FIRST-TIER TRIBUNAL
TAX CHAMBER

London: Taylor House

Appeal reference: TC/2023/13711

CAPITAL GAINS TAX – entitlement to loss relief under s253 TCGA 1992 following capitalisation of loan – appeal allowed

Heard on: 12 March 2024
Judgment date: 27 March 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MICHAEL BELL

Between

TIMOTHY BUNTING

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr T Chacko of Counsel instructed by Evelyn Partners LLP

For the Respondents: Dr J Schryber, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Mr Timothy Bunting (**Appellant**) appeals against the conclusions contained in a closure notice dated 1 September 2022 issued by HM Revenue and Customs (**HMRC**) refusing a claim for loss relief under section 253 Taxation of Capital Gains Act 1992 (all section references will be to Taxation of Capital Gains Act unless otherwise stated).

2. For the reasons set out below we allow the appeal.

RELEVANT LEGISLATION

3. This appeal turns on the correct interpretation of section 253(3) as amended in 1996 (**1996 Amendment**).

4. So far as relevant to this appeal (both directly and as relevant context) the terms of section 253 are as set out below (the italicised text was inserted by the 1996 Amendment, the original wording of the provision is then shown – other amendments not relevant to this appeal were made post 1996 and are not identified):

> (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) … if the loan is made before 24 January 2019, 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.
>
> …
>
> (3) *Where a person who has made a qualifying loan makes a claim and at that time* [pre 1996 – 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 civil partners, or companies in the same group, when the loan was made or at any subsequent time,
>
> then, … this Act shall have effect as if an allowable loss equal to that amount had accrued to the claimant *at the time of* [pre 1996 – when] the claim *or (subject to subsection (3A) below) any earlier time specified in the claim* [pre-1996] – was made].
>
> *(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 …*
>
> *(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; …*

(4) *Where* [per 1996 – If, on a claim] 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* [pre 1996 – 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 civil partners, … when the loan was made or at any subsequent time and the claimant and the borrower were not each other's spouses or civil partners, … 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.

(4A) A claim under subsection (4) above shall be made:

(a) for the purposes of capital gains tax, not more than 4 years after the end of 7 the year of assessment in which the payment was 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.

…

(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.

…

(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.

…

5. The 1996 Amendment was made, along with others, pursuant to section 201 and paragraph 8 of Schedule 39 of Finance Act 1996. The purpose was, expressly, said to be for

"enacting certain extra-statutory conditions". The 1996 Amendment amended section 253 in order to enact extra statutory concession D36 which provided:

> "TCGA 1992 s.253(3) provides that in certain circumstance a loss may be claimed when money lent to a person carrying on a trade, profession or vocation has become irrecoverable. In strictness, any loss arises at the date ·of claim. However the Inland Revenue will be prepared to accept that any such loss should be treated as arising in an earlier year of assessment (…) providing that:
>
> (a) the claim is made not later than two years after the end of that year of assessment …
>
> (b) all the conditions for the relief are satisfied at the date of claim, and
>
> (c) the relief would have been available at the end of the year of assessment … for which the relief is claimed.
>
> …"

6. Also relevant to our analysis of the meaning and effect of section 253 is section 251. So far as relevant it provides:

> General provisions
>
> (1) Where a person incurs a debt to another, … no chargeable gain shall accrue to that (that is the original) creditor … on a disposal of the debt, except in the case of the debt on a security (as defined in section 132).
>
> (2) … subject to subsection (1) above, the satisfaction of a debt or part of it … shall be treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied.
>
> (3) Where property is acquired by a creditor in satisfaction of his debt or part of it, … the property shall not be treated as disposed of by the debtor or acquired by the creditor for a consideration greater than its market value at the time of the creditor's acquisition of it; but if under subsection (1) above … no chargeable gain is to accrue on a disposal of the debt by the creditor (that is the original creditor), and a chargeable gain accrues to him on a disposal by him of the property, the amount of the chargeable gain shall (where necessary) be reduced so as not to exceed the chargeable gain which would have accrued if he had acquired the property for a consideration equal to the amount of the debt or that part of it.

AGREED FACTS

7. There was no dispute as to the facts of this case which were proven by reference to the documents made available to us and the witness statement from the Appellant which was supplemented by brief oral testimony and cross examination. We accept the evidence and make the following factual findings:

(1) The Appellant has had a successful career firstly as a banker and subsequently as an investor. He also has a keen interest in sports history and memorabilia.

(2) The Appellant has, at all relevant times, been resident in the UK.

(3) In or about the early 2000s the Appellant wanted to establish a business dealing in sports history books and memorabilia. It was intended that the business would trade with a view to a profit, the holding stock that was expected to appreciate in value.

(4) On 7 July 2004 Rectory Sports Limited (**Company**) was incorporated. The Appellant's wife was appointed as the sole shareholder and director as, at the time, the

Appellant worked for Goldman Sachs who indicated a preference that he should not have external directorships. The company was capitalised by 1, £1 ordinary share.

(5) The activities of the business were funded by the Appellant who personally invested £3,452,771 by way of a series of unsecuritised, non-interest-bearing loans (**Loan**). The business traded as Sportspages (for a period the Company was registered under the name of Sportspages UK Limited).

(6) The Loan represented money lent to the Company which was used by it wholly for the purposes of its trade in books and memorabilia and was not a debt on security (as defined in section 132).

