TC04495

Appeal number: TC/2014/04874

INCOME TAX – Further assessment to income tax on gain from exercise of share options - s 29 TMA 70 – whether discovery – yes - whether either of conditions in s 29(4) and (5) met – yes – income gain correctly calculated under Ch 5 Pt 7 ITEPA 2003 – yes - appeal dismissed. Whether Tribunal can give effect to consequential CGT issues – no – possible remedies examined.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALISTAIR NORMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SUSAN LOUSADA

Sitting in public at Priory Courts, 33 Bull St, Birmingham on 4 June 2015

Mr David Norman of D W Norman & Co, Accountants for the Appellant

Mr Philip Oborne of HMRC Local Compliance Appeals and Reviews Unit for the Respondents

DECISION

1. The appeal before the Tribunal was made by Mr Alistair Norman, against a further assessment to income tax on employment income for the tax year 2010-11 made under s 29 Taxes Management Act 1970 (TMA) in the amount of £75,679 charging additional tax of £20,214 after giving credit for additional tax deducted under Pay As You Earn (PAYE) of £15,134. Because of the similarity of names of the appellant and his representative (they are in fact son and father) any reference to a Norman in this decision (except in this paragraph) is a reference to Mr David Norman, the representative, and Mr Alistair Norman is called "the appellant".

The outcome of the appeal and other matters

2. The appellant will wish to know without reading all the way through this rather lengthy decision what our decision is. We have upheld the assessment made by HM Revenue and Customs (HMRC) with the result that the appellant is liable to pay the tax charged by it. We also hold that we have no power to alter the amount of capital gains tax (CGT) payable by the appellant, but that it appears that his CGT liability ought to be substantially reduced, probably to nil. We suggest that the appellant makes appropriate claims to HMRC on one or other or both of the bases which we have identified (see paragraphs 24 to 32 of Appendix 2 to this decision) and we look to HMRC to give effect to those claims, particularly as they have already agreed that the liability to CGT is incorrectly stated in the appellant's self-assessment.

3. And because we have found that neither the appellant nor Mr Norman acting on the appellant's behalf was careless in completing his tax return and self-assessment, we look to HMRC to honour the undertaking they gave us to cancel the penalty assessed on the appellant, but which the appellant for some reason did not appeal against.

The evidence

4. The appellant gave sworn oral evidence and he was cross-examined by Mr Oborne for HMRC and was questioned by the Tribunal. Mr Norman at one stage in his submissions also gave what amounted to evidence as to how the appellant's tax return was prepared and filed.

5. We also had three documents supplied by the appellant, consisting of:

(1) an email about his appointment as marketing director of QlikTech UK Ltd (QlikTech)

(2) a P45 from that employer and

(3) a record of a transaction on his behalf of selling shares in his employer's parent company.

They had been supplied after the time given by directions in the case, but as HMRC had no objection and as HMRC had in fact received these documents in the course of

correspondence but had not included them in its list of documents or its bundle, we admitted them.

6. HMRC also produced a bundle of documents which included:

(1) A screen print of the employment and chargeable gains pages of the Appellant's 2010-11 tax return and of the CGT computation attached to that return.

(2) A print of the self-assessment included in that return

(3) A copy of the notice of the s 29 assessment for 2010-11

(4) A P14 (return by employer of income paid and tax deducted for the year) for the appellant for the tax year 2010-11.

(5) Correspondence between the appellant and an HMRC Local Compliance Office in Bootle and with a reviewing officer following a review under s 49B TMA requested by the appellant.

Facts

7. From the evidence given by the appellant in chief and by Mr Norman, which we accept, and from the documents supplied to us we find the following facts as set out in paragraphs 8 to 27. We deal with answers given by the appellant in cross-examination at paragraphs 28 to 30 and at paragraph 31 we mention some matters, which, perhaps surprisingly, were not exhibited in evidence before us.

Our findings of fact from the documents and evidence in chief

8. The appellant had experience in marketing software. Towards the end of 2008 he was recruited by QlikTech (if any reader of this decision is wondering, that name is, we were told by the appellant, pronounced "Click-tech"). QlikTech was a subsidiary of a multinational company originally set up in Sweden but with its headquarters at that time in the USA.

9. The appellant exhibited an email dated 16 December 2008 addressed to him from Wendy Swann, HR Director Western Europe and International Markets for QlikTech (item (1) in paragraph 5 of the decision). The two relevant paragraphs are:

> "I am delighted to send you a formal offer of employment for the position of Marketing Director with QlikTech UK Ltd, which we sincerely hope you will give your utmost consideration. I am also enclosing a draft of the employee contract and a word version of our digital Employee Handbook for your perusal.
>
> Please also accept this as official confirmation that QlikTech are pleased to apply for 15,000 stock options as part of your package. This application is subject to board approval and does not form any part of any contractual terms and conditions of employment."

10. Under the employee contract the appellant received a basic salary, a bonus and a car allowance. He had received a separate letter about the "stock options" which showed (he said) that if he served for 5 years he would be entitled to exercise options

over 15,000 shares, but if he left before 5 years his entitlement would be proportionately reduced. The appellant understood that if the company was floated the options could potentially be very valuable. The company did in fact have an IPO (a flotation on a stock exchange etc. by way of initial public offering) and was listed on NASDAQ (a securities exchange in the USA) after he began to work there.

11. The appellant said he had been warned by QlikTech that the job he was recruited for was very tough, and he found that none of his four predecessors had lasted more than six months. By early 2011 he had had enough and resigned with effect from 31 January 2011. He had wanted to set up his own company and this was what he was currently doing, employing over 40 people. He had not drawn any salary from the new company for two years after leaving QlikTech as he had lived off the money he had received from the exercise and sale of his stock options.

12. The appellant also exhibited his P45 (item (2) in paragraph 5 of the decision). This showed that up to the leaving date of 31 January 2011 he had earned £100,918.48 from which tax of £31,974.26 had been deducted under PAYE using a tax code of 647L.

13. The third document exhibited by the appellant was a transaction record prepared by Citigroup Global Markets Inc who acted as agent in the transaction. It records:

> "You sold 6563 shares at a price of $22.9169 per share on Trade date 16-Mar-2011.
>
> **Trade Details**

Security Name	Qlik Technologies Inc
Trading Symbol	QLIK
Grant date	30-Mar-2009
Grant Type	0261400
Company plan Name	2007 Omnibus stock Option and Award
Company Plan Number	2007PREIPO
Option Exercise Price per Share	1.65
Sale Price Per share Sold	22.9169
Exercise Date	16-Mar-2011
Settlement Date	16-Mar-2011
Shares Exercised	15000.0000
Shares Granted	6563.0000
'FMV' @ Exercise	22.9169
Transaction Expense calculation	
Total option Exercise price	10,828.95
Total tax Amount	80,115.00

Commission	328.15
Exercise Fee	5.00
Transaction Expenses	91,277.98

All these figures are US Dollar amounts.

14. What we find this transaction record shows is that as a result of the appellant's service with QlikTech of just over two years he became entitled to exercise 6,563 (slightly over 40%) of the options awarded to him on 30 March 2009 (that number was 15,000). He exercised the options on 16 March 2011 and immediately sold them. The cost to him of the shares he acquired on exercise of the options was $10,828.95 ($1.65 per option) and the fair market value (FMV) of the shares on the day of exercise was $22.9169 per share, and this FMV was the sale price achieved for each share, the total being $150,403 ($22.9169 x 6,563) with transaction costs of $333.15. The only figure which the Tribunal did not understand was the entry for "Total Tax Amount" of $80,115.85 and the appellant was unable to say what it represented. He did say in response to a question from HMRC that the amount transferred to his bank account in respect of this transaction was in the region of £50,000.

