Past the use-by date

JULIE BUTLER reminds us that milk quota has now expired and tax advisers should consider the possibility of negligible value claims.

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The abolition of EU milk quota on 31 March 2015 is a stark reminder of the importance of negligible value claims for capital gains tax. As a result, there will be a flurry of these claims by those advising farmers on the tax returns for the year ended 5 April 2015. There will also be claims by executors for farming clients who died during 2014/15. These must not be forgotten by advisers.

> ***"The recent disappearance of milk quota is a stark reminder of the importance of negligible value claims for capital gains tax."***

HMRC interpret negligible value to mean "next to nothing". A taxpayer cannot make a claim simply because an asset is worth much less than it used to be – it must be virtually worthless. A claim for negligible value can be made retrospectively for up to two years from the beginning of the tax year for which the claim is made or two years from the beginning of the accounting period in the case of companies. This is subject to the taxpayer being able to show that they owned the asset at that time and that it became of negligible value while they owned it.

KEY POINTS

- The expiry of milk quota means that farmers may be able to make negligible value claims in 2014/15.
- Negligible value claims for those who have died during a tax year should not be overlooked by their executors.
- The *Leadley* case has highlighted the need for executors to review negligible value claims.
- Claims relating to a period before death cannot result in losses being carried forward against gains made by the executors.
- All negligible value claim opportunities should be regularly reviewed.

The responsibility of executors

The recent case of *Peter L Drown and Mrs RE Leadley as executors of J Leadley deceased* (TC4007), has highlighted the need for executors to review negligible value claims.

Here, the taxpayers were the executors of Jeffrey Leadley who had been killed in a motor accident in May 2010. Mr Leadley had invested £50,000 in two companies and made a loan of £334,784 to another company. HMRC accepted that the shareholdings had become of negligible value by 5 April 2010. The department also agreed that, in effect, the loan had ceased to exist as an asset on 3 November 2009 because the borrower company had gone into liquidation. The executors submitted claims for relief for the loss on the shares under ITA 2007, s 131 and TCGA 1992, s 24 and claimed relief for the loan under TCGA 1992, s 253.

In the first instance, HMRC refused the claims on the basis that they should have been made by the person who owned the shares and made the loan: Mr Leadley. The query by HMRC was that the claims were being made by executors. They had accepted that the shares in the unquoted trading companies were of negligible value at 5 April 2010 and all of the claims would have been accepted in full if the claim had been made by Mr Leadley himself before he died.

The executors' appeal

The executors appealed, claiming that a loss had been made under TCGA 1992, s 24 (assets that have become of negligible value) and that this was eligible for relief under ITA 2007, s 131 ("share loss relief").

ITA 2007, s 131(1) provides:

"An individual is eligible for relief under this Chapter ('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.

This is subject to subsections (3) and (4) and section 136(2)."

HMRC accepted that the preconditions of s 131 were fulfilled except in two respects. First, they argued that, to make a claim under s 131, the claimant must be "an individual" who had incurred the loss. Here the claimant was the executors, a body of persons rather than an individual, who had not incurred the loss. Second, HMRC argued that s 136(3)(d), which required there to have been "a deemed disposal under TCGA 1992, s 24(2)", had not been met. This was because s 24(2) required that a negligible value claim had to have been made by the owner.

The First-tier Tribunal set out their interpretation of ITA 2007, s 131 and TCGA 1992, s 24, saying: "The personal representatives of the deceased are treated as the deceased in so far as they are returning the deceased's own tax liability".

The risks of negligible value claims

Executors face several risks with regard to negligible claims. Guidance for them is found in the frequently asked questions (FAQ) section of HMRC's website for personal representatives. There, it clearly sets out that "income that the deceased received and capital gains that he made for the period to the date of death are taxed in the normal way". The guidance also explains the further risk faced by executors where it states that, if the personal representatives "fail to claim a repayment due to the estate ... you may have to make good the loss to the estate".

It was in following this guidance that the executors of Mr Leadley claimed relief under TCGA 1992, s 24 and s 253. However, a problem arises due to the precise wording where it is stated that a claim may be made by the owner of the asset which has become of negligible value during their ownership. As a result, although the executors could make the claims, the relief failed for the period after death. This was because the asset was owned by the executors from the date of death and it had become of negligible value before ownership by them.

The limit of the claim

The tribunal decided that the executors of Mr Leadley could make the relevant claims, but only to cover the deceased's chargeability to tax until his death. Further, the capital losses could not be offset against gains incurred by the executors after death.

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Taxpayers who own shares in a failed company or any other asset that has become worthless should consider making a negligible value claim to crystallise the loss for capital gains tax at an early stage. A cynical point is that a negligible value strategy should form part of "death bed" planning to enable the loss to be used against other capital gains in the same or a future tax year.

With the farming community enjoying various capital gains on land and building sales, the outstanding negligible value claims on milk quota will be timely. There will be a flurry of claims on the tax returns for the year ended 5 April 2015. Thus, if a farmer who owned milk quota died in 2014/15 a negligible value claim should be made by the executors to date of death when the value would have been small. This loss claim can be offset against any capital gains in the period 6 April 2014 to the date of death.

> ***"Income that the deceased received and capital gains that he made for the period to the date of death are taxed in the normal way."***

Although milk quota ceased to exist on 31 March 2015, this had been announced several years earlier and negligible value claims may already have been submitted for 2013/14. Consequently, there should be no problem for executors or personal representatives making a negligible value claim for the quota if the farmer who owned this died earlier in the year. This is, of course, subject to the point in *Leadley* that any unused relief cannot be carried forward.

Review all opportunities

For advisers, the lesson here is that all negligible value claim opportunities should be regularly reviewed and the strategy of negligible value claims should be considered by all taxpayers including executors for deceased taxpayers. There is no better time to deal with tax planning and compliance around such claims than around the end of a tax year; it is essential not to leave the claim too late.

Executors must consider maximising such loss claims, although unused losses in the year of death cannot be carried forward to offset against gains in the post-death period. The recording of negligible value claims for purchased milk quota should be considered by all taxpayers on the tax returns to 5 April 2015. Milk quota should no longer be included in farm accounts in addition to the processing of the formal loss claim. ■

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