# [4.8.13] Offset between spouses - Case V losses and excess capital allowances

**Statutory position.**

1. The only types of losses that should be offset between jointly assessed spouses are those for Case 1 (trading) and Case 11 (professional) income. Section 381(3)(b)(i) allows any remaining such losses that cannot be absorbed by the individual sustaining the losses to be set against the income of that individual's jointly assessed spouse. There is no similar provision in respect of Case V losses (or Case 111 or IV losses). Therefore, a spouse **cannot** use his/her unused Case V losses to reduce the income of the other spouse. Any unused losses can only be carried forward against the future Case V income of the spouse who has sustained those losses. However, excess Case V capital allowances can generally be offset between jointly assessed spouses. Section 305(1)(b)(i) contains a similar provision (but subject to election) to section 381(3)(b)(i) in respect of certain excess Case V capital allowances[1]. Although wear and tear allowances for fixtures and fittings in respect of the letting of furnished residential accommodation are given under Case V, any such excess allowances cannot be set off against the individual's other income or against the income of the individual's spouse. This is because section 406 acts to ringfence such allowances by disapplying section 305(1)(b).[2]

2. An examination of the steps involved in arriving at '**total income**' shows why, in the absence of a specific provision, jointly assessed spouses cannot 'share ' Case V losses. For joint assessment purposes, each spouse's total income is determined separately before being aggregated with that of the other spouse and before being subject to further deductions to arrive at 'taxable income'. An individual's total income is the aggregate of his/her income from all sources as reduced by certain specified allowances and deductions (e.g. Case V losses carried forward). Where an individual sustains a Case V loss in a year, there is no Case V income available for aggregation. Case V losses carried forward from a prior year are allowed in calculating an individual's total income but can only be set off against that individual's Case V income, if any. Any such deduction can only reduce the Case V income of the spouse in question and, if that income is not sufficient to absorb the full deduction, no part of the unused loss may be deducted in arriving at the other spouse's total income, unless there is a specific provision, such as section 381(3)(b)(i) in the case of trading/ professional losses, that allows such a set off. As mentioned in the preceding paragraph, there is no such provision in respect of Case V losses.

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[1] This sideways set off of excess capital allowances is generally subject to an annual limit of €31,750 that applies to both the other income of the individual and the income of the spouse (section 409A).

[2] Tax Instruction 9.2.3 deals with the treatment of capital allowances for plant and machinery that is leased with a building.

**Revenue Practice - Tax Briefing 23**

**3.** In **Tax Briefing 23**, Revenue advised that where a rented residential "section 23 type" property passes to a surviving spouse and a clawback of the "section 23 type" relief applies in relation to the deceased spouse, it is prepared to allow a set-off of the "section 23 type" deduction due to the surviving spouse against the amount assessable on the deceased in the year of death in respect of the property involved. The maximum set-off allowed is equivalent to the amount of the rent deemed to have been received by the deceased as a result of the clawback.

This practice requires a formal undertaking to be given by the surviving spouse to the effect that if, within the 10-year period from the date the property was first let, any event occurs which gives rise to a clawback, the amount of the clawback on the surviving spouse will be the full amount of the "section 23 type" deduction allowed in relation to the property, including any amount of such relief set off against the income of the deceased spouse from whom the property was transferred.

The practice applies in death cases where the ownership of the property passes on or after 6 April 1995. It also applies, from the same date, where a property passes to a spouse as a result of a maintenance arrangement (as defined in section 1025 Taxes Consolidation Act (TCA) 1997) and to circumstances where a property is transferred from the sole name of one spouse into the joint names of both spouses.

**Tax Briefing 23** specifically states that the practice does not apply to the transfer of a property which is part of a scheme or arrangement the main purpose, or one of the main purposes, of which is the avoidance of tax.

**Further option - Tax Briefing 08/2010**

**4.** In addition to the practice described in paragraph 3, Revenue is, as advised in **Tax Briefing 08/2010**, prepared to make a further option available in death cases involving spouses where rented residential "section 23 type" property passes to a surviving spouse and a potential clawback of the "section 23 type" relief applies in relation to the deceased spouse.

Under this further option, an election may be made that:

- no clawback of "section 23 type" relief will be applied in the case of the deceased spouse, and
- any unused balance of "section 23 type" relief will transfer to the surviving spouse, where such relief has not been used in full by the deceased spouse in relation to rental income received up to date of death.

Any election being made should be made in relation to all "section 23 type" property held by the deceased spouse i.e. elections will not apply to individual properties where more than one property is involved.

The election should be made to the relevant local Revenue office and should be made jointly by the personal representative of the deceased spouse (e.g. the executor of the will or the administrator of the estate) and by the surviving spouse. Where the surviving spouse is also the personal representative of the deceased, then the election may be made solely by that person.

In calculating the amount of the "section 23 type" relief used by the deceased spouse, the formula contained in paragraph 4 of Schedule 25C to the TCA 1997 should be used to decide on the unused amount of such relief as at 1 January 2007. Thereafter, the "section 23 type" relief should be treated as used only after deductions specifically referred to in section 97(2) TCA 1997 have been allowed, in accordance with section 485C(3)(ab) TCA 1997. See Tax Instructions 15.2A for additional information on the High Earners restriction.

Where this further option is availed of, a formal undertaking must be given, to the relevant local Revenue office, by the surviving spouse to the effect that if, within the 10-year period from the date each property was first let, any event occurs which gives rise to a clawback (notwithstanding any election availed of under this further option provision), the surviving spouse will take responsibility for the clawback. The amount of the clawback on the surviving spouse will be the full amount of the "section 23 type" deduction allowed i.e. whether allowed against the rental income of the deceased spouse only or against the rental income of the deceased spouse and of the surviving spouse.

This further option applies where ownership of a "section 23 type" property passes on or after 1 January 2010 and is available in death cases only.

It does not apply to the transfer of "section 23 type" property where the property is part of a scheme or arrangement the main purpose, or one of the main purposes, of which is the avoidance of tax.