15. The only written information received by the appellant about the stock option and exercise transaction was the document from Citigroup. He did not receive from QlikTech an additional P45 or any other notice of a payment from which tax was deducted.

16. On 16 May 2011 QlikTech submitted to HMRC a P14 Form (part of an employer's End of Year Return) relating to the appellant showing:

Pay in this employment	£176597.28
Tax deducted	£47109.86
Final tax Code	BR M1
Total of employee and employer contributions (NIC)	£28669.17
Employee contributions due	£5321.97

"BR M1" means tax at the basic rate of income tax (20%) on a non-cumulative basis.

17. At some time before the end of January 2011, the appellant provided Mr Norman with his P45 and the Citigroup Transaction record for the Stock Options with a view to Mr Norman's firm preparing and submitting the appellant's 2010-11 tax return and self-assessment. Mr Norman informed us that one of his staff calculated the chargeable gain from that information and included the calculation in the return. In that Tax Return Box 4 of page CG1 (Gains qualifying for entrepreneurs' relief) and Box 19 (Gains of the year before losses) both showed £85873.00. The return was filed on 31 January 2012.

18. The calculation accompanying the CG pages showed:

Disposal of 6,563 shares from s. 104 holding

Proceeds (6,563/6,563 x £93,836.81)	£93836.81
Cost of disposal	£331.16
Actual cost £7632.24 x 6,563/6,563	£7,632.24
Gain	£85,873
Less Annual Exemption	£10,100
TOTAL	£75773.30
Tax on 75773.00 @ 10%	£7577.30

10% is the rate of CGT where entrepreneurs' relief is due. No question whether this relief was correctly claimed has been raised.

19. No enquiry under s 9A TMA was begun before 1 February 2013 (the deadline for such enquiries)

20. On 22 April 2013 HMRC wrote to the appellant informing him that a compliance check was being made into his 2010-11 tax return and enclosing a factsheet CC/FS1a explaining what a compliance check was. It stated that if any additional tax was found due an assessment would be made under s 29 TMA and it warned that penalties may be payable if HMRC find there is an inaccuracy in the return.

21. In a letter of 12 June 2013 it was revealed by HMRC that the reason for their check was the discrepancy they had found between the amount returned by the appellant on the employment pages of his return (which was the amount on his P45) and the amount on the P14 returned by QlikTech UK Ltd. The amounts not recorded on the P45 but recorded on the P14 were pay of £75,679 and tax deducted of £15,134 (which is exactly 20% of the pay not on the P45, and is consistent with the statement on the P14 that the final tax code was BR M1).

22. The correspondence continued with HMRC seeking to understand why there was such a discrepancy, and Mr Norman explaining that the appellant had shown the amount as a capital gain in his return on the grounds that it was not income from his employment, the right to acquire shares under the option not being included in the employment contract (and in this regard he referred HMRC to the email which is item 1 in paragraph 5).

23. On 26 March 2014 HMRC made an assessment under s 29 TMA charging an additional amount of tax of £20,214.44. The tax calculation enclosed with the notice of assessment showed:

(1) Pay from all employments increased by £75,679

(2) Personal allowanced decreased by £6,074

(3) Tax deducted from employments increased by £15,134

(4) No change to the figure for capital gains tax.

24. On 25 April 2014 HMRC made a penalty assessment under paragraph 13 Schedule 24 FA 2007 (careless inaccuracy in return) in the amount of £3,601.58.

25. HMRC received a letter from Mr Norman on 12 May 2014, apparently dated 13 March 2014, the same date as a previous letter from him. That letter contained what was taken by HMRC as a late appeal against the s 29 assessment and a request for a review under s 49B TMA. Mr Norman explained that his secretary had wrongly used the date of a previous letter and that this letter was sent on 25 April so the appeal was not late.

26. HMRC accepted that notice of appeal could be given and carried out the review which upheld the decision to make the s 29 TMA assessment. But the reviewing officer identified that while the further assessment had charged the stock option gains to income tax, they also remained charged to CGT and as a result they stated in the letter giving their conclusions addressed to the appellant, not his representative, that they would "instruct HMRC to amend the 2010-11 assessment to remove this liability and the revised tax will then amount to £12637.14". The reviewing officer also made it plain that they were not reviewing the penalty assessment as it had not been appealed against.

27. Subsequently the appellant notified his appeal against the s 29 assessment to the Tribunal. The appeal form in which the appeal was notified was submitted to the Tribunal a few days late, but we gave permission for the appeal to be notified in accordance with s 49G(3) TMA.

Our findings of fact from the cross-examination of the appellant

28. In cross-examination the appellant accepted that options over QlikTech's parent's shares were not made available to the public generally. He did not agree with Mr Oborne's suggestion that he got less from QlikTech than he was expecting – he had no particular expectations. Asked why he was granted the options, he suggested somewhat faintly that they were offered to him as an incentive to give up other opportunities or a previous employment. He would not admit that the reason he was granted them was because he was a prospective employee.

29. On the points raised in cross examination, while we find the appellant to be honest, we think we was well aware of the argument being made by Mr Norman on his behalf that the fact that the options did not feature in his contract of employment meant that they were not subject to income tax. When answering questions from Mr Oborne about the circumstances in which he was granted the options, his answers were mostly irrelevant or equivocal.

30. We find that the options were granted to him because he was a prospective employee being offered a remuneration package. We had no evidence to support any claim that they were granted for any other reason, the appellant having failed to respond to HMRC's requests for further information or to produce to us any evidence of what he was giving up or that his possible foregoing of other matters played any part in the negotiation process. But even if there had been some other reasons we consider that the employment reason was obviously the dominant one.

Matters on which we had no evidence

31. We also mention here matters for which we had no evidence. We did not have in evidence the contract of employment, the letter and any details of the stock option awards or any documents from QlikTech about the apparent deduction of tax that were sent to the appellant. The appellant's evidence was of course that while he had received the first two items he had not received anything from QlikTech apart from the transaction record from Citigroup. Neither did we have any evidence to show that the scheme was a UK tax approved option scheme of any sort, and in its absence we have to assume that the scheme was not so approved.

Law

32. HMRC's bundle of authorities consisted entirely of legislation, not all of which was relevant. In Appendix 1 to this decision we set out those parts of the bundle relating to stock options together with other legislation on the subject which we consider also to be relevant. But here we set out the relevant parts of s 29 TMA as that is where the main dispute arises:

> "29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment--
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> …
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (3) Where the taxpayer has made and delivered a return under section 8 of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above--
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board--
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 … of this Act in respect of the relevant year of assessment; or

…

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if--

(a) it is contained in the taxpayer's return under section 8 … of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

…

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above--

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above--

(a) any reference to the taxpayer's return under section 8 … of this Act in respect of the relevant year of assessment includes--

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

...

(b) any reference in paragraph[.] … (d) to the taxpayer includes a reference to a person acting on his behalf.

