TC04634

Appeal number: TC/2014/04807

INCOME TAX– whether a capital loss was available for offset against net income - sections 131 and 132 of the Income Tax Act 2007 - held that the loss was an allowable loss on the basis that the appellant was ordinarily resident during part of the tax year – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MARK CAREY **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER JOHN AGBOOLA

Sitting in public at Fox Court, 30 Brooke Street, London on 3 June 2015

Mr Victor Dauppe of Arram Berlyn Gardner & Co, as adviser to the Appellant

Mrs Glynis Millward, an Officer of the Respondents ("HMRC")

DECISION

1. The issue was whether the appellant was entitled to claim relief for a capital loss of £145,872 by off-set against his taxable employment income for the tax year of assessment from 6 April 2011 until 5 April 2012 (the "**2011-12 tax year**") under s 131 and s 132 of the Income Tax Act 2007 ("**ITA 2007**"). This relief applies only to a loss which is an allowable loss for capital gains tax purposes. The dispute was solely as to whether the loss was such an allowable loss.

Facts

2. We find the following facts based on the documents bundle produced to the tribunal including a written statement made by the appellant dated 6 June 2012 (the "**Statement**"). The facts set out in the Statement were not in dispute. The appellant did not appear before the tribunal.

3. The appellant had been living and working in the UK and was resident and ordinarily resident in the UK for a number of years before the 2010-11 tax year.

4. On 4 January 2011 the appellant ceased to perform any employment duties in the UK when he informally left his employment with Sequel Business Solutions Limited ("**Sequel**") to embark on what he described in the Statement as sabbatical leave without pay. The appellant left the UK on 15 January 2011 to take up a post in Rwanda with Ikirezi Natural Products ("**Ikirezi**").

5. The appellant described his move to Rwanda in his Statement as follows:

> "I have wanted for a long time to work in impoverished areas of the developing world. I had discussions with Sequel's managing director beginning in January 2009 to plan for my departure. Whilst I was expecting that I would like to move away permanently, Sequel and myself wanted to keep our options open. In November 2010 we agreed to treat my departure as sabbatical. We agreed that the sabbatical would last until March 2012 which we both believed would give us enough time to confirm if my departure was permanent.
>
> On 4 January 2011 I was released from my duties at Sequel on Sabbatical leave without pay. I moved to Rwanda on 15 January 2011 to work full time for Ikirezi Natural Products as the first step in making a career change so that I could work full time where I could make more of a positive impact to impoverished communities."

6. In October, November and December 2011 the appellant negotiated the termination of his employment with Sequel and left the company on 9 December 2011.

7. On 7 December 2011 the appellant exercised a number of share options he held over shares in Sequel pursuant to which he acquired 1,200 ordinary shares of £0.01

each in Sequel. The appellant realised taxable employment income of £145,872 on the option exercise.

8. On 9 December 2011 Sequel purchased the shares acquired by the appellant on the option exercise from him for a total price of £999, 998. On the share buy back, the appellant realised taxable distribution income of £921,988. The taxable distribution was computed as the total price of £999,998 less £78,000 originally paid by the appellant for the shares. The appellant was also treated as making a disposal of the shares for capital gains tax purposes which gave rise to a capital loss of £145,872. The capital loss was computed on the basis of sales proceeds of £999,998 less (a) the amount of the taxable distribution of £921,988 (b) the amount originally paid by the appellant for the shares of £78,000 and (c) £145,872 taxable as employment income on the option exercise.

9. The appellant's negotiations with Sequel and contact with its (and his) advisers was conducted remotely from Rwanda. He did not visit the UK at all. All documents were signed under power of attorney.

10. In his Statement, the appellant noted that his "successful exit from Sequel Business Solutions has provided me with the resources to take a flexible approach in pursuing my new career."

11. The appellant worked full time in Rwanda for Ikirezi from 15 January 2011 (including two weeks orientation training in Rwanda) until 10 April 2012.

12. On ceasing full time employment with Ikirezi on 10 April 2012, the appellant carried on working for Ikirezi on a part time basis as a consultant and set up his own company in Rwanda, Fast Growth Consulting Ltd, with the aim of providing management consulting to "pro-poor businesses" across East Africa.

