TC06407

Appeal number: TC/2015/02327 and TC/2015/02328

Capital gains tax - closure notice - HMRC amendments to self-assessment returns in respect of capital gains on sale of Appellants' shareholding in private company - whether HMRC able to reverse previous decision to allow losses - yes - whether HMRC incorrectly disallowed expenditure - on the facts no - whether assessment correctly calculated - yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID & JACQUELINE COOPER **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN STOTT

Sitting in public at Leeds ET, City Exchange, Albion Street, Leeds on 28 September 2017

Mr Robert Milton for the Appellants

Mr Alan Hall, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. David and Jacqueline Cooper ("the Appellants") appeal against HMRC's closure notice and amendments to their self-assessment returns for the tax year ended 5 April 2011, as subsequently revised, disallowing losses claimed by the Appellants as not referable to the capital gains arising on a sale of the entire issued share capital of Coopers Coffee Limited of Unit 1 Calder Trading Estate Leeds Road Bradley Huddersfield West Yorkshire HD5 0RX ("the Company"). The Appeals where conjoined by the Tribunal on 13 May 2014.

2. A preliminary issue which arises is whether HMRC, having issued a closure notice and having initially allowed certain capital losses, were subsequently able to revisit their conclusions and review and disallow some of those capital losses.

3. The substantive issue in this appeal is whether capital expenses and losses claimed in the Appellants' returns for the year ended 5 April 2011 are allowable

Evidence

4. Correspondence between the parties from December 2012 to December 2016. Witness statements by the Appellants; Mr Cooper also gave oral evidence to the Tribunal; copy extracts from the Company's accounts to 31 December 2010 and 31 January 2011. Copy extracts from associated companies' accounts, copy tax returns and computations, relevant legislation and case law authority.

Background

5. The Appellants were the sole shareholders of Coopers Coffee Ltd, a company incorporated on 9 May 2001. Mr David Cooper held 51% of the shares and Mrs Jacqueline Cooper 49%.

6. The business had previously been operated by the Appellants' partnership and was transferred to the Company in or around 2001. The Tribunal was not provided with any documentation relating to that transfer.

7. On 11 January 2011 the Appellants entered into a Share Purchase Agreement ('SPA'), with First Choice Coffee Limited ("First Choice") for the sale of their entire issued share capital in the Company to First Choice. The Agreement provided for the sale of the business carried on by the Company, its assets, trading stock, and fixed assets including its interest in property occupied by the Company (owned by the Appellants personally). The Agreement was completed on 17 January 2011

8. The consideration payable for the shares under the share sale agreement was £1,368,000 of which £1,193,000 was payable in cash on completion and £175,000 was to be paid into a joint escrow account to provide for any adjustments to the purchase price following preparation, within 20 days of legal completion, of 'Completion Accounts' [to include a final balance sheet, P&L accounts and

Certificates of Actual Working Capital and Net Debt (defined as below) to 31 December 2010, being the end of the Company's financial year.

> The Actual Working Capital
>
> 'the amount by which the aggregate of the stock, trade debtors, prepayments and other debtors and deferred income of the Company exceeds the aggregate of the trade creditors, accruals and other creditors (for the avoidance of doubt including PAYE/NIC and VAT) falling due within one year, of the Company as shown in the balance sheet forming part of the Completion Accounts.'
>
> Net Debt
>
> 'the aggregate of all actual borrowing or indebtedness in the nature of borrowing owing or incurred by the Company as at the close of business on the relevant date (31 December 2010), whether by way of principle, or interest accrued on the principal balance, and any associated break fees…' [The agreement then set out, for the avoidance of doubt that 'Net Debt' would include any borrowings, undischarged liabilities, invoice discounting fees, guarantees undertakings or indemnities in respect of third party borrowings, all borrowings under finance leases or similar agreements, any bonuses payable to directors or employees, any corporation tax liability, any monies owed by the Company to professional advisers relating to the negotiation preparation of the agreement and the amounts owing by the Company to the sellers or any of their associates or employees of the Company]

9. The share sale agreement included a statement that:

> ".. the Company is the legal and beneficial owner of all assets included in the Accounts and all assets which have been acquired by the Company since the Last Accounting Date."