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to--

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; …

…"

33. It should be noted that while s 29 TMA uses the term "year of assessment" (at least it does for the year with which we are concerned: before 1998 it merely said "year") but does not define it, and the legislation imposing the charge to income tax before 2007 also used "year of assessment", and defined it, the legislation imposing the charge to income tax in the period with which we are concerned, the Income Tax Act 2007 (ITA), has replaced that term with the term "tax year" (see s 4(2) ITA). ITA did not amend s 29, or any other part of, TMA to make general amendments to the term "year of assessment", so to be satisfied that they mean the same thing (they do) it is necessary to apply paragraph 5 Schedule 2 ITA (continuity of the law between

superseded enactments and rewritten provisions) and s 119(3) TMA (commencement and construction) as subsequently amended.

34. It should also be noted that the references in s 29 TMA to "the Board" and "an officer of the Board" are to be read, by virtue of s 118(1) TMA 1970 (defining "Board" to mean "the Commissioners of Inland Revenue") and s 50(1) Commissioners for Revenue and Customs Act 2005 (CRCA), as references to "the Commissioners for Revenue and Customs" and "an officer of Revenue and Customs".

Submissions

Submissions for the appellant

35. For the appellant Mr Norman argued that the s 29 TMA assessment was out of time, as the window for enquiring into a tax return had passed by the time HMRC started their compliance check. He said that under self-assessment the 12 month time limit for enquires was introduced to foster an entrepreneurial spirit and to give business and other taxpayers finality in their affairs, subject only to HMRC finding that that there was negligent or fraudulent conduct.

36. In this case both he and the appellant had done their honest best to make a correct return. They had included in his return all the amounts that the Appellant had received from QlikTech. They had included the gain on the stock options as a chargeable gain in the CGT pages of the return because it was their view that being outside the contract of employment the stock options were not part of the appellant's remuneration but were a form of incentive for him to join the company. Mr Norman added that they were not guaranteed to be payable.

37. Mr Norman also argued that because the appellant has received no notification about the option gain from the company in the shape of a P45 or other document, and because the company had deducted, it turned out, 20% tax, then the payment was not properly treated as income because if it was income 40% tax would have been deducted under PAYE.

Submissions for HMRC

38. For HMRC Mr Oborne argued that the stock option transaction was not arm's length in the sense that the options were not available to the general public. This was not a SAYE matter (by which we assumed he meant that there was no scheme here approved under Schedule 3 Income Tax (Earnings and Pensions) Act 2003 (ITEPA)). He pointed out that the number of options granted depended exactly on the length of service and maintained that the options were granted to the appellant by reason of his employment, as there was no other plausible reason for the grant. They therefore counted as employment income.

39. Mr Oborne referred us to s 471 to show that Chapter 5 of Part 7 of ITEPA applies to securities options acquired by a person where the right or opportunity to acquire them is available by reason of employment. This he said was the case here.

40. He also referred us to ss 696 and 700 ITEPA to show that, if a "readily convertible asset" is provided to an employee, PAYE is deductible from the payment and this is what QlikTech must have done in this case.

41. Mr Oborne then turned to the assessment. He pointed out that, contrary to Mr Norman's submissions, the assessment was not out of time. Mr Norman was right about the time limits for a s 9A TMA enquiry, but this was not such an enquiry. The time limit for a s 29 TMA assessment was in general four years and in cases of carelessness was six years. In fact neither time limit was breached in this case.

42. Mr Oborne accepted that to justify the s 29 TMA assessment he had to show that one of two conditions was met. In fact he was arguing that both conditions were met. Section 29(4) TMA allowed a s 29 assessment to be made after the s 9A enquiry limit and before the expiry of six years from the end of the tax year concerned if the loss of tax sought to be recovered by the assessment came about as a result of careless conduct.

43. In this case the appellant had not taken reasonable care to ensure that the payment resulting from stock options had been correctly shown as income on the return and not as a capital gain. A reasonable person would have some idea of what he expected to receive and would have thought that something was amiss with any view that this was a capital gain. This was because the employer was required to give the appellant an additional P45 showing the details of any post-employment payment from which income tax had been deducted under PAYE so the appellant would know that 20% tax had been deducted by the employer.

44. The appellant had taken on trust that the amount he had received was capital. He had not sought clarification of the tax issues from HMRC or elsewhere. Despite repeatedly asking for it, HMRC had never seen the employment contract or any other documents relating to the transaction, apart from the Citigroup transaction record and the email on appointment.

45. Mr Oborne also justified the assessment on the basis that s 29(5) TMA applied. The only matters that the hypothetical officer considering the position at, in this case, 31 January 2013 could take into account were the entries in the tax return and the capital gains tax computation. The P14 was not information that could be taken into account in applying the hypothesis – s 29(6) TMA. On that basis there was no possibility that any officer, faced only with the entry in the capital gains pages, could have considered that there must be an amount counting as employment income which had not been returned.

Discussion

Structure of this part of the decision

46. In this part of the decision we deal first with the s 29 TMA point, and then go on to consider the amount of the assessment, and points arising from the legislation governing stock options. Other decisions of this Tribunal and its predecessors have dealt with these matters the other way round. But we also note that it is now

established that with s 29 TMA the burden of proof is on HMRC (*Household Estate Agents Ltd v HMRC* [2007] EWHC 1684 (Ch) per Henderson J at [48]) and that there have been a number of cases (the latest being *Hargreaves v HMRC* [2014] UKUT 395 (TCC)) where it has been argued that s 29 should be taken as a preliminary issue.

47. We do not think it makes any real difference which way round it is done, but as s 29 TMA is a threshold or gateway provision for HMRC, which their failure to pass over or through leads to any questions about the assessment becoming irrelevant, it seems to us logical to start with it.

The validity of the s 29 TMA assessment: introduction

48. As Mr Norman pointed out, the self-assessment system works on the basis that a taxpayer makes a return including a self-assessment and HMRC has, depending on the actual filing date, between 12 and 15 months to inform the taxpayer that they will enquire into the return. This period is intended to be long enough to allow a reasonable time for HMRC to examine and risk assess the return but short enough to give the taxpayer finality within a reasonable period.

49. But, as Mr Oborne submitted, that time limit for initiating enquiries is not universal. Before the introduction of the self-assessment system in 1996, s 29 TMA (as it then stood) was the sole provision allowing for an assessment to be made in response to a return (which of course did not then contain any assessment by the taxpayer of their liability to tax). Section 29 was radically amended by the Finance Act (FA) 1994 to provide HMRC with the necessary protection for certain cases where there was the possibility of a "loss of tax". The obvious target for such a provision was a simple case of tax evasion, for example omitting sales of a trade from accounts or the receipt of untaxed income such as income from property. Such action would clearly be at least careless and as a result a s 29 TMA assessment was allowed to be made after the s 9A TMA enquiry limit if the return had either not been delivered at all or if delivered had not been enquired into.

50. But a s 29 TMA assessment could also be made following the FA 1994 amendments if, without there being careless or deliberate inaccuracies, a loss of tax had occurred which could not have been apparent to someone who was described by Lord Keith of Kinkel in the House of Lords in *Scorer v Olin Energy Systems Ltd* 58 TC 592 at 639 (*Olin*) as an "ordinarily competent Inspector", a hypothetical civil servant who is now somewhat downgraded to be an ordinarily competent officer of Revenue and Customs. (We are not suggesting that this makes any difference to the test, though we can see an argument that the change may have lowered the required level of competence). The hypothetical officer concerned is however blinkered to some extent, as when the question whether a tax loss ought to have been apparent to them is posed, the answer must take into account that they are deemed only to have before them, and able to scrutinise, the tax return for the year in question and documents supplied with that return (and those for the previous two years) but not any information supplied by others such as an employer, so that in this case the P14 and the P45 would not be documents available to the hypothetical officer within the meaning of s 29(6) TMA.