(7) In the early years the business invested heavily in the acquisition of stock. It opened premises in Farnham and hired specialist staff. There was some initial success for the business but by 2012 it had become clear to the Appellant (and his wife) that the stock held was depreciating rather than appreciating and the targeted market was falling away. The business was becoming unsustainable.

(8) On 31 January 2013 the Appellant and the Company entered into an agreement for the capitalisation of £2,200,000 of the Loan. Pursuant to that agreement the Company issued 2,200,000 ordinary £1 shares to the Appellant in consideration the Appellant agreed to "fully and irrevocably release and discharge the Company from any and all claims or demands [the Appellant] [had] or may have against the Company and duties, obligations and liabilities that the Company [had] or may have to [the Appellant] under or in respect of [£2,200,000]."

(9) The capitalisation agreement does not represent an assignment of the capitalised proportion of the Loan.

(10) On 31 January 2013 the Company, and thereby the issued shares, had no value.

(11) The capitalisation of £2,200,000 of the Loan was undertaken for the purposes of, and in the belief that, the Appellant would, in consequence of the conversion, be entitled to claim income tax losses pursuant to section 131 Income Tax Act 2007 **(ITA)** on the basis that the shares had become of negligible value.

(12) Subsequently, on 18 March 2013, the Company and the Appellant entered a further agreement for the release and discharge of £1,325,771 in consideration for the transfer of identified assets (including the Company's name, fixed and moveable assets and stock).

(13) On 28 March 2013 the Company resolved that it should be liquidated. A liquidator was appointed on 14 April 2013.

(14) By his self-assessment tax return for the tax year ended 5 April 2013, submitted on 31 January 2014, the Appellant claimed £2,200,000 of income losses.

(15) On 27 January 2015 HMRC opened an in-time enquiry into the claimed income losses. During the course of that enquiry, on 29 February 2016, the Appellant initially made a protective claim to capital losses in respect of the losses arising in connection with the discharge of the capitalised proportion of the Loan. On 28 September 2016, having accepted that because the shares were of nil value at the time they were issued they had not "become of negligible value" and this the Appellant had no entitlement to the income losses claimed, the Appellant invited HMRC to close the enquiry into his 2012/13 tax return. By the same letter he invited HMRC to formalise the protective capital loss claim and amending the 2012/13 return in that regard.

(16) HMRC closed the enquiry on 25 November 2016 refusing the claim for income tax losses. They determined to treat the letter of 29 February 2016 as a claim for the capital losses made outside a return (the period for amending the return having expired).

(17) On 14 February 2017 HMRC opened an in-time enquiry into the capital loss claim. That enquiry was closed with the refusal of the claim on 1 September 2022. HMRC refused the claim on the basis the agreement to capitalise the loan satisfied £2,200,000 of the debt with the consequence that the Appellant failed to meet the conditions prescribed to incur the capital loss as specified in section 235. HMRC considered, in connection with the satisfied proportion of the Loan that there was no amount outstanding which had become irrecoverable.

(18) The closure notice was appealed to HMRC. It was reviewed and upheld on review and subsequently the appeal was notified to the Tribunal.

ISSUES TO BE DETERMINED

8. This appeal concerns only whether the Appellant is entitled to make a claim for capital losses pursuant to section 253. Whilst a claim had been made for income losses the Appellant accepts that he did not meet the conditions to claim such a loss. Critically, that concession was on the basis that the value of the Company and the 2.2 million ordinary shares had no value at the point of conversion. They could not therefore represent a shareholding which had become of negligible value as is required to claim an income loss pursuant to section 131 ITA.

9. On the basis of the facts identified and agreed in subparagraphs 67(2) and 67(6) above the HMRC accepted that the Loan was a qualifying loan meeting the terms of section 253(1).

10. HMRC also agreed that on and immediately before 31 January 2013 the whole Loan represented an "outstanding amount" and was "irrecoverable" such that as at that date the Appellant could have claimed the relief. It is further accepted that had the Appellant claimed the relief at that time and subsequently satisfied the Loan pursuant to the same terms of the capitalisation agreement the provisions of subsections 253(5) and (9) would not have been met and no gain (reversing the loss) would have accrued.

11. The Appellant accepts that vis a vis the proportion of the Loan which was satisfied by way of asset transfer there is no entitlement to claim a capital loss as the loan was satisfied for valuable consideration.

12. In consequence of the various concessions made we must determine whether the claim for capital losses made by letter of 28 September 2016 meets the conditions prescribed in section 253(3). In particular:

(1) the meaning and effect of the statutory language: "makes a claim and at that time …any outstanding amount of the principal of the loan has become irrecoverable"

(2) whether the contractual effect of the capitalisation agreement excludes the Appellant from a claim under section 253.

SUBMISSIONS OF THE PARTIES

13. We are grateful to the parties for their detailed skeleton arguments and comprehensive oral submissions. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission. It is, however, inevitable, given the detail of the arguments that not everything in the appeal is given specific mention in this judgment.

Appellant's submissions

14. Mr Chacko's submissions began with a recitation of what the Appellant contends is the history and purpose of section 253. He contended through an understanding of the section's

purpose the correct interpretation of the statutory language became clear. It was contended that the relief provided by section 253 corrects some of the potential tax imbalances which might otherwise arise in respect of the funding of a business. He identified that losses arising from equity funding are granted either as capital losses (and where the business is of an appropriate kind) by way of an income loss under section 131 ITA; and losses arising from commercial lending arising from bad debts will form part of the profits calculation for the lender. However, without section 253 an individual who has lent money to support a small business obtains no tax relief in the event that the whole or part of the investment is lost.