10. The company accounts drawn to 31 December 2010 show:

- Stock of £172,142 was held by the Company.
- Tangible assets of £191,206 were owned by the Company. Tangible fixed assets included 'Freehold property', 'plant and machinery' 'fixtures and fittings' and 'motor vehicles'.
- Intangible assets of goodwill owned by the Company was valued prior to amortisation at £50,000 and written down to a net value of £5,490, as at 31 December 2010. The accounts to 31 December 2011 show the goodwill written down to £75.
- Creditors of £432,604

11. The Appellants had entered into a legal charge with the Bank of Ireland relating to that part of the property at Calder Green Trading Estate which was let to the Company

and owned by them personally. It was a provision of the SPA that this mortgage was discharged on completion.

12. In their SA returns for 2010-11 the Appellants included the following computations in arriving at a total net gain of £358,997.

Share Sale Consideration		£1,368,000
Less		
1 Stock	£172,412	
2 Goodwill	£50,000	
3 Agents fees	£70,800	
4 Legal fees	£22,800	
5 Accountants fees	£8,550	
6 Spanish Investment Losses	£43,697	
7 Loan write off – Latte Hut Ltd	£25,000	
8 Spanish Property Transfer Losses	£96,638	
9 Mortgage discharge	£327,890	
10 Fixtures and fittings Disposal	£191,216	
Total		£1,009,003
Net Gain		£358,997

The gain was then allocated 51% to David Cooper and 49% to Jacqueline Cooper in accordance with their respective share allocations.

13. On 3 December 2012 enquiries under s 9A Taxes Management Act 1970 were opened into the Appellants' returns in respect of the above capital gains and also in respect of a separate furnished holiday letting operated by the Appellants.

14. On 2 October 2013 HMRC's enquiry officer, Officer Lindsay wrote to the Appellants agreeing 'without prejudice' some of the cost/loss claims, being the goodwill, the agents, legal and accountants fees and the mortgage discharge. Officer Lindsay also allowed an additional claim for the writing off of a loan by the Company to another company operated by the Appellants, Dalla Corte (UK imports) Limited of £38,721 (additional item 11). The total amount allowed was £501,736. The agreement was affirmed by Officer Lindsay on 16 May 2014.

15. Officer Lindsay issued closure notices under s 28A TMA 1970 on 4 August 2014.

16. Appeals against the closure notices were made on 10 September 2014.

17. Alternative Dispute Resolution discussions were opened which enabled agreement to be reached in certain areas which no longer form part of the appeal. The ADR process concluded on 1 December 2015 and the following additional claims/items were agreed between the parties:

a) Furnished Holiday Lettings losses of the Appellants were accepted as claimed. It was accepted that the lettings qualified as furnished holiday lettings and that the Appellants respective shares of the loss of £12,905 could be set against their other income for the year 2010-11;

b) Spanish investment/development losses (these are outlined below) in a total figure of £43,697 (additional item 12)

18. On 25 July 2016, Officer Karen Boden, who had taken over the ADR process from Officer Lindsay, having reviewed the Appellants' file, refused to allow £416,611 of the losses which had previously been allowed 'without prejudice' by Officer Lindsay. These were the goodwill, the writing off of the Dalla Corte loan and the mortgage discharge.

19. The Appellants assert that, when Officer Lindsay agreed to allow the items above, a formal and binding agreement had arisen which Officer Boden could not then repudiate.

20. HMRC's response is that Officer Lindsay's 'agreement' was 'without prejudice' irrespective of the fact that it was followed by Closure Notices reflecting the allowances agreed, and in any event the appellants have appealed the closure notice.

21. The Appellants now claim a further item of £148000 being the amount of deferred consideration, which First Choice would not release from the escrow account. Only £27,000 of the £175,000 escrow monies were released to the Appellants.

Relevant Legislation

22. The relevant legislation is contained in the Taxation of Capital Gains Tax Act 1992 ss 2, 16, 18, 38, 39, 253 and 286

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

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

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

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

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

(3) Except as provided by section 62, an allowable loss accruing in a year of assessment shall not be allowable as a deduction from chargeable gains accruing in any earlier year of assessment, and relief shall not be given under this Act more than once

in respect of any loss or part of a loss, and shall not be given under this Act if and so far as relief has been or may be given in respect of it under the Income Tax Acts.

