 11 October 2007, addressed to MCE's directors, Ulster Bank approved (i) an overdraft facility to MCE of up to £12,000, with the stated sole purpose being "to cover recent interest charge pending receipt of sale proceeds" (of the site); and (ii) a demand loan of £1.206m for the purchase of that site. The Bank's offer was accepted by Mr Eccles on that same day.

28. The Terms and Conditions applicable to the overdraft and loan included that 'The Facility together with interest and all other liabilities connected with the Facility' were to be secured by a first legal charge on the site at Glenavy Road, as well as "*an unconditional guarantee from Gerry and Shirley Eccles guaranteeing the Borrower's liabilities to the Bank - the sum of £230,000 with collateral charge of property at Dunmurry."*

29. The security (which I take to mean both the legal charge and the guarantee) was to be in a form and substance satisfactory to the bank, and was to be *"a continuing security for all of the liabilities (both present and future and whether actual or contingent) of the Borrower to the Bank".*

30. This is all the available evidence about the personal guarantee. The guarantee itself is not in evidence. On 29 May 2013, Mr Curran wrote to HMRC that *'the personal guarantee is held by the bank. Mr Eccles cannot trace a copy, if indeed he ever received one'*. It is clear that Mr Eccles, as the guarantor, would have been entitled to a copy of the guarantee, and did not obtain one. On 24 February 2014, Mr Eccles gave a mandate to HMRC, but I do not know what, if anything, HMRC did with that mandate.

Payment made under the guarantee

31. About 18 months later - that is to say, on 23 April 2009 - £295,700 was paid into the personal bank account (number ending 094) of Mr and Mrs Eccles.

32. Mr Eccles told me that was his personal money (and not MCE's money) being the balance of an insurance payment which he received some years earlier. I accept his oral evidence on this point, even though it is contrary to what was said on his behalf on 24 July 2013 when it was said that the £295,700 arose from a remortgage of the Eccles' family home. I have not been shown any evidence to support the latter contention. But, irrespective of its source, I find that the £295,700 placed into the Eccles' bank account on 23 April 2009 was their personal money and was under their control.

33. About 18 months later, namely on 1 December 2010, Mr and Mrs Eccles placed that exact same sum (£295,700) on deposit with Ulster Bank's Money Desk. That is the earliest evidence of money being placed into Money Desk. Mr Eccles told me that he originally placed money in Money Desk, at the suggestion of his bank manager, so as to assist MCE's prospects of development.

34. The terms of Money Desk are not in evidence, but, as I understand it - putting together Mr Eccles' oral evidence, with the documents which I have seen - was that it was a 3 month deposit, carrying modest interest, with an interest penalty if money was withdrawn in the three month period, and, in default of instructions to the contrary, would be transferred back to the depositor's current account at the end of the 3 month period.

35. On 1 March 2012, £295,700 was deposited into a corporate current account (ending with number 094) in the names of Mr and Mrs Eccles. This was described on the bank statement as an internal (ITL) 'TRO Settlement'.

36. Irrespective of Mr Eccles' motive behind the original deposit, and its subsequent retention intact, the £295,700 was being moved about in Ulster Bank - from the Eccles' current account into a Money Desk deposit, and back again.

37. I do not consider that the Bank 'effectively had a lien' on the money, as advanced in the Grounds of Appeal. The 'effectively' is revealing, because the Bank did not have an actual lien on the money.

38. The £295,700 did not remain continuously on Money Desk between 1 December 2010 and 1 March 2012, because it was in the Eccles' personal account 094 on 1 March 2012.

39. There was a flurry of activity in early March 2012.

40. On 1 March 2012, £295,700 left the Eccles' current account. This was described by the Bank as an internal (ITL) "TRO Payment'. Ulster Bank made a 'Money Market' transaction on behalf of Mr Eccles and his wife. That transaction was confirmed by way of a letter dated 1 March 2012, addressed to Mr and Mrs Eccles. £295,700 was placed on deposit with Money Desk, from 1 March 2012, for a three month fixed period, at a fixed annual interest rate of 0.38% gross. There is no suggestion in that letter (or indeed in any other contemporary document) that the Money Desk deposit was being made to fortify Mr Eccles' personal guarantee of MCE's borrowings, or that

the Bank had or was to have any recourse against the Money Desk deposit in relation to the borrowings of MCE.

41. On 7 March 2012, Peter Rooney, emailed David Bell, on the subject of Mr Eccles, thanking Mr Bell for meeting the bank. Mr Eccles was not at the meeting. There are no other details of that meeting. There was no attendance note from Mr Bell. There was no witness statement from either Mr Bell or Mr Rooney. Mr Rooney wrote (amongst other things) that he could "*confirm that the Bank cannot provide the funds currently held on deposit for investment with Helvetia Capital"*. Mr Rooney went on to require "*written confirmation that the funds held on deposit with the Bank can be taken in full settlement of PG liability to MCE and the remainder to reduce the PG liability of GSE*".