51. But in addition to simply being able to consider the information shown in the documents, the hypothetical officer is assumed capable of drawing those inferences from them that they may be reasonably expected to make. What it is reasonable for them to infer is also judged by reference to the officer who is ordinarily competent. Thus in *HMRC v Charlton & ors* [2012] UKUT 770 (TCC) (*Charlton*), the presence on the return of a "DOTAS" number would, the Upper Tribunal (Norris J and Judge Berner) held, have prompted a hypothetical officer to infer that there was in the possession of HMRC a form AAG1 setting out details of a disclosed tax avoidance scheme, and that inference coupled with the actual information on the return including white space entries describing a very large allowable loss was sufficient to demonstrate that a loss of tax should have been apparent to the hypothetical officer.

52. As mentioned above it is now well established that in s 29 TMA cases HMRC have the burden of showing that there has been a discovery and that one of the conditions in s 29(4) or (5) TMA is met. If that burden is discharged, then in accordance with s 50(6) TMA, the power that is given to the Tribunal in an appeal against an assessment to income tax and CGT, the burden is on the appellant to show that they are overcharged by the assessment, and if they fail to discharge that burden the Tribunal must let the assessment "stand good".

The validity of the s 29 assessment – s 29(1)

53. With that introduction we turn to the facts of this case. We were not addressed by either representative on the fundamental point in s 29(1) TMA: was there a discovery? This was no doubt on Mr Oborne's part because he considered it obviously in his favour. But if there is no discovery the s 29 assessment cannot be a valid assessment.

54. The threshold for a "discovery" is now also well established as being a fairly low one. In *Charlton* it was stated that "[a]ll that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment." We have no hesitation in accepting that the officer carrying out the compliance check made a discovery within the meaning of s 29(1) TMA. He had before him the P14 and the Employment pages of the tax return and there was a difference of some £75,000 odd between the figures on each which was something he had discovered by comparing the two. It was reasonable in our opinion for that officer to form the view that he had discovered that "profits which ought to have been assessed to tax have not been assessed" – s 29(1)(a) TMA.

55. We just add that the reference in s 29(1)(a) TMA to "assessed" (twice) includes the case of profits being or not being self-assessed, and that is likely to be the situation in the overwhelming majority of cases. Section 197 FA 1994 makes this clear:

> "(1) In the Tax Acts and the Gains Tax Acts, any reference (however expressed) to a person being assessed to tax, or being charged to tax by an assessment, shall be construed as including a reference to his being so assessed, or being so charged—
>
> (a) by a self-assessment under section 9 … of the Management Act,"

56. We therefore consider that HMRC have succeeded in showing that they have cleared the hurdle in s 29(1) TMA, in that there was a discovery of what was, in their opinion, a tax loss (or a "situation mentioned in subsection (1) above" as it is less elegantly put in sub-ss (2), (4), (5) and (6)).

The validity of the s 29 TMA assessment – the s 29(3) conditions

57. That is the first hurdle. The second is that in s 29(3) TMA read with sub-ss (4) to (7). Section 29(3) provides that a discovery assessment is invalid unless one of two conditions is fulfilled. HMRC argue that both are fulfilled.

The validity of the s 29 TMA assessment – s 29(4)

58. Section 29(4) TMA is by far the easier test to interpret which is no doubt why it is attractive for HMRC to put it forward if they can. HMRC must show that the tax loss is brought about carelessly – they do not argue here that it was brought about deliberately. The test in sub-s (4) was described by Judge Berner in *Anderson (deceased) v Revenue and Customs Commissioners* [2009] UKFTT 206 at [22] (*Anderson*), cited with approval by the Upper Tribunal (Judge Bishopp) in *Colin Moore v Revenue and Customs Commissioners* [2011] UKUT 239 (TCC) (*Moore*):

> "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done"

This statement was made in relation to the word "negligent" which was the word in the text of s 29 TMA before amendment by FA 2008, but the view of Judge Bishopp in *Moore* at [10] seems to have been that the test here quoted is equally apt for the current version of sub-s (4), and even if we are not bound by what is an *obiter* remark, we respectfully agree with it and follow it.

59. Looking then at the circumstances here, we found as a fact that the only two documents the appellant had relating to the sums he earned or was given which related to his employment with QlikTech in the year were his P45 showing his salary and the tax deducted under PAYE and the Citigroup record of the sale of shares. We consider that it was perfectly sensible for Mr Norman's firm to come to the conclusion that the appellant had made a chargeable gain from the sale of shares and to put what they thought were the correct figures on the return. The question then is: would a reasonable taxpayer or a person acting on his behalf exercising reasonable diligence have done more or done things differently?

60. HMRC in the form of the reviewing officer clearly thought so. They said that the payment from which QlikTech deducted tax should have been shown on the employment pages of the appellant's return, so that not to so show it must have been careless. When Mr Oborne made his submissions on this subsection, the Tribunal asked him to consider those pages as shown in the HMRC screen print and to tell us where the payment should have been entered. Mr Oborne said it was Box 1. The tribunal pointed out to him that the rubric for Box 1 said that taxpayers should "enter the total from your P45 or P60" and that was what the appellant had done.

61. The Tribunal also pointed out to Mr Oborne that when a past employment payment was made from which tax was deducted under PAYE there was no obligation on the employer to issue another P45. An employer is meant to give details of the payment and any tax deducted but can do it in any way it thought fit (regulation 37(6) and (7) of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) (the PAYE Regulations)). But we accept the appellant's evidence that this was not done in his case, and we do not think there was any reason why the appellant should think that he had not done what a reasonable taxpayer would have done.

62. But there remains the question: would a reasonably diligent taxpayer or his agent have sought, in these circumstances, specialist tax advice about the tax treatment of the payment he received? We do not think so. The appellant himself, as a client of Mr Norman, would have no reason to make his own enquiries. As to Mr Norman and his firm it was clearly their opinion that the gain did not come to the appellant from or by reason of his employment because it was not part of his contract. That was, as we hold below, an incorrect view as a matter of tax law. But that does not of itself mean it was careless of Mr Norman not to seek specialist advice.

63. We are influenced by the fact that the only information available to the appellant about the share sale was the Citigroup transaction record, that he entered his employment income correctly in his tax return, and that he returned the gain on the share sale as a chargeable gain which it is. There was nothing to prompt the appellant or Mr Norman to take a different view or, more importantly, to prompt Mr Norman to wonder if his view was in fact incorrect, and to seek specialist advice on the point.

64. Against that we are slightly troubled by the fact that neither the appellant nor Mr Norman seemed to query why the appellant, having made a capital gain of over £85,000, only received something over £50,000. The appellant did not clearly answer Mr Oborne's question whether he had expected to receive more.

65. It is we think a finely balanced point, but the burden is on HMRC to show carelessness and in our view HMRC have not met the condition in s 29(4) TMA.