15. We were directed to the Special Commissioners' determination of the purpose of section 253 in *Crosby v Broadhurst* [2004] SpC 416 (***Crosby***) at paragraph [12]:

> "We prefer Mr McKay's purposive approach which, we think, is consistent with the wording of the section itself-indeed, its title, 'Relief for loans to traders' identifies what that purpose is. It seems to us clear that Parliament's intention was to afford relief to those who, having made a loan to a trader, will not see the money, or a part of it, again. The relief is available, as Mr McKay pointed out, only in respect of a limited class of loans; and there are provisions catering for changes in the debtor's fortunes after a claim has been admitted (sub-s (5)) and countering abuse (sub-s (12)). …"

16. This statutory purpose was, it was contended, underpinned by the structure of section 253 and in particular the provisions of subsection (5) and (9) which ensured that any amount claimed as irrecoverable, but which was subsequently recovered was again bought back into the charge to tax.

17. In further support as to the purpose of section 253 we were referred to the observation of the Tribunal in *Atherley v HMRC* [2018] UKFTT 408 (TC) (***Atherley***) at paragraph [19] that the loss relief provided in section 253 assists in achieving a realistic application of the capital gains tax code where a taxpayer has suffered a real economic loss in funding a business.

18. In accordance with the correct approach to statutory interpretation as recently confirmed in *Hurstwood Properties Ltd v Rossendale Borough Council* [2021] UKSC 16 we were invited to interpret section 253 purposively and apply the facts viewed realistically to determine the correct taxing outcome.

19. Through such a purposive lens it was contended that the critical language which must be construed permitted the claim to capital losses because the Appellant had made a qualifying loan which, at the time of the claim, was outstanding (in the sense that it had not been paid) and was irrecoverable (in the sense that it was not expected that it ever would be paid).

20. It was contended that HMRC were wrong to contend that the relevant proportion of the loan was not outstanding after 31 January 2013 and/or that the conversion satisfied the Loan so as to deprive the Appellant of the right to claim a capital loss.

21. With regards to HMRC's argument that the relevant proportion of the Loan had ceased to exist by the time of the claim, such that there was no longer a qualifying loan in respect of which a claim could be made (whether outstanding or otherwise), the Appellant draw our attention to the conclusion of the Special Commissioners in *Crosby*.

22. *Crosby* concerned qualifying loans granted to a company by trustees. The loans had become irrecoverable. The shareholders of the company secured a sale of the company but, as a condition of purchase, the purchasers required that the trustees execute a deed of waiver and release of the loans. The trustees made a claim for relief under section 253. HMRC opposed the claim on the basis that the loan had ceased to subsist in consequence of the waiver and release; as such there could be no subsisting irrecoverable debt and no amount outstanding.

The Special Commissioners concluded that there was no statutory wording which required the loan to subsist at the time of the claim. They accepted the taxpayer's submission that the language of the provision as it then stood merely required that a loan had become irrecoverable and that any claim was limited to the irrecoverable amount.

23. Whilst Mr Chacko recognised that the terms of section 253 considered by the Special Commissioners had provided "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" (i.e. the words "at that time" had not yet been inserted) he contended that the amendment had not altered the interpretation to be placed on the provision. This was so because the amendment (as articulated in section 201 and Schedule 39 Finance Act 1996) was for the purpose only of enacting the extra statutory concession D36. It would be inconceivable that the concession could have narrowed the scope of the provision and thus the codification of the concession could not either have been intended or have the effect of narrowing the provision.

24. The Appellant contended that the statutory purpose and effect of "at that time" was to require that at the time of the claim the amount was actually irrecoverable. The words were introduced along with the introduction of subsection (3A) which provides for a claim to be made for an earlier tax year. "At that time" ensures that no claim may be made for an earlier tax year where, by the time of the claim, the debt is paid or has become recoverable.

25. It was also submitted that the language of subsection (4) indicates that "at that time" should be given the meaning advanced by the Appellant. Subsection (4) provides for a claim to loss relief where a guarantor is required to make a payment under the guarantee. Like subsection (3) any outstanding amount must have become irrecoverable at the time of the claim but the guarantee payment must have also been made. Thus, it was submitted, as the payment of the guarantee will immediately release and discharge the loan there will never be a situation in which, at the time the claim is made, there will be a subsisting and outstanding loan. The requirements of subsection (4) would simply never be met if HMRC's interpretation were correct.

26. HMRC's interpretation was also considered to be surprising in light of the limited number of cases in which section 253 had been considered since *Crosby*. *Atherley* concerned a claim under section 253 where a part of the loan had been written off. The dispute centred on whether, as a matter of fact, the written off part had become irrecoverable and/or whether the write off was an act of the lender which pursuant to subsection (12) would have precluded a claim. The Appellant noted that HMRC did not defend the appeal on the basis that there was no subsisting debt, and the point was not considered by the Tribunal of its own volition. A surprising omission if HMRC's position in this appeal were correct.