42. The "funds held on deposit" were the funds in the Money Desk account. The "PG liability" was Mr and Mrs Eccles' personal guarantee for the liabilities of MCE.

43. As he told me, Mr Eccles knew about that email at the time, and it was discussed with Mr Bell. Mr Eccles told me, and told Mr Bell at the time, that he didn't really care what happened. Mr Eccles 'just wanted the whole thing to go away'.

44. In response, on 8 March 2012, David Bell wrote to Mr Rooney saying (amongst other things):

> *"Gerry Eccles has authorised you to draw the fund held on deposit and utilise them to clear the £250,000 Personal Guarantee on MCE Developments Limited with the balance of funds being used against the GSE Developments Loan"*.

45. On 9 March 2012, the Bank asked Mr Eccles to send in a signed letter, because it could not accept instructions from Mr Bell, who was not on the Eccles' bank mandate. Such a letter was written, ostensibly coming from Mr Eccles, addressed to Mr Rooney, saying:

> *"I authorise you to utilise the funds currently held on deposit by the Ulster Bank as follows:*
>
> *1. The amount of £250,000 in full settlement of my personal guarantee on MCE Developments Ltd;*
>
> *2. The balance of the funds to be used as a permanent reduction of the amounts borrowed on GSE Developments Ltd"*

46. That instruction took some time to put into effect. The Money Desk deposit was brought to an end on 26 March 2012. That appears in a letter from Ulster Bank to Mr and Mrs Eccles of that same date, which confirms, 'as requested', 'termination' of the deposit of £295,700. The deposit was terminated because the funds were put by the Bank against Mr Eccles' personal guarantee for MCE's borrowings. £230,000 was paid into the account of MCE. The other £65,700 (£295,700 minus £230,000) was paid into the account of GSE Developments (NI) Ltd which is another company in

which Mr Eccles was involved. This appeal concerns only the £230,000. Mr Eccles' has claimed relief as to half = £115,000.

47. In my view, HMRC's acceptance (as early as it letter of 10 April 2015) that the money was paid under the guarantee so as to meet TCGA 1992 section 253(4)(b) is clearly right, but, regardless of HMRC's acceptance of the point, I so find. This is for the following reasons.

48. In this regard, the second bullet point of the Bank's letter of 15 April 2014 *('the Bank did not call up Mr Eccles' personal guarantee ... Mr Eccles voluntarily paid his guarantee liability in full'*) is not conclusive. It is nothing more than a bare assertion by the Bank, more than two years after the event, that it had not made any call on the guarantee.

49. As the Tribunal (Judge Swami Raghavan and Mr Hossain FCA) made clear in *Peter Goldsmith v HMRC* [2012] UKFTT 521 (TC), the question whether a payment was made under the guarantee for the purposes of TCGA 1992 section 253(4)(b), is one which has to be determined "according to the particular circumstances of the payment in question": see Para [36]. Even the absence of a formal demand is not conclusive.

50. Here, the particular circumstances of the payment in question were that the discussions taking place between Mr Bell and Mr Rooney included discussion about Mr Eccles' personal guarantee. The emails of 7 and 8 March 2012 show that the parties were working on the footing that there was link or nexus between Mr Eccles' money held in the Money Desk account and his personal guarantee. This was entirely rational: the link between MCE's indebtedness to the Bank (i.e., MCE owing the Bank money) and Mr Eccles' credit balance (i.e., the Bank owing Mr Eccles money) was Mr Eccles' personal guarantee.

51. It is clear that both the Bank and Mr Eccles' representative had in mind that the quid pro quo for the Bank releasing Mr Eccles from his personal guarantee was his payment of money from the Money Desk account.

52. I find that the payment which was made on 26 March 2012 was made under the guarantee within the proper meaning and effect of TCGA 1992 s 253(4)(b).

Control of the Money

53. As I understand it, the Appellant's argument is that the £295,700 (for the sake of argument, whether held in a current account, or a Money Desk deposit) was effectively being held intact as a form of money bond to fortify Mr Eccles' personal guarantee and was therefore not truly 'controlled' by Mr Eccles.

54. I reject this argument. It is wrong in fact and in law, for the reasons which I set out below.

55. Firstly, there is no evidence to support it. Mr Eccles' oral evidence - which I have accepted - that his bank manager linked the Money Desk deposit with the

making available of credit to MCE does not prove the point. For reasons which I understand (including the passage of time, and Mr Eccles' ill health) it is simply too vague and nebulous to allow any firm evidential finding to be made. The best evidence in this regard is the facility letter of October 2007, but that does not (for example) stipulate - as it could have done - that a condition of the loan facility was to be that Mr Eccles was to maintain a credit balance of £x at all times with the Bank. Indeed, the £295,700 does not even first seem to appear in Mr Eccles' bank account until April 2009.

