

THE IMMIGRATION OF NON-RESIDENT TRUSTS WITH LOSSES

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In this article I look at the circumstances of a non-resident trust, to which FA 1981 s.80 applies, becoming resident in the UK and having at that time unutilised capital losses realised in an earlier year of assessment. In paragraph 10.6 of his publication entitled "Non-Resident Trusts", Robert Venables QC expressed the view in passing that such losses cannot be carried forward to be set against gains of the trustees in later years. At Robert's express invitation, I set out the contrary view.

It is a cardinal principle of the capital gains tax legislation that losses accruing to non-resident persons, even if accruing in respect of disposals of assets situate in the UK, are not allowable losses: CGTA 1979 s.29(3)). However, for non-resident trusts to which FA 1981 s.80 applies, special provision is made by FA 1981 s.83(6) which is in these terms:-

"Section 29(3) of the Capital Gains Tax Act 1979 (losses accruing to non-residents not to be allowable losses) shall not prevent losses accruing to trustees in a year of assessment for which section 80 above or section 17 of that Act applied to the settlement from being allowed as a deduction from chargeable gains in any later year beginning after 5th April 1981 (so far as they have not previously been set against gains for the purposes of a computation under either of those sections or otherwise)."

Two immediate comments can be made in connection with s.83(6). First, it does not make losses in the non-resident period allowable losses; it simply says that CGTA 1979 s.29(3) shall not prevent such losses from being allowed as a deduction from chargeable gains accruing in a later period. Secondly, its primary purpose is to take into account losses in the calculation of trust gains in a non-resident period for the purposes of FA 1981 s.80(2).

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However, the wording of s.83(6) is not in terms restricted to allowance by way of deduction against gains of a non-resident period because of the reference to gains accruing ".. in **any later period** .." (my emphasis). Taken at its face value, the fact of such a reference, coupled with the absence of any express restriction in the subsection on its application, does not rule out allowance by way of deduction against chargeable gains accruing in a resident period. In this connection, it does not seem to me that the heading to s.83 (namely, "Provisions Supplementary to Sections 80-82") is sufficient to restrict the wider application which the specific wording of s.83(6) appears to allow. Furthermore, whilst it may be unusual to have regard to the FA 1981 in ascertaining for the purposes of the CGTA 1979 (and in particular s.4 thereof) the amount of the chargeable gains in a resident period, the fact that s.83(6) is included in Part IV of the FA 1981, which is to be construed as one with the CGTA 1979 (FA 1981 s.139(3)), in my view provides the necessary linkage. However, let us test that conclusion in terms of the policy of the capital gains tax legislation.

At first sight, the conclusion I have reached might seem unduly generous in comparison with individuals. Suppose a non-resident individual sells assets situated in the UK at a loss. Clearly he has no allowable loss. If he subsequently comes to the UK in circumstances making him liable to capital gains tax on disposals, and he realises a chargeable gain, he cannot set-off the earlier loss that he made in his non-resident period. For that reason, it might be said that my construction of s.83(6) appear very generous to non-resident settlements. Nevertheless, I do not think that the comparison is a valid one. If the order of events I have described were reversed, that is to say the non-resident individual made a gain during his non-resident period, his subsequent residence in the UK would not of course expose him to a liability to capital gains tax. By contrast, a non-resident settlement which subsequently becomes resident in the UK, will indeed find that those previous chargeable gains can be visited subsequently on beneficiaries who receive capital payments from the trust by virtue of FA 1981 s.81(2).

In summary, if immigration of a non-resident settlement having unutilised capital losses is otherwise desirable, do not despair of being able to set-off such losses by way of deduction against later chargeable gains.