27. Reference was also made to the Upper Tribunal (**UT**) judgment in *Drown (executors of Leadley deceased) v HMRC* [2017] UKUT 111 (TCC) (***Drown***). In that case the taxpayer had successfully appealed to the FTT against a refusal of section 253 relief bought on behalf of Mr Leadley by his executors. In an undefended appeal bought by HMRC the UT noted that had Mr Leadley would have been entitled to the section 253 claim had he not died. The Appellant contended that this observation would have been incorrect were HMRC's argument in this appeal to be correct. It was contended again that this was a surprising result given the unopposed appeal.

28. The Appellant also drew an analogy to what was said to be the common position in a creditors voluntary arrangement where creditors are required to waive some or all of their debts. The Appellant contended that it would be irrational and capricious to require a creditor forced to waive part of their debt to make a claim to loss relief prior to the approval of the arrangement.

Particularly in the context of section 42(2) Taxes Management Act 1970 which requires claims to be included in the claimant's self-assessment tax return unless they are out of time to make or amend the return.

29. With regard to HMRC's position that the capitalisation had satisfied part of the Loan such that there was no amount outstanding at the time of the claim the Appellant contended that whilst that part of the Loan to which it related was discharged as there was no transfer of value to the Appellant the amount to which the claim was made was an amount outstanding and irrecoverable within the language of section 253.

30. It was said that HMRC's reliance on section 251(2) (see below) was misguided or irrelevant. It was said that the fact that satisfaction of a debt represents a disposal of the debt took HMRC nowhere in interpreting section 253(3). It was contended that the argument evidenced an unacceptable lacuna in the evident statutory intent of ensuring that those who invest in the trade carried on by a business who then make a loss on that investment are entitled to relief from tax in respect of that loss.

HMRC's submissions

31. The closure notice was issued on the basis that "there was no amount outstanding on the loan at the date of the claim. The loan had not therefore become irrevocable as it was satisfied by virtue of an exchange for shares in Sportspages UK limited and so paragraph 3(2) of s253 is not met." Further explanation was given in HMRC's view of the matter letter which stated:

> "30 … for an allowable loss to accrue, at the time a claim for relief is made any outstanding amount on the loan must have become irrecoverable. In such instances, the allowable loss would accrue at the time of the claim being 29 February 2016, unless an earlier time was specified in the claim.
>
> 31. On 31 January 2013, the £2.2m loan was converted into shares and, as a result, the loan was satisfied. Consideration was therefore received in the form of shares when the loan was settled. The fact that a debt can be satisfied by property (i.e. shares) is covered by s251(3). The legislation here does not specify that the property required to satisfy the debt must be of the same value, only that it is acquired in satisfaction of the debt. The value of the shares therefore has no bearing on the fact that the loan had be satisfied.
>
> 32. Since the loan had been satisfied and no longer existed on 31 January 2013, at the time the claim for relief under s253 TCGA 1992 was made (29 February 2016) there was not an outstanding amount on the loan. The loan had therefore not become irrecoverable at the time the claim was made and, as a result, the conditions for a valid claim at s253(3) TCGA 1992 had not been met.

32. A wider contention that no claim is permissible under section 253 where a loan ceases to exist (by satisfaction, waiver or otherwise) was first made in the statement of case. Before us it was pursued as the "core" submission.

33. In this regard it was contended that the amendment made to section 253 by section 201, and paragraph 8 of Schedule 39 Finance Act 1996 introduced the condition that the loan must subsist at the time the claim was made and any earlier time specified in the claim. Dr Schryber contended that it was plain from *Crosby* that HMRC's standing instructions to officers in 1995 required the debt to subsist at the time of the claim and the amendment made in 1996 could be assumed to have been enacted with this standing instruction in mind. In the alternative, he contended that the amendment may have been fortuitous but that the only reasonable and plain meaning of the language "makes a claim and at that time any outstanding amount … has become irrecoverable" is that the relevant time at which it is to be determined that the amount

is both outstanding and irrecoverable is at the time of the claim – "that time" being a reference to the making of the claim.

34. HMRC contend that no purposive interpretation of the statutory language is required. HMRC almost went as far as contending that there was no overarching statutory intent that irrecoverable loss incurred by a lender of a qualifying loan should be relieved. However, it was contended that relief is subject to precisely drafted conditions which must be met for the benefit of the relief to be given. As with many other areas of tax, and more specifically the capital gains tax code, reliefs were carefully scoped. Entitlement did not, in HMRC's submission, always follow business or economic logic. In this regard HMRC relied on the Court of Appeal judgment in *HMRC v Blackwell* [2017] EWCA Civ 232 (***Blackwell***) in which the Court determined at paragraph [22]:

> "While the capital gains tax legislation was generally to be interpreted on a basis consistent with business common sense, it by no means followed that there would in any particular instance be a conflict between business common sense and a careful juristic analysis of particular provisions. Even if there was, the clear language of statutory provisions by which gains were to be computed, and deductions allowed, might nonetheless prevail, even where the outcome might have appeared to be one that a businessman might find surprising. However, it was not uncommercial to apply a juristic analysis of the intangible asset constituted by shares in a company for the purpose of ascertaining its state or nature at any particular time."

35. HMRC contend that "at that time" precludes a loss claim in respect of a loan which has ceased to exist by the time the claim is made even where at the time of the claim the principal amount of the loan is irrevocably irrecoverable.