13. As of 6 June 2012 the appellant was in the process of researching companies in East Africa he might be able to approach to work with and looking to establish the best base for his operations. He thought his base looked likely to be in Nairobi in Kenya both because he thought it operated as a regional hub and because his girlfriend had friends and family there.

14. At the end of March 2012 the appellant and his girlfriend travelled from Rwanda to Australia to attend a friend's wedding, to catch up with his girlfriend's family who were based there and to carry on working for Ikirezi and researching opportunities remotely. The appellant and his girlfriend intended to travel back to Kenya in June to have initial meetings with prospective clients for his consultancy firm and to start setting up life there.

15. The appellant also intended to visit England which would have been his first visit since leaving the UK on 15 January 2011. He thought it probable he would visit England in August 2012 for a stay of 3 or 4 weeks in August 2012 to attend weddings, catch up with family and friends. The appellant then thought that it was likely that in the future he would spend approximately 3 or 4 weeks per year in the UK. He also noted that, given that his girlfriend's family were in Australia, he and his girlfriend

were likely to travel there on a reasonably regular basis and he had moved some money into an Australian bank account.

16. Shortly before he made the Statement, the appellant had sold the pick up truck he had purchased in Rwanda as he wished to buy a truck in Kenya as he thought it probable that he would make Kenya his base. The house where he had been staying in Rwanda was then being rented by a friend who kept some of his belongings there and who made a room available for the appellant and his girlfriend when in Rwanda. The appellant and his girlfriend were looking for more permanent accommodation in Kenya.

17. As at 6 June 2012 the appellant described his activities as follows:

> "I am in a position to provide consultancy and advice to pro-poor businesses for free for a short period and once I am working with them I will look to identify ways that I can be remunerated for this work (e.g. based on success, increase growth, obtaining funding for the business etc) so that the arrangement is more sustainable for me in the long term. If I carry out work for less pro-poor business I will look to charge them a fair market rate. I will test the market for future income generating activities as part of my initial interaction with prospective clients. Whilst my own consultancy firm is the main focus of my efforts at the moment I also look out for relevant jobs with NGOs, social enterprises and consultancy firms and have applied to some. These would offer me more secure income and give me the chance to learn more about the market before venturing out on my own. Whilst any new venture has risks and is not guaranteed to succeed I am vey excited about the chance to pursue this line of work".

18. As regards the UK the appellant noted in the Statement that:

> "I took steps as early as was practicable to inform the relevant bodies that I was no longer resident. I own a rental property (formerly my home) in the UK and bank accounts with the objective of providing me with income which will support my activities in East Africa and ensuring that not all of my wealth is subject to some of the risks that go with operating in East Africa. The property is rented out through a letting agent."

19. In his tax return for the 2010-11 tax year the appellant claimed "split year" treatment for income tax purposes under extra statutory concession A11 ("**ESC A11**") on the basis that he had left the UK on 15 January 2011. The appellant claimed the benefit of ESC A11 on the basis that he was moving abroad for full time employment overseas.

20. In his tax return for the 2011-12 tax year the appellant included a claim for the capital loss of £145,827 to be set off against the corresponding employment income of £145,827 arising in that year (made under s 131 and s 132 ITA 2007).

21. In the tax return for the 2011-12 tax year the appellant stated that he was not resident and not ordinarily resident in that year as he had put "X" in boxes 2 and 3 in

the relevant residence pages and stated Rwanda to be the country in which he was resident in that year. The relevant boxes were ticked stating that the appellant had been resident and ordinarily resident in the UK in the 2010-11 tax year.

22. In the "any other information" space in the tax return for the 2011-12 tax year the appellant stated that:

> "I left the UK on 15 January 2011 to work full time for Ikirezi Natural Products in Rwanda. I did not return to the UK at all during the 2011/12 tax year. Entries in boxes 10 and 12 are purely for the purposes of filing my Return online. No days were spent in the UK in 2011/12."

23. The entries referred to indicated that the appellant had spent some time in the UK but this was incorrect. Mr Dauppe explained that the entries had been made because the form could not be filed online with no entry in the relevant spaces. It is accepted by the appellant and HMRC that the appellant was not in fact present in the UK for any time at all in the 2011-12 tax year.