16 Computation of losses

(1) Subject to section 72 of the [1991 c. 31.] Finance Act 1991 and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.

(2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.

18 *Transactions between connected persons*

(1) This section shall apply where a person acquires an asset and the person making the disposal is connected with him.

(2) Without prejudice to the generality of section 17(1) the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by way of a bargain made at arm's length.

(3) Subject to subsection (4) below, if on the disposal a loss accrues to the person making the disposal, it shall not be deductible except from a chargeable gain accruing to him on some other disposal of an asset to the person acquiring the asset mentioned in subsection (1) above, being a disposal made at a time when they are connected persons.

(4) Subsection (3) above shall not apply to a disposal by way of gift in settlement if the gift and the income from it is wholly or primarily applicable for educational, cultural or recreational purposes, and the persons benefiting from the application for those purposes are confined to members of an association of persons for whose benefit the gift was made, not being persons all or most of whom are connected persons.

(5) Where the asset mentioned in subsection (1) above is an option to enter into a sale or other transaction given by the person making the disposal a loss accruing to the person acquiring the asset shall not be an allowable loss unless it accrues on a disposal of the option at arm's length to a person who is not connected with him.

(6) Subject to subsection (7) below, in a case where the asset mentioned in subsection (1) above is subject to any right or restriction enforceable by the person making the disposal, or by a person connected with him, then (where the amount of the consideration for the acquisition is, in accordance with subsection (2) above, deemed to be equal to the market value of the asset) that market value shall be-

(a) what its market value would be if not subject to the right or restriction, minus-

(b) the market value of the right or restriction or the amount by which its extinction would enhance the value of the asset to its owner, whichever is the less.

(7) If the right or restriction is of such a nature that its enforcement would or might effectively destroy or substantially impair the value of the asset without bringing any countervailing advantage either to the person making the disposal or a person connected with him or is an option or other right to acquire the asset or, in the case of incorporeal property, is a right to extinguish the asset in the hands of the person giving the consideration by forfeiture or merger or otherwise, the market value of the asset shall be determined, and the amount of the gain accruing on the disposal shall be computed, as if the right or restriction did not exist.

(8) Subsections (6) and (7) above shall not apply to a right of forfeiture or other right exercisable on breach of a covenant contained in a lease of land or other property, and shall not apply to any right or restriction under a mortgage or other charge.

38 *Acquisition and disposal costs etc*

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

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

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

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

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

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

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

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

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

39 Exclusion of expenditure by reference to tax on income

(1) There shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure allowable as a deduction in computing the profits or gains or losses of a trade, profession or vocation for the purposes of income tax or allowable as a deduction in computing any other income or profits or gains or losses for the purposes of the Income Tax Acts and any expenditure which, although not so allowable as a deduction in computing any losses, would be so allowable but for an insufficiency of income or profits or gains; and this subsection applies irrespective of whether effect is or would be given to the deduction in computing the amount of tax chargeable or by discharge or repayment of tax or in any other way.

(2) Without prejudice to the provisions of subsection (1) above, there shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure which, if the assets, or all the assets to which the computation relates, were, and had at all times been, held or used as part of the fixed capital of a trade the profits or gains of which were (irrespective of whether the person making the disposal is a company or not) chargeable to income tax would be allowable as a deduction in computing the profits or gains or losses of the trade for the purposes of income tax.

(3) No account shall be taken of any relief under Chapter II of Part IV of the [1981 c. 35.] Finance Act 1981 or under Schedule 5 to the [1983 c. 28.] Finance Act 1983, in so far as it is not withdrawn and relates to shares issued before 19th March 1986, in determining whether any sums are excluded by virtue of subsection (1) or (2) above from the sums allowable as a deduction in the computation of gains or losses for the purposes of this Act.