36. It was considered that there was nothing unreasonable or surprising in Parliament having chosen to require a claimant under section 253 to order their affairs so as to make a claim before waiving or satisfying a claim and thereby limiting the time in which a claim can be made to the period in which the debt is still owed in the sense that the lender could, if they chose, enforce it. Once waived or discharged, it was contended, there was no enforceable debt and therefore no sum outstanding. In setting a requirement that the amount must be capable of enforcement at the point of claim Parliament was merely precluding an open-ended relief; appropriately providing certainty in this aspect of the tax regime.

37. Relying on *Crosby* HMRC submitted that through the 1996 amendment Parliament had done exactly what the Special Commissioners had indicated needed to be done in order limit claims to those where there had been no waiver or discharge of the debt prior to the claim. HMRC referred to paragraph [12] (partially cited above) which went on to state:

> "… We agree with Mr McKay that if Parliament had intended that a loan must be both subsisting and irrecoverable it would have been simple to say so, either by rephrasing sub-s (3) or by adding further words to that effect to sub-s (12). Instead, it seems to us, sub-s (12) should be taken as an exhaustive list of the circumstances which disqualify a lender from the relief to which he would otherwise have been entitled. We see nothing in the statutory words to support the view that the accident of waiving a loan, and not for reasons which come within sub-s (12), before rather than after a claim is made disqualifies the lender from the relief."

38. In light of this HMRC noted that the Appellant had chosen to capitalise the loan. He had done so in the hope or belief that by so doing he would be entitled to a larger income tax loss relief claim. That by that choice, they said, he had effectively deprived himself of the ability to make the capital loss relief claim. But that was his choice, presumably made on advice.

There was nothing, so it was contended, offensive in the Appellant now being refused entitlement to a claim that he could have made had he managed his affairs differently.

39. In the alternative (or perhaps better by way of complementary argument) HMRC's position is that even where a claim may be bought where a debt has ceased to exist (i.e. on the basis that *Crosby* remains good law despite the legislative amendment) the circumstances in which the debt ceases to exist are relevant and where a debt is satisfied rather than waived prior to the date of the claim no entitlement to claim can arise. They found this argument, in part, on the provisions of section 251 which provides that when a loan is satisfied there is a disposal of the debt asset which, being outside the precise requirements of section 253 simply has no effect for capital gains tax purposes (as provided for in section 251(1).

40. HMRC contend that satisfaction of a loan for consideration is to be distinguished from waiver or discharge for no consideration.

BURDEN OF PROOF

41. In this appeal it is for the Appellant to establish that the conclusion of the closure notice is wrong. He must do so on the balance of probabilities.

DISCUSSION

42. It is accepted by HMRC that the effect of *Crosby* is that in respect of the pre 1996 legislation there was no statutory language which excluded a person who had made a qualifying loan from waiving all or part of that loan prior to making a claim for relief. However, as set out above, they contend that:

(1) *Crosby* is no longer good law as it has been amended so as to require that the loan subsists at the time the claim is made; and/or

(2) *Crosby* does not extend to a situation in which the loan has been satisfied prior to any claim being made.

What are the legal findings in *Crosby*?

43. The judgment in *Crosby* is short. As indicated above the Special Commissioners were required to interpret section 253 and in particular subsection (3) and determine whether the taxpayer in question was entitled to claim relief where, prior to the claim being made, the loan had been waived.

44. In their judgment the Special Commissioners clearly set out what they considered to be the purpose of section 253 by reference to the title to the provision and its terms: it is intended "to afford relief to those who, having made a [limited class of] loan to a trader, will not see the money or part of it, again". On the basis that such was the purpose of section 253 the Special Commissioners concluded that the requirement that "any outstanding amount of the principal of [a qualifying loan] has become irrecoverable" there was no basis to exclude from claim an amount which had, by the date of the claim to relief, been waived.

45. In doing so we consider, though it is not expressly stated, that, the Special Commissioners were applying an interpretation of "outstanding" which is consistent with that advanced on behalf of the Appellant i.e. that outstanding means "not paid" as distinct from that advanced by HMRC i.e. that the lender had an ongoing entitlement to enforce the debt. Quite plainly a waived debt is no longer enforceable whereas it is unpaid.

46. We therefore start from the position that there is previous, though non-binding authority, that the section 253 relief may be claimed when a loan no longer exists because it has been waived.

47. That interpretation was subsequently accepted by HMRC. As noted in *Crosby*, in 1995 HMRC had issued guidance to officers that in order to claim the loan must remain in existence. Dr Schryber informed us that HMRC's practice following *Crosby* (and pending the outcome of this appeal) has been to allow claims where the loan has been waived but not where there has been satisfaction of the debt. In this regard we note that the Capital Gains Tax Manual CGT659434 currently states:

> "Before relief can be given on a claim you will need to check that: at the date of the claim the outstanding amount of the principal of the loan has become irrecoverable. Thus if the loan has been satisfied, for example by way of the issue of shares or securities even though these themselves may be worthless, no relief will be due. (If, however, there is an outstanding amount of the principal of the loan which has become irrecoverable prior to the claim, the fact that the loan has then been waived before the claim is made will not preclude relief. In Crosby v. Broadhurst (SpC416) the Commissioners said; "We see nothing in the statutory words to support the view that the accident of waiving a loan, and not for reasons which come within subsection (12), before rather than after a claim is made disqualifies the lender from the relief.")"

What is the effect of the 1996 amendment?

48. We start from the position that the statutory purpose of the 1996 Amendment is as explicitly provided for in section 201 and paragraph 8 Schedule 39 Finance Act 1996; namely: to enact the extra statutory concession previously provided for under concession D36.