24. HMRC wrote to the appellant and his agent on 17 May 2013 to inform them that they were undertaking an enquiry into the appellant's self assessment tax return for the 2011-12 tax year under the provisions of s 9A of the Taxes Management Act 1970. On issuing a formal closure notice on 12 May 2014 pursuant to s 28A of that Act HMRC amended the appellant's self assessment for the 2011-12 tax year to deny the relief claimed for the loss of £145,827 resulting in additional tax due from the appellant of £52, 152.40. The appellant submitted an appeal to the Tribunal on 23 August 2014.

Legislation

25. Sub-section 131(1) ITA 2007 provides that an individual is eligible for relief (share loss relief) "if-

> (a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ("the year of the loss"), and
>
> (b) the shares are qualifying shares."

26. The remainder of s 131 sets out what are qualifying shares and a number of other conditions for relief to apply

27. Under s 132 ITA 2007 an individual who is eligible for share loss relief under s 131 ITA 2007 may make a claim for the loss to be deducted in calculating the individual's net income for the year of the loss, for the previous tax year or for both tax years.

28. In this case the appellant made a claim under the provisions of s 131 and s 132 ITA 2007 for the 2011-12 tax year for the capital loss of £145,827 arising in that year on the sale of the shares in Sequel to be set off against the employment income of £145,827 also arising in that year on the prior exercise of share options over the shares in Sequel. The only dispute between the parties was whether the loss was an

allowable loss for capital gains tax purposes as required by sub-s 131(1) (a) ITA 2007.

29. The Taxation of Chargeable Gains Act 1992 ("**TCGA**") sets out the rules for the charging of tax on chargeable gains and the relieving of allowable losses. Whether a person falls within this regime depends on his residence status in the year of assessment in which the gain or loss is realised.

30. Sub-section 2(1) TCGA provides that (subject to certain exceptions):

> "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".

31. Section 2 goes on to provide for capital gains tax to be charged on chargeable gains after deduction of allowable losses in the manner permitted by that section.

32. Section 288 TCGA provides that, unless the context requires, allowable loss shall be construed in accordance with s 8(2), s 16, s 16A, s 261B, s 261D and s 263ZA TCGA. Otherwise there is no definition of allowable loss. Most of these provisions relate to specific circumstances where a loss is specified to be an allowable loss or not which are not of relevance here.

33. Section 16 TCGA relates to the computation of losses which is of relevance:

(1) Sub-section 16(1) TCGA provides that generally the amount of a loss accruing on a disposal of an asset is to be computed in the same way as the amount of a gain accruing on a disposal.

(2) Sub-section 16(2) provides that generally all of the provisions of the TCGA which distinguish gains which are chargeable gains from those which are not are to apply also to distinguish losses which are allowable losses from those which are not and that references in TCCA to an allowable loss are to be construed accordingly.

(3) Sub-section 16(3) TCGA provides that a loss accruing to a person in a year during no part of which he is resident or ordinarily resident in the UK is not an allowable loss (except in certain specified circumstances which do not apply here).

34. Sub-section 9(1) TCGA provides that "resident" and "ordinarily resident" have the same meanings as in the Income Tax Acts. At the applicable time, those Acts contained only very limited provisions on the meaning of these terms which are not in point here. It was common ground therefore that the meaning of the term "ordinarily resident" should be taken from the principles established in case law which are set our below.

Application of section 2 TCGA

35. In our view the combined effect of sub-s 16(1) and sub-s 16(2) TCGA is that sub-s 2(1) TCGA is to be interpreted as applying to determine whether a person is entitled to relief for capital losses accruing in a particular year of assessment in the same way as it applies to determine whether a person is within the charge to capital gains tax on gains accruing in that year. On that basis, as regards losses, sub-s 2(1) TCGA can be read as meaning that a person is potentially entitled to relief under the UK capital gains tax regime for capital losses accruing to him in a year of assessment during any part of which he is resident in the UK, or during which he is ordinarily resident in the UK.

36. It is agreed between the parties that the appellant was not UK resident at any time in the 2011-12 tax year on the basis that UK residence had ceased when the appellant left the UK to work in Rwanda on 15 January 2011. The only question was whether the loss realised by the appellant in the 2011-12 tax year was an allowable loss on the basis that the appellant satisfied the requirements of sub-s 2(1) TCGA as regards ordinary residence.