253 *Relief for loans to traders*

(1) In this section "a qualifying loan" means a loan in the case of which-

(a) the money lent is used by the borrower wholly for the purposes of a trade carried on by him, not being a trade which consists of or includes the lending of money, and

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

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

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

(2) In subsection (1) above references to a trade include references to a profession or vocation; and where money lent to a company is lent by it to another company in the same group, being a trading company, that subsection shall apply to the money lent to

the first-mentioned company as if it had used it for any purpose for which it is used by the other company while a member of the group.

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

(a) any outstanding amount of the principal of the loan has become irrecoverable, and

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

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

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

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

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

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

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

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

this Act shall have effect as if an allowable loss had accrued to the claimant when the payment was made; and the loss shall be equal to the payment made by him in respect of the amount mentioned in paragraph (a) above less any contribution payable to him by any co-guarantor in respect of the payment so made.

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

(6) Where-

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

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

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

(7) Where-

(a) an allowable loss has been treated under subsection (3) above as accruing to a company ("the first company"), and

(b) the whole or any part of the outstanding amount mentioned in subsection (3)(a) is at any time recovered by a company ("the second company") in the same group as the first company,

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

(8)Where-

(a) an allowable loss has been treated under subsection (4) above as accruing to a company ("the first company"), and

(b) the whole or any part of the outstanding amount mentioned in subsection (4)(a), or the whole or any part of the amount of the payment mentioned in subsection (4)(b), is at any time recovered by a company ("the second company") in the same group as the first company,

this Act shall have effect as if there had accrued to the second company 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.

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

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

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

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

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

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

(13) For the purposes of subsections (7) and (8) above, 2 companies are in the same group if they were in the same group when the loan was made or have been in the same group at any subsequent time.

(14) In this section-

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

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

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

(15) Subsection (3) above does not apply where the loan was made before 12th April 1978 and subsection (4) above does not apply where the guarantee was given before that date.

The parties' respective submissions in respect of each disputed item of cost/loss

23. The Appellants' explanation of the claimed capital losses received from the share sale is set out below, together with HMRC's response. In summary, the Appellants contend that all of the items 1 to 10 as referred to in paragraph 12 above are allowable, together with two additional items, - item 11 - the written off Dalla Corte Loan and £148,000 of the unreleased deferred consideration, it having been agreed with First Choice that only £27,000 of the £175,000 held in escrow, should be released to the Appellants. HMRC contend that each of the items 1, 2, and 7-10 and the two additional items are not deductible/allowable in the computation of the capital gains.

i. *Stock.* - £172,412

The Appellants' accountant Mr Milton says that beneficial ownership of the Company's stock was vested in the Appellants, and therefore the sale of the stock represented a capital loss to them.

HMRC say that the accounts of the Company for the years ending 31 December 2010 and 31 December 2011 clearly reflect the fact that the stock was an asset of the Company and was therefore reflected in the value received for the sale of the shares in the Company. At clause 35 of the share sale agreement it is stated as follows:

> "Except for current assets disposed of by the Company in the ordinary course of business and the property the Company is the legal and beneficial owner of all assets included in the accounts and all assets which have been acquired by the Company since the last accounting date ....."

The stock was included as an asset on the balance sheet of the Company. The only way in which the stock could reasonably be treated as a deduction in the Appellants capital gains computations would be if they incurred the cost of the stock personally and then transferred the stock to the Company prior to disposal. The balance sheet of the Company makes it clear that this was not the case.

ii. *Goodwill*. - £50,000

Mr Milton says that ownership of the goodwill was vested in the Appellants and therefore on the sale of the goodwill the Appellants suffered a capital loss.

Officer Lindsay had initially said that he was prepared to accept, without prejudice, that this £50,000 represented the acquisition value of the shares in the Company acquired by the Appellants when the partnership business was transferred to the Company in 2005.