The validity of the s 29 TMA assessment – s 29(5)

66. We turn now to the rather more complicated test in s 29(5) TMA. We ask first what information would be available as at 1 February 2013 to the hypothetical ordinarily competent officer. The answer at first sight is only the appellant's tax return and the CGT computation contained in it. From those that officer would be able to see that the name of the employer that paid the appellant his salary was almost identical to the name of the company whose shares he had sold. Would that fact allow the officer to infer that there had been an event giving rise to something which was to be treated as employment income and from which PAYE had been deducted?

67. We do not think that any hypothetical officer, however competent, would be justified in making that inference. We do not consider that a hypothetical officer should have been aware that there was a tax loss just by considering the material the officer is limited to by s 29(6)(a) TMA.

68. But we also need to consider the inferences that the hypothetical officer might be expended to draw. We have seen that in April 2013, within a few weeks of the ending of the enquiry period, HMRC started a compliance check as a result of the P14. But that form is dated 16 May 2011. It is reasonable to assume that within a few days or at the most a few weeks of its delivery to HMRC the P14 details would have been posted to the appellant's record on the NPS computer system. We had no evidence of how the P14 details came to be compared with the tax return details or the P45 details, and whether that is done automatically by HMRC's NPS computer system or when, but we have wondered whether an ordinarily competent officer ought reasonably to have been expected to have inferred from the information in the return that such a comparison is made.

69. But assuming that that inference could reasonably be drawn, does it mean that the hypothetical officer would have been aware of the tax loss from the inference? Only, we think, if the officer is to be treated as having actually interrogated the system to discover whether there was a discrepancy between the return (and hence the P45) and the P14. To assume that the hypothetical officer would, or should, have done this is we think to go too far. We have already noted (paragraph 51) that in *Charlton*, the Upper Tribunal held that HMRC should have been able to infer the existence of information which would have contributed to alerting the ordinary competent officer to a tax loss, that information being the information about a tax scheme on a Form AAG1. In our view there is a world of difference between inferring, on the one hand, the existence of an AAG1 and hence a likely tax loss in a case where a Scheme Reference Number is shown on the return along with an unusual transaction giving rise to an abnormal loss, and inferring on the other hand, as in this case, the existence of a tax loss because a hypothetical officer should know that tax return, P45 and P14 material is routinely reconciled, something which must happen in millions of cases annually. We therefore consider that HMRC have discharged the onus of showing that the condition in s 29(5) TMA is met.

The assessment on employment income

70. So far in this discussion we have assumed that HMRC did discover what in their reasonable opinion was a loss of tax. But that assumption does not means that we were satisfied that there was or its amount without further argument. Mr Norman submitted that there is no loss of income tax and no liability to income tax on the share option gain because he says the options were not granted to the appellant by reason of his employment, as they were outside the terms of his contract of employment and were offered to him as an incentive.

71. The income tax treatment of stock options is found in Chapter 5 of Part 7 of ITEPA, the relevant parts of which are set out in Appendix 1. (From here onwards, to avoid unnecessary repetition, any use of a section or Part number by itself is a reference to that section or Part of ITEPA). Chapter 5, like much of the rest of Part 7, is complex. Because of that complexity we think it is worth saying something about the way tax law has dealt with such matters historically, to see if a clear purpose behind Chapter 5 of Part 7 can be discerned from that history.

72. Before 1960 there had been considerable confusion about the treatment of options to acquire shares granted to employees. The confusion was dispelled by the House of Lords in *Abbott v Philbin (HM Inspector of Taxes)* 39 TC 82. In that case the House of Lords held that when an option is granted an employee receives income, a perquisite, from their employment equal to the then value of the option, and does not receive income from the employment when shares are acquired from exercise of the option or on their sale.

73. Parliament's reaction came in 1966. Section 25 of, and Schedule 4 to, FA 1966 reversed *Abbott v Philbin* and imposed a charge to income tax on exercise, saying relevantly:

> (1) Where … a person realises a gain by the exercise … of a right to acquire shares in a body corporate obtained by that person as a director or employee of that or any other body corporate he shall be chargeable to income tax under Schedule E on an amount equal to the amount of his gain as computed in accordance with this section.
>
> (2) Subject to subsection (8) below-
>
> > (a) the gain realised by the exercise of any such right at any time shall be taken to be the difference between the amount that a person might reasonably expect to obtain from a sale in the open market at that time of the shares acquired and the amount or value of the consideration given whether for them or for the grant of the right,
>
> (9) For the purposes of this section a right to acquire shares is obtained by a person as a director or employee of a body corporate-
>
> > (a) if it is granted to him by reason of his office or employment as a director or employee of the body corporate …"

74. The legislation also removed the *Abbott v Philbin* charge on grant. Section 25 and Schedule 4 were successively consolidated and rewritten becoming ss 135 to 137 and 140 Income and Corporation Taxes Act (ICTA) 1988 and then Chapter 5 Part 7. But apart from some modernisation of the language and layout, effected mainly by ITEPA, the main operative rules and definitions cited above are still there. It can be seen from this brief bit of legal archaeology that Parliament has from 1966 consistently intended to impose a charge to income tax when an employee makes a profit from the *exercise* of an option to acquire shares in the employer or a company in the employer's group, and equally not to impose a charge to income tax on the *grant* of that option. Chapter 5 of Part 7 needs then to be interpreted with this purpose and policy in mind.

75. It should be added that over the years a number of tax privileged schemes involving options have been enacted, and where these apply, the charge now in Chapter 5 has been disapplied. We have found no evidence that the scheme in this case was a tax privileged one.

76. Mr Oborne took us only to one section in Chapter 5, s 471, which we set out here for convenience as it deals with the issue which is the appellant's grounds of appeal on the substantive matter.

"471 Options to which this Chapter applies

(1) This Chapter applies to a securities option acquired by a person where the right or opportunity to acquire the securities option is available by reason of an employment of that person or any other person.

(2) For the purposes of subsection (1) "employment" includes a former or prospective employment.

(3) A right or opportunity to acquire a securities option made available by a person's employer, or a person connected with a person's employer, is to be regarded for the purposes of subsection (1) as available by reason of an employment of that person unless--

(a) the person by whom the right or opportunity is made available is an individual, and

(b) the right or opportunity is made available in the normal course of the domestic, family or personal relationships of that person.

(4) A right or opportunity to acquire a securities option available by reason of holding employment-related securities is to be regarded for the purposes of subsection (1) as available by reason of the same employment as that by reason of which the right or opportunity to acquire the employment-related securities was available.

(5) In this Chapter--

"the acquisition", in relation to an employment-related securities option, means the acquisition of the employment-related securities option pursuant to the right or opportunity available by reason of the employment,

"the employment" means the employment by reason of which the right or opportunity to acquire the employment-related securities option is available ("the employee" and "the employer" being construed accordingly), and

"employment-related securities option" means a securities option to which this Chapter applies."

77. It did not seem to be in dispute that the options in this case were "securities options". That that is correct is confirmed by s 420(8) which includes:

(8) In this Chapter and Chapters 2 to 5—

"securities option" means a right to acquire securities other than a right to acquire securities which is acquired pursuant to a right or opportunity made available under arrangements the main purpose (or one of the main purposes) of which is the avoidance of tax or national insurance contributions;"

while "securities" includes "shares", including shares in a body corporate wherever incorporated – s 420(1). Thus options over shares in Qlik Technologies Inc are securities options for the purpose of s 471.