37. The difficulty is that looking at the wording of sub-s 2(1) TCGA in isolation it is not clear how it is to be construed in the context of ordinary residence. The question is to what period the words "during which he is ordinarily resident in the UK" are referring. Does the provision mean that a person is entitled to relief for capital losses accruing to him in a year of assessment only if he is ordinarily resident in the UK during that year of assessment or is he entitled to such relief if he is ordinarily resident in the UK during any part of that year?

38. Our view is that, on a purposive approach to construction, sub-s 2(1) has to be interpreted not in isolation but in the overall context of the intended effect of the related provisions in TCGA on allowable losses. Looking at the context we note that sub-s 16(3) TCGA provides that a loss is not an allowable loss if it accrues to a person in a tax year during no part of which he is resident or ordinarily resident in the UK. This is clearly based on the assumption that a loss realised by a person who is resident or ordinarily resident during at least some part of the year would be an allowable loss. On that basis, we have concluded that the better interpretation is that sub-s 2(1) TCGA applies to entitle a person to relief for capital losses accruing in a year of assessment if he is ordinarily resident in the UK during any part of that year of assessment.

Submissions

39. In outline, Mr Dauppe submitted that:

(1) The ordinary residence test set out in the cases has to be assessed by reference to the appellant's intention as at the end of the 2011-12 tax year and on the basis of the immediately past facts and circumstances. The test should not be applied with the benefit of hindsight as regards subsequent events. At the end of the 2011-12 tax year the appellant was undecided about whether he would stay in East Africa and retained a settled purpose of remaining in the UK such that as at that time his absence should be regarded as merely temporary.

Mr Dauppe referred particularly to the case of *Genovese v HMRC* [2009] UK VAT SPC 00741 and the references in that case to *Shah v Barnet London Borough Council* [1983] 1 All ER 226. In Mr Dauppe's view applying this test the appellant was ordinarily resident during the 2011-12 tax year.

(2) A person can be ordinarily resident in more than one place and therefore the above conclusion is not prejudiced if the appellant was also ordinarily resident in Rwanda in the 2011-12 tax year.

(3) That the appellant had relied on split year treatment under ESC A11 as regards his residence position for income tax purposes in the 2010-11 tax year did not mean that the appellant became non-ordinarily resident in that tax year.

(4) The statements made by HMRC in HMRC 6 ("Residence, Domicile and the Remittance basis") as regards a person becoming non-ordinarily resident on taking up full time employment abroad are not in accordance with the law.

40. Mrs Millward submitted that:

(1) Applying the ordinary residence test set out in the cases, the appellant had ceased to have a habitual or regular mode of life in the UK with a settled purpose when he left the UK on 15 January 2011 and so was not ordinarily resident in the UK at any time in the 2011-12 tax year. The facts showed that from that time onwards the appellant intended to stay in East Africa moving forwards and he did in fact do so. Reference was made to the following facts as evidence: the appellant had sold his shares in Sequel in December 2011, the appellant worked full time in Rwanda for Ikirezi from January 2011, the appellant had then set up his own company in Rwanda and worked part time as a consultant for Ikirezi, he later considered settling permanently in Africa and he sold some of his assets to further his activities in East Africa.

(2) HMRC accept that a person can be ordinarily resident in more than one country but in this case the evidence is that the appellant was ordinarily resident only in Rwanda in the 2011-12 tax year.

(3) The appellant had relied on "split year" treatment for the 2010-11 tax year under ESC A11 and it was a condition of such treatment that he ceased to be ordinarily resident. In the appellant's tax return for the 2011-12 tax year the appellant had ticked the box that he was not ordinarily resident as well as not resident. These factors evidence that the appellant intended to be non-ordinarily following his departure from the UK for Rwanda on 15 January 2011 and HMRC had treated him as such.

Meaning of ordinarily resident

41. The issue before the tribunal was whether the loss realised by the appellant in the 2011-12 tax year was an allowable loss within the meaning of the capital gains tax legislation. As set out in 30 to 33, the effect of s 2 and s 16 TCGA is that a loss realised in a year of assessment is not an allowable loss unless the person realising the

loss is resident or ordinarily resident for any part of that year. The parties agreed that the appellant was not resident in the UK in the 2011-12 tax year and therefore the only question was whether the appellant was ordinarily resident during any part of that year.