56. Nor were the terms and conditions of the Money Desk in evidence. But Mr Eccles explained that the three month fixed deposit, made on 1 March 2012, did not mean that he and his wife were locked out of the money for three months. He explained, and I accept, that a purpose of putting the money on Money Desk rather than keeping it in a current account was that it was earning some interest, with the condition that, if the money were withdrawn in the three month period (as it was on 26 March 2012), then no interest at all, for any part of that period, would be payable.

57. Bullet point 4 of the Bank's letter of 15 April 2014 ('*Once the £230,000 was paid to MCE Developments Ltd, Mr Eccles did not have access to these funds as they were used to reduce the debts of MCE'*) was clearly correct. But it only goes so far. To avoid any doubt, I have not read into it any assertion by the Bank that the contrary was also the case - namely, that when funds when in the Money Desk Mr Eccles *did* have access to them.

58. On the evidence, I am quite satisfied that Mr and Mrs Eccles did have access to the funds in the Money Desk account.

59. It is clear to me that the Money Desk letter of 1 March 2012 supports the following propositions:

(1) The £295,700 belonged to Mr and Mrs Eccles. It was their money;

(2) Mr and Mrs Eccles had the power to give Ulster Bank instructions in relation to that money;

(3) Ulster Bank acted on those instructions in moving the money from their personal account into the Money Desk Deposit.

60. I do not consider that anything relevant to this appeal can be read into the sentence (in either of the Money Desk letters) that those letters are "not a document of title". Although the letters do not explain what that expression was intended to mean, even if it is true (as a matter of law) that the letters themselves were not "documents of title", it is plain that this was meant only in the sense that possession of the letter should not be treated, in and of itself, without more, by any third party as proof that the bearer of the letter had £295,700 on Money Desk. That is to say, the letter was not to be treated by third parties as a representation or warranty that Mr or Mrs Eccles had £295,700 on the Money Desk.

61. I reject any argument that the expression "this is not a document of title" can be read as meaning that *the money* - whether as a matter of law, or as a matter of fact -

did not actually belong to Mr and Mrs Eccles when it was on the Money Desk. Not only is this inconsistent with my conclusions above, but it is also inconsistent with the terms of the letters of 1 December 2010 and 1 March 2012 which each say that Ulster Bank, *'when the deposit matures ... will follow your usual settlement instructions'*, with a default provision that the principal and interest would be remitted to the Eccles' instant access account (as seems to have happened on at least one previous occasion).

62. Mr Eccles' also argues that he did not have control of the £295,700 because the bank refused to release the deposit so as to allow him to make an investment. As he put it - pithily - in cross-examination, *'If I had my way, I would have taken the £300,000 and to hell with it'*.

63. I reject this argument. Whilst the Bank indeed declined to appropriate the funds held on the Money Desk deposit to Helvetia Capital, it seems to me that far too much, in evidential terms, is being made of the Bank's email. There was no evidence from Mr Rooney, who wrote the email. In my view, the email did not amount to any positive or unequivocal assertion by the Bank that it owned the £295,700, and could do whatever it wished with that money and/or that the money did not belong to the Appellant. Mr Eccles did not force the issue with the Bank. In my view, and insofar as the Appellant relies on this email, he fails to discharge the evidential burden which is placed upon him.

64. But, even if I were mistaken on that point, Mr Eccles' own representative, Mr Bell, gave Ulster Bank instructions, on behalf of Mr Eccles, and with his authority, on 8 March 2012, that the Bank could draw the funds held on deposit and use them to clear the £250,000 personal guarantee (which in fact was £230,000) on MCE Developments. This was confirmed by a letter from Mr Eccles to Mr Rooney dated 9 March 2012. Mr Eccles knew that this was happening.

65. Mr Eccles did have control over the Money Desk deposit in March 2012, because, if he had not, there would have been no need for the Bank to have asked Mr Eccles to authorise anything.

66. As Mr Eccles explained, he did what he did because he *'just wanted the whole thing to go away'*. The 'whole thing' was not only MCE's indebtedness, but was Mr Eccles' personal guarantee for MCE's borrowing and (by inference) the charge held by the Bank.

67. Some confusion has arisen from the Bank's use of the word 'voluntarily'. Mr Curran captures the sense of this in his letter of 10 February 2015, referring to the bank 'forcing the settlement'. It is clear that there was a degree of commercial pressure. But Mr Eccles' subjective assessment of the situation - i.e., the feeling that he had to make the payment and so did not do so 'voluntarily' - is not determinative. When he authorised the payment - even if he did so unhappily, and would have preferred to do something else - it was quite clear that the alternative was that the Bank would insist on its rights against him under the personal guarantee, and that, if it did not receive money from Mr Eccles to reduce MCE's borrowings, then the personal

guarantee would be pursued, and, if not satisfied, other steps would be taken such as making Mr Eccles bankrupt.