49. Accordingly, and in our view, the 1996 Amendment represents codifying or consolidating legislation such that it is appropriate to apply the presumption that an Act passed for the purposes of consolidating or codifying is not intended to change the law (see *Bennion Bailey and Norbury on Statutory Interpretation Eighth Edition: 24.7 – Consolidation and tax law rewrite Acts*).

50. There are limits to the presumption, see Lord Simon of Glaisdale in *Maunsell v Olins* [1975] AC 373 at 392:

> "'It has been generally accepted in the past that there is a presumption that Parliament does not intend by a consolidation Act to alter the pre-existing law: But . . . such a presumption has no scope for operation where the actual words of the consolidation Act are not, as a matter of legal language, capable of bearing more than one meaning. The docked tail must not be allowed to wag the dog.'

51. We must therefore determine whether, as asserted by HMRC, there is only one reasonable interpretation of the amendments which has the effect of requiring that the loan subsist at the time of the claim for there to be an entitlement to relief.

52. We set out below a comparison of entitlement to claim pre and post 1996:

Provision	Pre 1996	Post 1996
(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 principle of the load has become irrecoverable … thus Act shall have effect as if an allowable loss equal to that amount had accrued	Where a person who has made a qualifying loan makes a claim and at that time (a) any outstanding amount of the principal of the loan has become irrecoverable… 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

	to the claimant when the claim was made.	subject to subsection (3A) any earlier time specified in the claim.
(3A)	Derived from extra statutory concession D36: TCGA 1992 s.253(3) provides that in certain circumstance a loss may be claimed when money lent to a person carrying on a trade, profession or vocation has become irrecoverable. In strictness, any loss arises at the date of claim. However the Inland Revenue will be prepared to accept that any such loss should be treated as arising in an earlier year of assessment (…) providing that: (a) the claim is made not later than two years after the end of that year of assessment … (b) all the conditions for the relief are satisfied at the date of claim, and (c) the relief would have been available at the end of the year of assessment … for which the relief is claimed.	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 … (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; …

53. We note that D36 required that "all conditions for the relief [were] to be satisfied at the date of the claim and" (emphasis added) at the end of the tax year to which the relief was to be attributed if relief were to be treated as arising in an earlier year. As such D36 was subservient to section 253 vis a vis the scope and nature of a claim to relief. First and foremost there needed to be a valid claim under section 253 and if there was, and the conditions for relief were also met in one of the two preceding years, the claim could be treated as arising in one of the earlier years as specified by the claimant.

54. The statutory draftsman adopted a formulation which required that the qualifying lender make a claim and "at that time" (and to the extent that the claim was made for an earlier period in that earlier period) the conditions for a claim to relief as prescribed in section 253 be met.

55. But the conditions for a claim under section 253 did not change pre and post amendment. In order to bring a claim pre amendment the requirements of section 253 needed to be met at the time of the claim, otherwise there was no valid claim. Under D36 it was only a valid claim (i.e. one meeting the conditions prescribed in section 253) which could be treated as arising in an earlier period in accordance with the concession. Following amendment the same conditions for claim must be met at the time the claim is made and, as previously under the concession, if the claim is to be attributed to an earlier period, the conditions must be met in that earlier period. Thus pre the 1996 Amendment the concessionary position was precisely as it is now though now founded in statute.

56. Thus what needs to be determined in this case is whether as of 29 February 2016, as regards the capitalised debt, there was an "outstanding amount … [which] … ha[d] become irrecoverable".

57. In interpreting those words, consistently with the approach advanced by Lady Arden in *R (on the application of) Derry v HMRC* [2019] UKSC 19 (at paragraphs 84 – 90 and in particular paragraph 88) it is entirely appropriate that we consider and apply the conclusion in *Crosby* as the Special Commissioners were interpreting the same provision.

58. As indicated, we are not bound by *Crosby.* However, applying the principle of judicial comity as set out in *Police Authority for Huddersfield v Watson* [1947] 1 KB 842 at 848 as follows [at 848] as a Tribunal of first instance "we [sh]ould always follow the decision of another judge of first instance, unless [we are] convinced the judgment is wrong".

59. Having considered *Crosby* not only are we not convinced it is wrong, we consider *Crosby* to be right. By their conclusion the Special Commissioners interpreted the words "outstanding" and "irrecoverable" in a way which was entirely consistent with their dictionary definitions (see the Cambridge Dictionary definition of "outstanding" (not yet paid) and "irrecoverable" (impossible to get back)) thereby applying the ordinary meaning of the statutory language chosen.

60. Further, and to test our conclusion we have also considered the role of "outstanding" and "irrecoverable" in terms of section 253 as a whole. In our view section 253 represents a comprehensive and complete code providing relief for those who have lent money to a trader and who will "never see that money again". Subsection (1) identifies the type of loan and lender to which the relief might apply. The relief applies, as a consequence of subsections (3) to (9) to permit the party out of pocket (whether as the creditor or guarantor) to claim a loss to the extent only of the loss suffered; and, by virtue of subsections (1)(c), (3)(c) and (10), only where that the loss is not otherwise relieved or relievable. Anti-avoidance provisions are prescribed in subsection (12) to minimise the risk that the lender can engineer irrecoverability of the loan.