Were the options granted "by reason of an employment?" – s 471

78. Chapter 5 then applies only to those securities options where the right or opportunity to acquire them was available to the appellant "by reason of an employment", which includes a former or prospective employment – s 471(1) and (2).

These subsections explain Mr Oborne's questioning of the appellant as to why he was given the opportunity to acquire the options.

79. We note that the term "by reason of … employment" has been used consistently in legislation on stock options since it was first enacted in FA 1966 (see s 25(9) FA 1966 set out in paragraph 73). That use predates the use of the same phrase in the benefits code (the provisions taxing benefits in kind introduced in 1948) where it first appeared in FA 1976. It was held by the Court of Appeal in *Wicks v Firth* 56 TC 318 that the term "by reason of" in the benefits code is wider than that used for emoluments generally where it was necessary to show that they came "from the employment" before they were taxable. In that case it was said by Lord Denning MR (at 339):

> "**By reason of his employment** - It seems to me that the words 'by reason of' are far wider than the word 'therefrom' in the 1970 Act. They are deliberately designed to close the gap in taxability which was left by the House of Lords in *Hochstrasser v Mayes*. The words cover cases where the fact of employment is the *causa sine qua non* of the fringe benefits, that is, where the employee would not have received fringe benefits unless he had been an employee. The fact of employment must be one of the causes of the benefit being provided, but it need not be the sole cause, or even the dominant cause. It is sufficient if the employment was an operative cause - in the sense that it was a condition of the benefit being granted. In this case the fact of the father being employed by I.C.I. was a condition of the student being eligible for an award. There were other conditions also, such as that the student had sufficient educational attainments and had a place at a University. But still, if the father's employment was one of the conditions, that is sufficient. If two students at a university were talking to one another - both of equal attainments in equal need - and the one asked the other 'Why do you get this scholarship and not me?', he would say 'Because my father is employed by I.C.I.'. That is enough. The scholarship was provided for the son 'by reason of the father's employment'."

80. Oliver LJ said (at 342/3):

> "The essence of Mr. Aaronson's submission is that the words 'by reason of' in s 61 are merely a synonymous alternative for the word 'from' as construed in that case and that they must be given the same meaning, so that the question to be asked (and one which the Commissioners, as a finding of fact, answered in the negative) is simply 'was the child's scholarship a remuneration or reward for the father's services?' He points out that the original charge to Schedule E in the 1842 Act was on salaries etc. 'accruing by reason of' an office or employment and that the fasciculus of sections with which this appeal is concerned is headed 'Benefits derived by company directors and others from their employment'. Thus, the argument runs, unless it can be said - and the question is one of fact for the Commissioners - that the benefit under consideration is provided, in effect, as part of the consideration for the rendering of the employees' services, it is not a benefit arising from or provided by 'reason of' the employment.
>
> Whilst I see the attraction of an argument which attributes to the legislature an admirable consistency in the expression of its intention, I find myself unable to accept Mr. Aaronson's submissions on this point. Accepting once more that the

> subject is not to be taxed except by clear words, the words must, nevertheless, be construed in the context of the provisions in which they appear and of the intention patently discernible on the face of those provisions, from the words used. As it seems to me, the obvious intention of this legislation - presumably in an attempt to produce fairness between taxpayers - is to impose tax on the value of those otherwise untaxed advantages which the employee enjoys because he is employed, advantages which may not even accrue to him directly but which, because of their receipt by a member of his household, benefit him by relieving him of an expense which he might otherwise expect to bear out of his own resources. These are, in many cases, by definition, benefits which could not in any ordinary sense be attributed to a reward for the employee's services - for instance the use of a car for the private purposes of a member of the employee's family or an interest-free loan to one of his relatives - and to restrict the operation of the section in the way suggested by Mr. Aaronson would, in my judgment, virtually deprive it of any operation at all in the case of benefits other than those provided to the employee himself. Speaking only for myself I do not in the case of this legislation, find the philosophical distinction between a '*causa causans*' and a '*causa sine qua non*' helpful. I see no reason why a benefit 'derived' from the employment (to use the words of the chapter title) necessarily has to be invested with an intention on the part of the employer to remunerate the employee for the performance of his duties. One is directed to see whether the benefit is provided by reason of the employment and in the context of these provisions that, in my judgment, involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it."

81. We have found (paragraph 30) on the basis of the evidence in this case that what it was that enabled the appellant to obtain the option, the right to acquire shares in the words of s 471, was an employment, which includes a prospective employment for the purposes of that section. We further found that if it was not the sole cause it was a dominant cause, which in accordance with Lord Denning's judgment is enough to decide that the options were granted by reason of the employment. We therefore hold that the option granted to the appellant was a right or opportunity as mentioned in s 471(1) and (2) and is therefore an "employment-related securities option" within the meaning of s 471(6).

82. But we also think that Mr Oborne's questions were unnecessary. Subsection (3) of s 471 provides an irrebuttable presumption that a right or opportunity to acquire options that is given by an employer or a connected person is given by reason of the employment, unless the employer is an individual. We have assumed from the Citigroup transaction record that the options in this case were granted by the US company Qlik Technologies Inc and we assume, in the absence of any evidence to the contrary, that that company is connected with QlikTech UK Ltd, the actual employer in this case. Neither of these is of course an individual, so we hold that this subsection applies to the appellant.

The charge to tax on employment-related securities options

83. But s 471 does not itself impose any charge to tax. For that we have to dig deeper into Chapter 5 where first we find s 473 which tells us that liability to tax may arise where securities are acquired pursuant to the options within the Chapter.

84. Then we come to s 476 which is the section that comes closest to being a charging section. It provides that on a "chargeable event" (see paragraph 86 for a discussion of what this means) the "taxable amount" (see paragraph 87ff for a discussion of what this means) counts as employment income of the employee for the relevant tax year. The significance of something "counting as employment income" is nowhere alluded to in s 476 or anywhere else in Part 7, but going back to Part 1 we find in s 7 that "employment income" includes any amount which counts as employment income and is listed in sub-s (6). Going to that subsection there is listed Part 7 of which s 476 forms part. But there is no charge to tax on "employment income" as such in ITEPA. Section 6 appears at least to impose the charge to tax (it certainly cannot be found anywhere else in ITEPA) but that charge is on (a) general earnings and (b) "specific" employment income. Back to s 7 and we find that "specific employment income" means "employment income" except any that is exempt – s 7(3).

85. So there is the charge to which the s 29 TMA assessment relates. The assessment charges an amount of £75,679. This, it is apparent from the evidence, is the amount included in the P14 that was not in the P45. It was therefore the amount treated by the employer as PAYE income for the purposes of Part 11 and the PAYE Regulations. It was doubtless for that reason that HMRC cited to us ss 696 and 700 on the amount on which PAYE should be withheld. Neither the appellant nor Mr Norman disputed this amount, and given that their main ground of appeal was that no amount was due, that is not surprising. A strict view would be that in those circumstances the amount of the further assessment to income tax stands, but we consider that where an appellant is unrepresented or represented by someone who is not a tax expert, or not one in an area as complicated as this undoubtedly is, the Tribunal should ensure that HMRC's contentions as to the amount of the liability are correct, and this we proceed to do.