42. As noted there is no guidance in the legislation in place at the time as to the meaning of the term ordinarily resident of relevance in this case. It is established in the cases that whether a person is ordinarily resident is a question of fact to be determined by reference to the principles set out in case law. In particular, the tax cases in which this issue has been considered have made reference to the factors set out by Lord Sharman in the case of *Shah v Barnet London Borough Council* [1983] 1 All ER 226 (for example, as summarised in the judgement of Lewison J in Revenue and *Customs Commrs v Grace* [2009] STC 21 at 3, which summary was adopted by Lloyd LJ, who gave the judgment in the Court of Appeal).

43. In summary, the main principles set out in the *Shah* case are that:

(1) The words ordinary residence must be given their natural and ordinary meaning (as established in the earlier cases of *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486 and *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511).

(2) Unless it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, ordinarily resident refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.

(3) A person can be ordinarily resident in two countries at the same time.

(4) It is wrong to conduct a search for the place where a person has his permanent base or centre for general purposes or to look for his "real home".

(5) There are two, and no more than two, respects in which the mind of the person is important. The residence must be voluntarily adopted and there must be a degree of settled purpose.

(6) To have a settled purpose does not require an intention to stay in a particular place indefinitely; purpose, while settled, may be for a limited period.

(7) A settled purpose may include education, business or profession, employment, health, family, or merely love of the place and there may well be many others. All that is necessary is that the purpose of living where a person does has a sufficient degree of continuity to be properly described as settled.

44. Mr Dauppe referred to the summary of the principles established in the *Shah* case set out in the case of *Genovese v HMRC* [2009] UK VAT SPC 00741. The summary given in the *Genovese* case accords with that in 43 above but includes (at the end of 35) an additional conclusion that the ordinary residence test requires "objective examination of immediately past events, and not intention or expectation for the future".

45. This conclusion in *Genovese* was based on the statements of Lord Scarman in *Shah (*at 345F to H*)* where it was said:

> "nor need any attempt be made to discover what [the individual's] long term future intentions or expectations are. The relevant period is not the future but one which has largely (or wholly) elapsed, namely that between the date of the commencement of his proposed course and the date of his arrival in the United Kingdom."

46. Lord Scarman made this comment in the context of considering whether certain individuals had become ordinarily resident in the UK for three years prior to taking up a course of study in the UK. The issue was that they were only eligible for certain study grants if that was the case.

47. Here we are considering when the appellant ceased to be ordinarily resident on leaving the UK. Looking at the essential elements of ordinary residence as set out above, we see the question as being at what point the appellant ceased to have an abode in the UK voluntarily adopted for settled purposes as part of the regular order or pattern of his life.

48. We do not take the comment in *Shah* set out at 45 above as having established a principle that in all cases when considering ordinary residence a person's intentions or expectations as to the future are not relevant. That comment has to be read in the context of the circumstances in that case where the court was looking back at the ordinary residence position of the relevant individuals over a prior three year period. Where a person is leaving the UK, his intentions as to his future plans must be relevant in assessing what his settled purpose is, as regards whether he has ceased to have an abode in the UK voluntarily adopted for settled purposes as part of the regular order or pattern of his life. However, in assessing what a person's intention is at a particular point in time it would not be right to seek to evidence that intention by reference to future events as they subsequently actually occur and so with the benefit of hindsight. Instead this requires an objective assessment of all current and immediately past facts and circumstances.

49. In many of the cases regarding taxpayers leaving the UK, the courts have looked at whether there has been a sufficiently distinct break in the pattern of a person's life in the UK for him to have ceased to be resident or ordinarily resident. An early case where this test was expressed is *Inland Revenue Commissioners v Combe* (1932) 17 TC 405. The taxpayer was apprenticed for three years to an American firm. He made his headquarters in the USA, but visited the UK for short periods on his employer's business, staying in hotels; he had no other place of abode in the UK. Lord Sands said (at 411) that:

> "where a man is resident permanently in this country and he goes to America for certain purposes, but he remains…for a half of each year in this country. Now, I think it would be somewhat difficult to hold that there was any break in his residence in this country. But that is not consonant with what happened here. There was a distinct break.'"