Following the review by Officer Boden, HMRC now say that the accounts of the Company for the years ending 31 December 2010 and 31 December 2011 clearly reflect the fact that the goodwill was an asset of the Company and was shown its balance sheet under 'intangible fixed assets.' It was therefore owned by the Company at the point when it was sold and was reflected in the value received for the sale of the shares by the Appellants.

iii. *Agents* fees. Agreed by HMRC

iv. *Legal fees.* Agreed by HMRC

v. *Accountants fees.* Agreed by HMRC

vi. *Spanish development/investment losses*

The Appellants say that the Company suffered a loss on an overseas investment in 2008. The Company had made an investment into Almanzora Country Club, Cueve Del Almanzora, Spain in 2004-05. In 2006 the developer encountered financial difficulties and in 2008 went into liquidation, having failed to complete the development. Many investors lost their deposits. The investment eventually proved irrecoverable, but not until after a protracted period of litigation. It was only upon conclusion of that process that the extent of the losses could be fully quantified. For that reason the Appellants loss relief claim was not out of time. At the time the 2004-05 tax return was completed, the time limit for claiming capital losses incurred in that year was 31 January 2011. On 1 April 2010 that time limit became 5 April 2009. The tax return for the year 2010-11 containing the claim was received

on 26 January 2012. Initially HMRC said that the claim was not made in time and could not be accepted. The Appellants say that the loss was not crystallised until late 2009-10 when the case was considered hopeless. This claim has now been agreed by HMRC.

vii. *Loan write-off/Latte Hut Limited.*

This was a loan of £25,000 made by the Company to The Latte Hut Ltd ("Latte") on 9 February 2011. The loan was made so that Latte could refurbish its premises and revitalise the business. Dr Milton says the loan was written off at the end of March 2011 as irrecoverable.

The loan was made to effect major improvements which unfortunately did not bring about the success hoped for, resulting in Latte not being able to repay the loan. The loan was written off as irrecoverable. Under s 253 TCGA relief may be given for a qualifying loan that has become irrecoverable. Under s 253(3)(a) it is necessary that any outstanding amount of the principal of a loan to have become irrecoverable in order for a claim to succeed.

The Latte Hut Limited was previously known as Dalla Corte (UK Imports) Limited which was incorporated on 28 February 2001 and of which the Appellants were the shareholders and directors. It operated from the same trading address as the Company and on 31 January 2011 changed its name to The Latte Hut Limited pursuant to a warranty in the SPA. The Company was wound up on 19 February 2016.

HMRC do not dispute that this loan was made and never repaid but say that it was not an allowable capital loss because it was a loan between two connected companies and not an expense or loss of the Appellants.

HMRC do not consider that the provision of a bank statement showing an entry for £25,000 is sufficient to show that a loan was made, or that it was irrecoverable, especially as the company's accounts do not show any loan write-offs.

In any event, at the time the loan was 'written off' there was still a reasonable prospect of it being recovered. Latte's takings for February, March and April 2011 respectively were £5,089, £6,019 and £7,046, which suggest that the loan was not irrecoverable at the time it was written off.

HMRC dispute that the loan was written off during March 2011. The company accounts of Dalla Corte Ltd for the year ended 30 April 2011, (by then known as and operating as The Latte Hut Limited) which were filed on 20 January 2012, state:

> "The directors will not seek repayment of amounts due to them until such time as the company can make repayment. The loans from the directors had increased from £8,680 to £52,264."

Section 253(3)(a) of the Taxation of Capital Gains Act 1970 requires that any outstanding loan must be irrecoverable in order for it to be written off.

> '(3) (where a person who has made a qualifying loan makes a claim and at that time) -
> (a) any outstanding amount of the principal of the loan has become irrecoverable...'

The loan must actually *become* irrecoverable and not be irrecoverable when it was made. If the loan was in fact irrecoverable in March 2011 then the loan was also irrecoverable when it was made in February 2011.

The loan was made less than eight weeks before it was decided that it had become irrecoverable. The loan was used to refurbish the company premises. HMRC could not accept that it is realistic to believe the Appellants could possibly be in a position to know that the investment was irrecoverable at the end of March 2011. It would take time for the effects of the refurbishment to be judged. Latte continued in existence for a number of years afterwards, presumably trading, and there must therefore have been every possibility of the loan being repaid. If it is the case that the loan was irrecoverable when suggested, it was less than eight weeks after it being made, was it irrecoverable at the time it was made? If so the loss is not allowable.