68. Arguments appear in the correspondence that the Bank had placed pressure on Mr Eccles to give this authority, but the unavoidable fact is that he did give authority to Mr Bell. I have no jurisdiction to consider or to decide whether the Bank dealt with Mr Eccles fairly or not, taking into account what was or may have been known about his health, and so I express no views on the same.

Negligible value

69. On 16 July 2015 the Appellant's representatives wrote that 'an allowable loss may arise where a disposal has not taken place when the asset has negligible value'. This is also hinted at in the Appellant's Statement of Case: *'the investment had nil value in 2010'*. Although it is not put expressly, I have taken this as a reference to TCGA 1992 section 24.

70. As far as I am aware, no 'negligible value' claim was made by the Appellant.

71. I remind myself that the Appellant bears the burden of establishing, albeit only to the appropriate civil standard, that he is entitled to a deduction sought.

72. There is simply insufficient evidence before me which would allow such a finding to be made. Assertions by representative in Statements of Case or in letters are not evidence.

73. The two spreadsheets (for y.e. 28.2.08, and y.e. 28.2.09, but not for any later years) simply show that MCE had borrowed money to buy the site, but (at the very highest) were not incurring fees on it in the year ending 28.2.09, despite having done so in the previous year. I have not seen any filed accounts for MCE, or any evidence (apart from the 2007 facility) as to its dealings with the Bank.

When did the claim under section 253(4) arise?

74. HMRC's fundamental position is that although there was a capital loss, this loss did not in fact arise until Mr Eccles made the payment on 26 March 2012, which was in 2011/12, and, as such, it could not be claimed to offset capital gains arising in the earlier years 2009/10 and 2010/11.

75. In my view, these propositions are entirely correct.

76. The main reason for this is the wording of section 253: "as if an allowable loss had accrued to the claimant <u>when the payment was made.</u>" The emphasis makes it clear that section 253 engages only "when the payment" (that is, the payment under the guarantee) "was made".

77. Looked at the other way, the Appellant's arguments that the Bank could or should have called in the guarantee sooner cannot overcome the clear and unambiguous wording of the statute. The statute does not (for example) say 'when the

payment should have been made', or 'at the earliest date when the payment could have been made'.

78. For the same reasons, I must reject the argument that the loss occurred in 2009/10 *'as the result of the bank not extending funds to develop the site'*. Apart from these bare assertions, which are not evidence, and in the absence of any corroborative documentation, I am simply not in a position to assess what part the Bank had to play in the financial fate of MCE.

79. But, even if it were true that the loan to MCE become irrecoverable because of something the Bank had or had not done, this does not in my view have any bearing on the correct applications of section 253(4) in this case. I simply do not see any good reason why it should, not least since it would potentially involve me in an impermissible re-writing or interpretation of the statute.

80. The property crash in 2008, relied upon by the Appellant, is not F2009/10. Nor does information about MCE's financial position in y.e. 28.2.08 or y.e. 28.2.09 assist, since neither of those is F2009/10.

81. I am fortified in my conclusion as to the proper meaning and effect of section 253, since it does not refer to 'loss' generally, but to 'allowable loss', being defined as the amount of the payment made under the guarantee.

82. Even if (for the sake of argument) the loan to MCE had become irrecoverable, within the proper meaning and effect of section 253(4)(a), at some time in (say) 2009/10, a claim for allowable loss under section 253(4) has to meet four cumulative conditions. All must be satisfied. There cannot be any claim for allowable loss under section 253(4) unless and until the requirement in section 253(4)(b) has been satisfied. This explains why the claim to allowable loss is expressly linked to the date of the payment under the guarantee. A payment under a guarantee (b) against an irrecoverable loan (a) cannot be made until the loan has become irrecoverable. The loan will have become irrecoverable at some point before the payment under the guarantee. The loan could become irrecoverable in Year 1, with payment being made under the guarantee being made in Year 2. The claim for allowable loss would arise in Year 2.

83. I should add that my comments on section 253(4)(a) are in the context where (i) the matter in section 253(4)(a) did not seem to be in dispute; (ii) even if I have misunderstood, and it is in dispute, the Appellant would still bear the burden of establishing that section 253(4)(a) was met, and has failed to discharge that burden.

Conclusions

84. Therefore, the event referred to in section 253(4)(b) took place on 26 March 2012, which was in 11/12.

85. Any allowable loss arose on 26 March 2012, which is in 2011/12.

86. Section 2(3) TCGA 1992 applies. Mr Eccles cannot deduct the capital loss arising in 2011/12 from chargeable gains accruing in any earlier year of assessment.

87. Therefore, the appeal is dismissed.

88. 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.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 12 FEBRUARY 2019