The amount which "counts as employment income"

86. To find the amount which counts as employment income we need to establish what is meant by a "chargeable event" and by "the taxable amount". Section 477(3) includes as a chargeable event relevant to this case "the acquisition of securities pursuant to the employment-related securities option by an associated person". At this point we consider that any experienced reader of tax law would pass over this subsection to look for the event where it is the *employee*, not an associated person, who acquires the securities. That reader would search in vain, because by going back to s 472 we find what to our mind is a singularly confusing and unhelpful definition section. In s 472(1)(a) we are told that an "associated person" is "the person who acquired the employment-related securities option on the acquisition" (which doesn't, also confusingly, mean the acquisition of the shares – s 471(5)) and in s 472(1)(b) "(if different) the employee", as well as, in s 472(1)(c) any "relevant linked person" (ie

the person who any normal legislation would describe as an associated person). But at least we have found our event in this case, and we hold that the appellant is an "associated person" by virtue of s 472(1)(a) (though who he is meant to be associated with is wholly unclear) who has acquired securities (the Qlik Technologies Inc shares) pursuant to an employment-related securities option.

87. Section 478 tells us the taxable amount. It is AG – DA. AG is amount of any "gain realised on the occurrence of the chargeable event". Expanding that last term by reference to s 477 the meaning of AG is:

> "any gain realised on the *acquisition* of securities pursuant to the employment-related securities option" [Our emphasis]

88. This is another confusing phrase. In this form it first arose in the ss 477 and 478 which FA 2003 substituted for the original sections. In the original version of Part 7 s 476(1) provides:

> "(1) This section applies if the employee realises a gain by *exercising*, assigning or releasing the share option." [Our emphasis]

and this wording goes back to the introduction of the charge to tax in s 25(1) FA 1966 (see paragraph 73).

89. The United Kingdom's income tax is a system of tax which economists regard as a "realisation-based" system, that is one where no liability to tax can arise unless some income or gain has been "realised". Realisation happens when periodic income is received or an interest in assets is sold or exchanged for a consideration. That consideration need not be money but may be money's worth. Where the consideration is shares the courts have consistently held that there is a realisation for the purposes of the income tax charge under Case I of Schedule D (trading) and that the amount to be taken into account is the market value of the shares (*The Royal Insurance Co Ltd v Stephen (HM Inspector of Taxes)*14 TC 22, *Gold Coast Selection Trust Ltd v Humphrey (HM Inspector of Taxes)* 30 TC 209). The courts have also consistently held in those circumstances there is a realisation for the purposes of the charge to income tax under Schedule E (employment income) (*Weight (HM Inspector of Taxes) v Salmon* 19 TC 174, *Tyrer v Smart (HM Inspector of Taxes)* 52 TC 533). But in *Varty (HM Inspector of Taxes) v British South Africa Co* 42 TC 406, the House of Lords held that there is no realisation for the purposes of Case I of Schedule D when an option is exercised to acquire the shares over which it was granted.

90. That would seem to be conclusive that the exercise of an option is not its realisation. But against that is the judgment of Hoffmann J (as he then was) in the Chancery Division in *Ball (HM Inspector of Taxes) v Phillips* 63 TC 529 (*Phillips*). There he says, in relation to s 186 ICTA 1970, the statutory predecessor but one of s 476(1) as originally enacted:

> "The second condition is that he should have realised a gain within the meaning of the section by the exercise of that right. Again, there is really no dispute that the exercise of the right produced a gain within the meaning of s 186(3)."

91. Faced with a House of Lords decision which says as part of the reasons for decision that exercise of an option is not a realisation for the purposes of Case I of Schedule D, and a judgment of the High Court by a judge of the eminence of the future Lord Hoffmann which is to some extent at least obiter ("there is no dispute" presumably between the parties) but which is on the very legislation that applies in this case, we admit to some doubt as to which we should follow. It is clear that the Special Commissioners (see *Employee v CIR* (SpC 673) Dr Nuala Brice) have assumed that Lord Hoffmann's judgment was a correct reflection of the law, and because that case concerned the pre-Rewrite version of the very legislation with which we are concerned here we consider we should follow *Phillips*.

92. Thus if the matter were to be decided under the originally enacted Part 7, we would have held that there had been a gain realised on the exercise. Does it make any difference that the FA 2003 version, which is what applies in this case, talks about a "gain realised on the *acquisition*" of the *shares*, not the *exercise* of the *option*? There cannot be any presumption, as there was as between ITEPA and s 135 ICTA 1988 which in turn consolidated s 186 ICTA 1970, that FA 2003 did not change the law.

93. The conclusion we come to on this is that the FA 2003 legislation uses a shorthand expression to encompass the notion that a gain is realised by the exercise of the option to acquire the shares, and that *Phillips* applies here. So to hold is consistent with the evident purpose of Chapter 5 of Part 7 which we identified in paragraph 74.

94. That established, we then go to s 479 which tells us what the amount realised is: MV – C. As its abbreviation suggests, MV is the market value of the securities acquired pursuant to the exercise of the option at the time they are acquired, while C is the amount given for the acquisition, ie the option exercise price.

95. Section 480 defines the deductible amount (DA) as the consideration given for the acquisition of the option (which in this case was nil) and the amount of any expenses associated with the acquisition of the securities.

96. Finally s 481 provides for a relief to be given against the taxable amount in any case where arrangements have been entered into for the employee to pay the Class I National Insurance contribution otherwise payable by the "secondary contributor" (commonly called "Employer's NIC") on the gain.

97. Pulling this altogether in the appellant's case we can see from the Citigroup record that:

MV = 6,563 x $22.9169 = $150,403

C = 6,563 x $1.65 = $10,829

Therefore AG = $139,574

DA = $333

AG – DA = $139,241

98. This mirrors in dollars the CGT computation in the appellant's tax return. The main difference between the two is that the consideration for the purposes of CGT,

which is actually a realisation based tax, is the proceeds of sale of the shares, not the market value of the option. But the amounts are the same. We can accept the CGT computation as an appropriate sterling version of the s 478 amount if the correct and a consistent exchange rate have been used. Unfortunately they haven't. The proceeds have been converted at a rate of $1.6/£1. The acquisition cost seems to use $1.42/£ and the transaction costs have not been converted, or looked at another way have been converted at $1/£1. Exchange rates are of course publicly available information and we find that the spot rate for the day of the transaction was $1.60 to the nearest whole cent. Therefore the sterling equivalent of the s 476 gain is £87,025 and that is the amount which we consider counts as employment income.

99. This exceeds the HMRC figure used in the s 29 assessment by £11,346. How is this explained? Since HMRC used the P14 information to decide the amount to be assessed, the first place to look is at the law of PAYE in s 700 and any relevant regulations. Section 700(2) tells us that the amount on which PAYE is to be operated is the amount "likely to count as employment income". This ought to be the s 476 amount but that is £87,025 and the amount on which PAYE was operated was £75,679. How then is the difference to be accounted for? A possible clue is in s 700(4A). This provides that amount on which PAYE is to be operated is the amount after deducting any relief under s 481. Those sections give relief (as mentioned in paragraph 96) for the Employer's NIC charge on the payment which is met by the employee. From the P14 (see paragraph 16) we can see that Employer's NIC due from the employer was £23,347. The rate of Employer's NIC in the tax year was 12.8% so grossing that figure up at 12.8% gives £174,585. Given the closeness of this figure to the total pay and allowing for the fact that Employer's NIC has a (low) threshold and that the appellant was not employed for the whole year, it seems reasonable to assume that the discrepancy is explained by the fact that the appellant had agreed to pay the employers NIC and was entitled to relief under s 481. If that is right then the appellant is entitled to that relief in computing the s 476 liability.