The Company's accounts for the years 30 April 2011 and 30 April 2012 state:

> "the directors have prepared the accounts on a going concern basis because they will not seek repayment of amounts due to them until such time as the company can make repayment without affecting its ability to continue to trade"

The Appellants assertion that the loan had been written off in the tax year ended by April 2011 is therefore not in accordance with the statements made in the Company's accounts which indicated that there was still every intention of Latte repaying the loan.

The company accounts of Latte for the year ended 30 April 2011, filed on 20 January 2012, state that "Included in Creditors: amounts falling due within one year" are loans from the directors totalling £52,264 which must have included the £25,000 loan. In 2010 creditors were shown as £8,680.

viii. *Spanish Property Transfer losses* - £96,638.

The Appellants say that they arranged to transfer the legal title to a property they owned in Spain to Coopers Overseas Property Investments Ltd, another company operated by themselves, to carry on the trade of furnished lettings. Although Coopers Overseas Investments Limited briefly operated the lettings it is unclear whether the legal transfer of title had formally taken place before the entire estate where the property was situated was destroyed by catastrophic floods. The offices of the solicitors dealing with the transfer in Spain were also

completely destroyed. All records were lost. The Appellants concede that there is a lack of direct evidence but video evidence of the flood damage has been provided to HMRC. They assert that sufficient indirect evidence has been provided to allow the claim.

HMRC say that the Appellants have provided very little evidence in support of their claim. All HMRC knows is that there was a flood and their solicitors have moved. There is nothing in the file to confirm that all documents were lost. If there was a formal transfer there would be third party documentation to verify this. It is not enough for the Appellants to state that they had meant to transfer their properties into a company that they had set up. In the absence of any evidence/documentation of the properties transferring out of their ownership, or how the value at transfer was reached, the loss is not allowable.

The agreement reached at ADR was that further information was to be obtained. No further information or documentation has been received to evidence that the transfer of the property in Spain to Coopers Overseas Property Investments Ltd actually took place in 2010-11. If the transfer to Coopers Overseas Property Investments Ltd did take place then it couldn't have taken place in the year 2010-11, as claimed, because the company was not incorporated until 26 August 2011. Its dormant company accounts and balance sheet shows cash at bank of £100 and no other assets. It was dissolved on 23 December 2014.

The transfer appears to have been made to a connected enterprise, which did not exist in 2010-11. Any loss would also fall to be 'clogged' under s 18 TCGA. The loss of £96,638 cannot be allowed in the capital gains computation.

ix. *Mortgage redemption*

Under the terms of the SPA the Appellants were required to pay off the mortgage on the property occupied by the Company.

HMRC say that the property was owned by the Appellants personally so it was not an asset of the Company. The mortgage was taken by the Appellants personally so the mortgage was not a liability of the Company, which leased the property from the Appellants.

HMRC initially accepted the claim without prejudice on the basis that it could be treated as being repayment under guarantee of a loan made to a trading company that had become irrecoverable and therefore could be set off against the capital gain.

However HMRC's revised view is that from a capital gains perspective the use made of the sale proceeds has no impact on the capital gains computation on the disposal of the shares. The claim cannot be allowed. The mortgage was called in by the Bank of Ireland and the Appellants upon receipt of the

proceeds from the sale of the shares used part of the proceeds to pay off the mortgage.

The redemption of a personal loan secured against personally owned assets cannot comprise an allowable deduction against the sale proceeds on the disposal of the shares - the land was not within the assets disposed of which were held by the company.

x. *Associated disposal – sale of fixtures and fittings* - £191,216

The Appellants say that they had originally purchased the fixtures and fittings and transferred them to the Company.

HMRC do not dispute the value placed on these assets, but say that the fixtures and fittings were not an asset owned by the Appellants personally at the time the shares were sold. They were assets owned by the Company and reflected in the balance sheet. The Company must have incurred the expenditure for that to be the case. If the Appellants initially purchased the assets which were then transferred to the Company they must have already received consideration for the asset. There was therefore no loss. The claim had to be disallowed.

xi. *Write off of loan to Dalla Corte* - £38,721

As referred to above a further claim was made for monies paid to clear a loan account between the Company and Dalla Corte (UK Imports) Ltd. The accounts of the Company at note 20 state that on completion of the share purchase agreement the debt due from Dalla Corte had been settled in full and therefore the debtors balance was in fact £nil. It would appear therefore that this claim is invalid, being the settlement of a debt by Dalla Corte which clearly does not represent a capital loss to the Appellants. HMRC therefore say that insufficient information has been provided to consider the claim. In any event the loan appears to be between two connected companies, and so is a matter between those entities. It does not represent a loss to the Appellants.

xii. *Reduction in consideration received/retention of part of escrow account.*

Any part of the consideration which is unpaid and irrecoverable may be the subject of a claim under s 48 TCGA.