61. Within this code there is nothing offensive in relief being granted where, as a matter of fact, the amount loaned has not been paid, whether or not such non-payment is enforceable at the time the claim is made provided always that it is reasonable to conclude that the amount will never be paid.

62. As identified in *Crosby* if Parliament wants to legislate to provide that a claim be denied from the point at which there is no longer a right to enforce it is free to do so. But it has not yet done so. Until then we consider that an unpaid debt which is no longer enforceable is an amount outstanding (within the ordinary meaning of that word) which has become irrevocably irrecoverable and falls within the drafted terms of the relief.

63. Finally we note that our conclusion that the words "at that time" do not add to the conditions specified in subsection 3(a) – (c) is reinforced when considering the addition of the same words to (4) through the 1996 amendment. Subsection (4) provides for relief to guarantors who are entitled to claim where at the time of the claim there is an outstanding amount which has become irrecoverable from the borrower, and which has been met by way of payment under the guarantee. Somewhat obviously, the payment under a guarantee is an amount paid to the creditor thereby reducing or eliminating the amount outstanding to that creditor and precluding a claim for relief by them. The guarantor may or may not have a right of recovery against the debtor in respect of a guarantee payment. However, the effect of subsection (4) is that upon payment, and irrespective of any right of recovery from the borrower (though not any co-guarantor), the guarantor has a right to make a claim to relief. As we have concluded in respect of subparagraph (3) "at that time" requires that the conditions specified

in subparagraphs (4)(a) – (d) are met at the time of the claim and/or in any earlier period in respect of which it is said claimed that the relief arose. But the addition of those words does not affect the interpretation of the conditions and, in particular, cannot require that the sum paid under the guarantee be enforceable at the time of the claim because in the case of a guarantor the provisions would never be met.

Does the conclusion in *Crosby* apply where the debt is discharged as a consequence of being satisfied?

64. As indicated above, the basis on which the closure notice was issued was that the Appellant was not entitled to claim relief under section 253 because the debt had been satisfied by way of the issue of shares in the Company. HMRC's position in this regard is consistent with the terms of the guidance at CGT65934 (as set out in paragraph 47 above).

65. *Crosby* determined that there was no requirement under section 253 that a debt must subsist at the time of the claim to be entitled to the relief. It did so in the context of waiver rather than satisfaction. The question for us is whether that conclusion should apply equally where the debt no longer subsists because it has been satisfied albeit that despite it being satisfied the sums are irrecoverable (HMRC accepting that to be the position here).

66. For the reasons given above we have concluded that there will be "an outstanding amount … [which] has become irrecoverable" where the amount has not been paid and is not expected to be paid. Or to use the language in *Crosby* the lender has not seen and "will not see the money, or part of it, again."

67. Thus the question is: when there has been satisfaction of a debt by way of the issue of shares which HMRC accept have a nil value it can be said that the amount has been paid?

68. In essence, HMRC appear to contend that the Appellant has been "paid" despite the nil value of the shares. They contend that the shares were described as representing the consideration acceptable to the Appellant to discharge the loan. During oral submissions Dr Schryber also contended that as a consequence of having been issued the shares and in the period until the company was liquidated 46 days later the Appellant owned an asset that was capable of increasing in value. As such there had been consideration "paid" for the release/discharge of the debt. The debt had not simply been waived. By reference to section 251(2) HMRC contend that there was, for capital gains tax purposes, a disposal of the debt as it was made for consideration the debt was thereby "paid".

69. We do not consider that in any ordinary sense of the word the Appellant was "paid" £2.2m when the debt was capitalised. He exchanged a right to enforce the debt for shares in the Company at a time when the shares were worthless.

70. By reference to the provisions of subsections 253(9) and (5) had the capitalisation occurred after the claim had been made the Appellant would not have been treated as recovering an amount in relation to the loan. This is because subsection (9) only causes the subsection (5) gain to bite where the creditor "received any money or money's worth in satisfaction of his right to recover that amount". It can therefore be seen that "satisfaction" of a debt other than money or money's worth does not represent "recovery" and thereby "payment" against the loan when made after a claim to relief. In our view it would be extremely odd were satisfaction other than in money or money's worth to constitute recovery or payment against the loan when occurring before a claim but not afterwards. On this basis we do not consider that the basis on which the proportion of the Loan was capitalised can represent payment such that the relevant proportion of the Loan was no longer outstanding.

71. Contrary to the position adopted by HMRC, we consider that our view, rather than theirs, is reinforced by reference to section 251.

72. Section 251(1) provides that the disposal of a debt (other than a debt on a security) is not within the scope of the charge to capital gains tax. However, section 251(2) provides that subject to subsection (1) the satisfaction of a debt or part of it shall be treated as a disposal of a debt. The effect of these two provisions is that whilst satisfaction of a debt represents a disposal of the debt; that disposal (unless of a debt on a security) is not chargeable to capital gains tax.

73. Section 251(3) then provides that where property is acquired by a creditor in satisfaction of a debt the property shall not be treated as acquired by the creditor whose debt has been satisfied for a consideration greater than the market value at the time of its acquisition. That is unless and until, in a situation in which subsection 251(1) applies, the property so acquired is itself disposed of. In that latter situation, where a chargeable gain is made on the subsequent disposal of the property that gain will be reduced so as not to exceed the gain which would have accrued if the property had been acquired for the amount of the debt.