50. This was the approach followed by this tribunal in the more recent case of *Turberville v HMRC* [2010] UK FTT 69. In that case it was held that the taxpayer did not cease to have a settled purpose as regards the UK as soon as he formed the intention to leave the UK which was a few months before his departure. Rather the question was whether as at the date of the taxpayer's actual departure from the UK the taxpayer was making a distinct break from the UK looking at the position as it was at the date of departure without the benefit of hindsight. At the time of his departure, the taxpayer had a three year employment contract with an overseas employer, he had incurred significant expenditure on furnishing an apartment rented by that employer and he was potentially in line for the chairmanship and chief executive position in the overseas employer. These factors were sufficient for the taxpayer to be regarded as making a distinct break from the UK on his departure.

51. Some cases have doubted the usefulness of the "distinct break" test. Our view is that this should not be viewed as a distinct test in itself. It is simply a convenient way of summarising what is required for a person to be regarded as having ceased to have a voluntary abode in the UK for a settled purpose as part of the regular order or pattern of his life. It follows from the formulation for when a person is ordinarily resident that when looking at whether a person has ceased to be ordinarily resident, there has to be a sufficient disruption in a person's settled purpose adopted as part of the regular order or pattern of his life.

Decision on ordinary residence issue

52. The question is at what point it can be said, looking at all the present and immediately past circumstances of the appellant's life, the appellant no longer had an abode in the UK voluntarily adopted for purposes with a sufficient degree of continuity to be regarded as settled as part of the regular order or pattern of his life.

53. On this approach, we have first considered whether the appellant ceased to be ordinarily resident when he moved from the UK to Rwanda on 15 January 2011. Looking at the circumstances when and immediately before he left the UK, the appellant had been living and working in the UK for some years, he remained formally employed by his UK employer and he retained a substantial interest in his UK employer in the form of the share options he held. He also continued to own his home in the UK. He rented that property out on a commercial basis but we do not know when the renting out commenced. The appellant's evidence set out in the Statement is that he had wanted for a long time to work in impoverished areas of the developing world. He had discussions with his UK employer starting as long ago as January 2009 planning his departure. Whilst he expected that he would want to move away permanently, both he and his UK employer wanted to keep their options open. In November 2010 they had agreed to treat his departure as an unpaid sabbatical which would last until March 2012.

54. It seems clear that, at the time of his departure from the UK, whilst the appellant very much wanted to make a life in East Africa if possible, he viewed the viability of this as somewhat speculative given the on-going UK links he retained. At this point the appellant did not know whether he could make a successful career in East Africa

or whether he would return to the UK by or before March 2012 when his period of unpaid sabbatical leave would end. In the circumstances, we find that the on-going links with the UK and the lack of certainty surrounding the appellant's potential life in East Africa indicate that the appellant had not ceased to have a voluntary abode in the UK for an on-going purpose of living and working in the UK at the time when he initially left the UK on 15 January 2011.

55. We have then considered to what extent the appellant continued to be ordinarily resident in the UK during the 2011-12 tax year. Our view is that the appellant ceased to be ordinarily resident in the UK in December 2011. In October, November and December 2011 the appellant negotiated the termination of his employment with Sequel and he formally left the company on 9 December 2011. He exercised his options over shares in Sequel on 7 December 2011 and sold the shares acquired back to Sequel on 9 December 2011 for the substantial sum of £999,998. At that time the appellant in effect severed his work ties with the UK and realised his substantial economic interest in his employer company. He still retained his former UK home and, as noted, it is not known precisely when he started to rent that property out. In his Statement the appellant noted that selling the shares in Sequel provided him with resources to take a flexible approach in pursuing his new career in Rwanda. These circumstances evidence that the appellant no longer retained a settled purpose of living and working in the UK as part of the regular order or pattern of his life. We do not consider that the retention of the home was by itself a sufficient factor to mean that the appellant remained ordinarily resident.

56. On that basis, the appellant was ordinarily resident in the UK during part of the 2011-12 tax year and therefore the loss he realised on the sale of his shares in Sequel is an allowable loss for capital gains tax purposes.

57. We note that it is perhaps unusual for a person to be found to be ordinarily resident at a time when it was accepted that he was not resident in the UK. We have not looked at the residence issue as the parties were in agreement that the appellant had ceased to be UK resident on 15 January 2011. However, whilst the facts which give rise to such a situation may be quite rare, in principle, we see no reason why a person cannot be held to have maintained ordinary residence notwithstanding that residence has ceased. Sections 2 and 16 TCGA set out above clearly contemplate that this may be the case as they each apply by reference to whether a person is either resident or ordinarily resident in the relevant period.