The Appellants say that the final sale consideration received for the business was reduced by the sum of £148,000 as only £27,000 of the deferred consideration paid into the escrow account has been paid over.

HMRC say that this is a new claim as the matter has not previously been raised or referred to in any discussions. Although not explicitly mentioned, s 48 Taxation of Chargeable Gains Act 1992 may be applicable but HMRC are of the opinion that the issue is in reality merely the normal working of an escrow account and s 48 TCGA does not apply. As the documentation

supplied is incomplete relief cannot be given without further details and evidence.

24. HMRC's final computations of the allowable losses are as follows:

	Consideration		£1,368,000
	Agents	£70,800	
	Legal	£22,800	
	Accountants	£ 8,550	
	Historic losses	£43,697	
			£ 145,847
	Net gain		£1,222,153

Mr Cooper's share of the gain was 51% - £623,298
Mrs Cooper's share of the gain was 49% - £598,855

The "without prejudice" issue

25. The Appellants argue that it is entirely unjust to allow a taxpayer to rely on two separate letters for a period of nearly three years and to materially alter their position in reliance on those letters (spending the money that would have otherwise been put aside to pay the potential CGT liability on the now disallowed items). HMRC cannot now purport to repudiate the agreement which they reached with the Appellants.

26. The closure notice of 16 April 2014 issued by Officer Lindsay allowed the goodwill costs, the Dalla Corte account, and the mortgage discharge thus superseding any previous purported 'without prejudice' agreement. The decisions taken by Officer Lindsay were not arrived at on a whim, but based on evidence provided by the Appellants and after very detailed consideration following lengthy representations.

27. Further, the subsequent review carried out by HMRC on 6 February 2015 only considered matters that Officer Lindsay had not agreed in his closure notice, i.e. it did not consider the goodwill, the Dalla Corte loan and the mortgage discharge. The reason for that is because they had already been allowed by HMRC in the schedules to the closure notice.

28. HMRC did not raise the three disputed items until July 2016 and as yet have not raised assessments for the additional tax claimed to be due on those items.

29. This appeal, being against the closure notice, should therefore not deal with the three previously allowed items, as they have already been agreed by Officer Lindsay

30. HMRC refer to s 50(6) and (7) TMA 1970 which state:

> (6) If on appeal notified to the tribunal, the tribunal decides (a) that …the appellant is overcharged by a self-assessment: the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on appeal notified to the tribunal, the tribunal decides (a) that …the appellant is undercharged to tax by a self-assessment...: the assessment or amounts shall be increased accordingly.

31. HMRC say that the general principle in civil proceedings is that written or oral communications which are made 'without prejudice' for the purposes of a genuine attempt to compromise a dispute between parties may not be admitted in evidence. See *The Leasing Number 1 Partnership* (TC04745).

32. The extent to which HMRC would be constrained by the conclusions in a closure notice was considered in *HMRC v Tower MCashback LLP* 1(2011) UKSC 19 Paragraph 18

"It seems to me inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal. It follows that either party can (and in practice frequently does) change their legal arguments. Clearly any such change of argument must not ambush the taxpayer and it is the job of the Commissioners hearing to prevent this by case management." Per Lord Walker referring to Dr Avery Jones observations in D'Arcy, para 13.

Lord Walker also referred to Henderson J comments:

"There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest. …For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the Commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the Commissioners on their own initiative.' paragraph 15

Conclusions

The preliminary – "without prejudice" - issue

33. Under s 50(7) TMA the Tribunal may increase any assessment, including the self-assessment arising from amendments made under s 28A TMA. As HMRC say the Closure notice has in any event been appealed, which opens the decisions under the closure notice to review.