74. These provisions are perhaps best understood by reference to an example. If it is assumed that Lender A is owed £1,000,000 by Borrower B by way of debt other than on a security. The debt is satisfied by the issue of shares in B which, at the time of issue are worth £250,000. The satisfaction of the debt is treated as a disposal of the debt for a consideration of £250,000. There is a disposal, it is deemed to be for £250,000 but it is simply outside the scope of the tax. If however, the shares were subsequently sold of £1,100,000 the gain on the disposal of the shares of £850,000 would be reduced to £100,000 (i.e. the proportion of the gain attributed to the satisfied debt remains outside the charge to capital gains tax).

75. HMRC rely on section 251(2) as evidencing that the satisfaction of the Appellant's debt represents a disposal of it such that it cannot be said that after satisfaction there is an outstanding debt for the purposes of section 253(3)(a).

76. We cannot accept that submission. If a £1,000,000 debt were satisfied on payment of £250,000 it is our view that the lender has been paid £250,000 but it cannot be said to have been paid the remaining £750,000. That £750,000 remains unpaid and therefore outstanding (in the ordinary sense and as determined in *Crosby*) but has been waived in order that the debt be satisfied.

77. Similarly in respect of satisfaction of a debt in return for property where the market value of the property is less than the debt against which it is provided . Section 251(3) is explicit that value of the consideration given on the disposal is capped at the market value of the property. Thus, were the facts as in the example at paragraph 74, the same analysis as is set out in paragraph 76 would apply.

78. In the present case the debt was satisfied and discharged in consideration of shares with a nil market value. The Appellant was therefore paid nil against the debt of £2,200,000 which remained unpaid and, in our view, thereby outstanding. In the sense envisaged in section 251 the debt owed to the Appellant was satisfied only in the sense that it was waived in return for worthless property.

79. We therefore consider that whilst the facts of the present case differ from that in *Crosby*, on the basis that no value was given in order to satisfy the debt the whole amount remained outstanding and irrecoverable. It is not the act of satisfaction which renders a debt no longer outstanding – it is satisfaction for valuable consideration (i.e. consideration in money or money's worth) in respect of which it is then reasonable to say that the debt or such part of it as is reflected in the value given has been paid. To the extent that the value given in money or money's worth is less than the debt the balance of the debt over the value given will remain outstanding.

80. In order to test our conclusion we have considered what would have happened were it hypothesised that at the point of satisfaction/waiver the shares issued were worthless, relief under section 253 was claimed, but the shares were subsequently disposed for value. On our analysis at the point of satisfaction/waiver the amount of the debt remains outstanding. When the shares are sold the consideration received is properly to be regarded as an amount "recovered" under section 253. The language of recovery mirrors and acts as a counterpoint to irrecoverable. When the shares are sold for value part of the outstanding amount has been recovered. Accordingly, the sum so received is treated as a gain under section 253(5). That gain is not taxed as a disposal of the shares by operation of the tail piece within the provisions of section 251(3) because the waiver was given (by way of satisfaction) for worthless property.

Final matters

81. In reaching our conclusion we do not consider that there is any ambiguity in the statutory language which required us to resort to applying a purposive interpretation. However, we are satisfied that the plain meaning we have applied to the statutory wording is consistent with the statutory purpose as identified in *Crosby* and with which we agree.

82. Further we have not applied a commercial or economic lens in reaching our conclusion. In this context we consider that the judgment in *Blackwell* has no relevant application. We accept that had we concluded that the statutory language was to be interpreted as HMRC contend there would have been no basis for an alternative conclusion justified by a view that it made no commercial sense.

83. We did not find it necessary to consider the other examples advanced by the Appellant to demonstrate that HMRC's position led to the refusal of what the Appellant considered were plainly good claims for relief. For the reasons given we do not accept HMRC's interpretation as one which can properly be made out by reference to the statutory language used and by reference to the legislative context of the 1996 Amendment.

84. Finally, we have not considered it necessary to consider the judgments in *Atherley* or *Drown*. We must confess that we did not fully understand the relevance of *Drown* as we do not understand that there was a question on the facts that the debt owed to Mr Leadley's had been waived or satisfied when Mr Leadley died. It is therefore entirely reasonable that HMRC would accept that had Mr Leadley filed his return prior to death he would have been entitled to relief. *Atherley* was potentially more relevant but a decision to write off a loan is not to be equated with waiver or satisfaction. Under accounting principles the lender may or should write off a loan when it considers that it is more likely than not that the sum will not be recovered. But writing off a debt does not equate to the debt being unenforceable by the lender which was the critical issue in this appeal.

DISPOSITION

85. At paragraph 12 we identified the issues before us as:

(1) the meaning and effect of the statutory language: "makes a claim and at that time …any outstanding amount of the principal of the loan has become irrecoverable"

(2) whether the contractual effect of the capitalisation agreement excludes the Appellant from a claim under section 253.

86. For the reasons stated:

(1) we consider that the meaning and effect of the statutory language is that at the time of the claim the debt to which the claim relates must be unpaid (whether or not there is a continuing right to enforce the debt) and where there is a right of enforcement it is reasonably considered that the debt will not be paid. Where there is no right of

enforcement it is almost inevitable that the requirement of irrecoverability will have been made out.

(2) On the basis that there was no valuable consideration provided under the capitalisation agreement the Appellant is not excluded from relief under section 253. The position would, plainly, have been different had the issued shares had value.

87. Accordingly, we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 27 March 2024