58. Our conclusion is not affected by the fact that the appellant claimed the benefit of ESC A11 for the 2010-11 tax year or that in his tax return for the 2011-12 tax year the appellant ticked the box stating he was ordinarily resident. HMRC have argued that these factors evidence that the appellant intended to be ordinarily resident from the time of his departure from the UK on 15 January 2011.

59. As set out, whether the appellant was ordinarily resident is a question of fact to be assessed in all the circumstances. The appellant's intentions are relevant to that assessment in terms of whether he had ceased to have a settled purpose as regards his life in the UK. That the appellant made a declaration in his tax return that he was not

ordinarily resident is clearly inconsistent with the stance he is taking now and no evidence has been produced from the appellant as to why this declaration was made. Mr Dauppe submits that it was simply an error. However, in the circumstances we do not see that we could draw any conclusion from this as to the appellant's intentions, so far as relevant to determining whether the appellant had a settled purpose as regards the UK, which would outweigh the factors outlined above on which we have made our decision.

60. As regards ESC A11, HMRC's argument is that this evidences the appellant's intention to become non ordinarily resident from the point of departure on the basis that in HMRC's view it is a condition of ESC A11 applying that the person becomes non ordinarily resident.

61. ESC A11 applies (a) where an individual ceases to reside in the UK if he has left for permanent residence abroad and (b) where an individual goes abroad for full time service abroad under a contract of employment (in each case where certain conditions are satisfied). There is no dispute that the appellant made his application on the basis that he was going abroad for full time service under a contract of employment. Our reading of ESC A11 is that the condition that the individual should satisfy HMRC that on his departure he was not ordinarily resident in the UK applies to the situation in (a) and not that in (b). The full text of ESC A11 is set out in the Annex. In any event we would not regard it as sufficiently clear that becoming non-ordinarily resident is a condition of this treatment in these circumstances that any particular conclusion could be drawn as to the appellant's intentions, so far as relevant to the ordinary residence position.

62. We have not considered the statements made by HMRC in HMRC 6 ("Residence, Domicile and the Remittance basis") as regards a person becoming non-ordinarily resident on taking up full time employment abroad. We are obliged to consider the ordinary resident position according to the law.

Conclusion

63. For the reasons set out above, we have concluded that the appellant was ordinarily resident during part of the 2011-12 tax year in which the capital loss of £145, 872 was realised. The capital loss was therefore an allowable loss for capital gains tax purposes within the meaning of s 131 ITA 2007 and the appellant was entitled to make a claim for relief for the capital loss under s 132 ITA 2007. The appellant's appeal is allowed.

64. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 14 SEPTEMBER 2015

ANNEX

Extra-Statutory Concession A11

"A11 RESIDENCE IN THE UK: YEAR OF COMMENCEMENT OR CESSATION OF RESIDENCE

The Income and Corporation Taxes Acts make no provision for splitting a tax year in relation to residence and an individual who is resident in the UK for any year of assessment is chargeable on the basis that he is resident for the whole year.

But where an individual –

(a) comes to the UK to take up permanent residence or to stay for at least two years; or

(b) ceases to reside in the UK if he has left for permanent residence abroad,

liability to UK tax which is affected by residence is computed by reference to the period of his residence here during the year. It is a condition that the individual should satisfy the Board of Inland Revenue that prior to his arrival he was, or on his departure is, not ordinarily resident in the UK. The concession would not apply, for example, where an individual who had been ordinarily resident in the UK left for intended permanent residence abroad but returned to reside here before the end of the tax year following the tax year of departure.

This concession is extended to the years of departure and return where, subject to certain conditions, an individual goes abroad for full time service under a contract of employment. Those conditions are –

- the individual's absence from the UK and the employment itself both extend over a period covering a complete tax year; and
- -any interim visits to the UK during the period do not amount to –

(i) 183 days or more in any tax year; or

(ii) an average of 91 days or more in a tax year (the average is taken over the period of absence up to a maximum of four years); and

- for years up to and including 1992-93, all the duties of the employment are performed abroad or any duties the individual performs in the UK are incidental to duties abroad.

Where the concession applies and the tax year is split, FA 1995 s128 (limit on income chargeable on non-residents - income tax) does not apply for the period for which an individual is treated as not resident. That section only applies to complete years of non-residence."