34. We can do no better than refer to the dicta in *Charlton* [20`12] UKFtT 770 (TCC) at [37] and [42]:

"In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an

oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

"... on the basis of our finding that nothing new is required except the conclusion, the question in a case such as that put by [counsel for the taxpayer] would, we suggest, not be on the collective corporate knowledge of HMRC, but on the newness of that conclusion. Without deciding the matter, we can certainly envisage an argument that the passing of a file from one HMRC officer to another could not have the effect of refreshing a conclusion that was no longer new. But that does not depend on something new being discovered by reference to HMRC's collective knowledge. It is solely concerned with the newness of the conclusion."

35. Similar comments were made in *Hankinson* [2011] EWCA Civ 1566 at [15] and [16], and in *Grundy* 18 TC 271 at p277:

"...it seems to me to be quite clear that the word 'discover' cannot mean ascertain by legal evidence; it means, in my opinion, simply 'comes to the conclusion' from the examination he makes, and, if he likes, from any information he receives. If one applies that, there seems to be little doubt that if 'discover' means coming to the conclusion from his examination that applies here."

36. A 'without prejudice' agreement is not a binding agreement. There has been no binding agreement, for example by way of a s 54 TMA 1970 agreement which would constrain any action by HMRC or the Tribunal. If there were no appeals, the position may be different. But that is not the case here. Although closure notices under s 28A TMA 1970 were issued they are always open to legal challenge and in fact have been appealed. Therefore matters remain open and subject to the decision of the Tribunal.

Substantive issues

37. Under common law the onus of proof rests with the person making the assertion. The standard of proof is the ordinary Civil Standard of the balance of probabilities. Where an amendment is made to a return following an enquiry the onus for any increase is upon HMRC. The onus is then on the Appellant to provide evidence, to either set aside or reduce HMRC's figures, otherwise the Revenue amendments under s 28A TMA shall stand good.

38. Under s 38 and s 39 TCGA 1992, the sums allowable as a deduction in computing any gain are set out. The sums are restricted to "expenditure wholly and exclusively incurred on the asset by him or on his behalf". Section 38(2) also explicitly sets out what may be claimed as the incidental costs of making the disposal.

39. Section 38 also requires that the expenditure must be "reflected in the state or nature of the asset at the time of the disposal". Any expenditure must relate to the shares that were sold, and be incurred by the owner of the shares, to be allowable, and must be inherent in the asset.

40. As a matter of law, shares held in a company are separate from its business assets. This legal separation clearly applies for CGT purposes. The stock, goodwill and fixtures and fittings cannot be allowable as a deduction under s 38 TOGA 1992. They belong to the company. The expenditure was not incurred by the Appellants.

41. It is claimed that the redemption of a mortgage was an incidental cost of the sale. But this is merely the paying off of the Appellants own mortgage, from funds received on the sale of shares. It is not an expense within s 38(2) TOGA. The mortgage did not involve the Company.

42. HMRC have agreed items 3,4 and 5 as expenditure of the *Appellant* directly referable to the sale of the shares.

43. HMRC have also agreed that item 6 – Spanish investment losses – may also be deducted.

44. We entirely concur with HMRC's reasoning and find that each of the other items 1, 2, and 7-12 are not allowable in the computation of the capital gains on each Appellant. As a matter of law, the shares sold by the Appellants were separate from the business assets of the Company. The Appellants have not discharged the evidential burden of showing that that they incurred costs on the acquisition of assets included in the business sold to First Choice or that the cost/losses claimed are relate to expenditure incurred by them on the sale of their shares in the Company. Any expenditure incurred by the Appellants on the acquisition of business assets is not relevant to the gains which arose on the share sale. Any expenditure incurred by the Appellants on items 1, 2 and 10 would have been reflected in the consideration and value received for the share. Items 3-6 inclusive have been allowed. Items 7, 8 ,11 and 12 cannot be allowed for the reasons clearly argued by HMRC.

45. We therefore dismiss the appeal and vary the closure notices to the amounts set out at paragraph 24 above.

46. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 22nd MARCH 2018