Conclusion on the assessment to income tax

100. We do not have any evidence to show that the amount of the income which was not self-assessed by the appellant and should be charged to tax by the s 29 TMA assessment is any greater than £75,679.

CGT consequences

101. HMRC seemed from the correspondence to think that a CGT assessment on the disposal of the shares cannot stand in the face of an income tax assessment on the acquisition of the options. The reviewing officer said to the appellant that the CGT element of the s 29 TMA assessment would be removed. In their statement of case HMRC listed the "matters under appeal" as:

Year	**Date of issue**	**Description**	**Amount**
2010-11	26 March 2014	Discovery assessment	£20,212.44 but to be amended to £12,637.14

with the amending apparently to be done by HMRC.

102. The Tribunal asked Mr Oborne on what authority the assessment could be amended by HMRC. He accepted that, other than by a s 54 TMA agreement which was not relevant here, it could only be done by the Tribunal under its powers in s 50 TMA. We observe that s 30A(4) TMA is still good law and says:

> "After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.".

And officers of HMRC might like to reflect that it is only just over 50 years since the repeal of a provision which charged a penalty of £50 on any person who "makes, causes, or allows to be made, in any assessment, any unauthorised alteration" – s 50(1) Income Tax Act 1952.

103. It is also clear from the evidence that the reviewing officer expected the case officer to remove the CGT amounts from the assessment because there was no gain within the scope of CGT, and that position arose because there was an income tax charge on the stock options which had been taxed under PAYE. This is also incorrect though it remains a popular fallacy.

104. In Appendix 2 we consider the CGT implications of our finding. We do this primarily to assist the appellant in formulating any claims he might have to reduce his CGT liability, and secondarily to give some pointers to the HMRC staff who will be dealing with any such claims who may be unfamiliar with this somewhat arcane area of tax law.

105. In that Appendix we also consider what avenues may be open to the appellant and HMRC to give effect to the CGT consequences of our decision. As we have not had the benefit of argument on these points any conclusions are necessarily tentative, but we hope that they will enable the appellant and HMRC to reach a satisfactory outcome for those matters which in this Tribunal we are unable to determine in the absence of a relevant appealable decision.

Overall conclusion

106. We have held that the amount counting as employment income which ought to be charged to tax is, after giving s 481 relief, £75,679, no greater than the amount implicitly charged in the further assessment made under s 29 TMA. Our powers to deal with the s 29 assessment are in s 50(6)(c) and (7)(c) TMA. In relation to the assessment we hold that, in accordance with s 50(6)(c) and the fullout words, the appellant is not overcharged by the assessment which is not a self-assessment, and therefore the assessment stands good. Section 50(6) is however implicitly subject to s 50(7) TMA and we have to also consider whether the appellant is undercharged by the self-assessment. In relation to that we hold that the appellant is not undercharged and we do not increase the assessment, with the result that it remains stood good.

107. We have briefly considered whether s 50(8) TMA has any bearing on the appeal. It applies in the case of an assessment which is not a self-assessment which is

the case here. But it is of relevance only, it seems, where our decision under s 50(6) or (7) would have been to increase or reduce only the amounts assessed and not the tax charged, leaving HMRC to make the necessary calculations and to amend the tax charged figure. In this case we have done neither. But we observe that had we decided for example that the amount that counts as employment income by virtue of s 476 was in fact less than the amount put forward by HMRC, we would have been in some difficulty in complying with s 50(8). That is because the document which is said to be the notice of the assessment refers only to the amount of tax charged by the further assessment (which is why we used the word "implicitly" in paragraph 106). Included with the notice of assessment was a tax calculation consisting of two columns. The first column shows the figures in the self-assessment. The second column shows the total figures after increasing the relevant amounts (employment income and PAYE deducted) or decreasing them (personal allowances, because of the effect of s 4 FA 2009) and applying the appropriate rates of tax to the new totals. To work out what the amount of the further assessment made under s 29 is requires an exercise in arithmetic which has not been undertaken by HMRC (nor has it been programmed into its computer). The amount of tax charged by the further assessment is shown on both the notice of assessment and the tax calculation. Thus it would only be with some difficulty and inconvenience that we could do what s 50(8) would have permitted us to do.

108. We also observe that is hardly convenient or helpful for taxpayers not to show the figures relating to the further assessment. Before computerisation of the assessing process a further assessment would have been issued in a three column format with the additional amounts clearly distinguished.

The penalty issue

109. We have set out the opening sentence of this decision in the way we have because a matter arose which was not covered by the appeal before us. We noted from the papers we had that an assessment had been made on the appellant under paragraph 13 Schedule 24 FA 2007 of a penalty for an inaccuracy in his return which was regarded by HMRC as deliberate. The inaccuracy identified was the omission from his return of the amount of income which is the subject of the appeal against the s 29 TMA assessment.

110. There appears to have been no appeal against the penalty, but Mr Oborne had on behalf of HMRC given an undertaking to the appellant that were the appellant to succeed before the Tribunal he would ensure that the penalty assessment was removed. Mr Oborne repeated that undertaking before us and we so record. But it occurred to us that there might be circumstances under which the appellant would not succeed in his appeal, but where there was no question of carelessness. Mr Oborne also undertook that in these circumstances he would also ensure that the penalty assessment was cancelled. This is in fact the outcome of the appeal.

111. We harbour some doubts about how exactly a penalty which has not been appealed can be cancelled. The most likely ways are either through the exercise of HMRC's powers of "collection and management of revenue" (s 5(1)(a) CRCA) or through the giving of a special reduction under paragraph 11 of Schedule 24 FA 2007,

a discretion that, in our view, does not require the existence of an appeal before it may be exercised. We add that we do not think that s 32 TMA (see Appendix 2) would help the appellant in such a case.

112. Because of these doubts we did consider whether to invite the appellant to make an on-the-spot appeal to Mr Oborne (in writing) which would give him as an officer of HMRC the opportunity to either accept the late giving of the appeal or to refuse it and to immediately refer the matter to us for a decision under s 49(2)(b) TMA. But in view of his unequivocal undertakings we decided not to embark on that rather dramatic course.

113. It will be seen from paragraphs 65 and 69 of this decision that the situation discussed in paragraph 110 has come about, that is we have upheld the assessment to income tax but have held that the appellant's conduct was not careless.

Decision.

114. Under s 50(6) TMA we decide that the assessment to income tax stands good. Therefore the appeal is dismissed.

115. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 22 June 2015

APPENDIX

Legislation relating to the this case

INCOME TAX (EARNINGS AND PENSIONS) ACT 2003

471 Options to which this Chapter applies

(1) This Chapter applies to a securities option acquired by a person where the right or opportunity to acquire the securities option is available by reason of an employment of that person or any other person.

(2) For the purposes of subsection (1) "employment" includes a former or prospective employment.

(3) A right or opportunity to acquire a securities option made available by a person's employer, or a person connected with a person's employer, is to be regarded for the purposes of subsection (1) as available by reason of an employment of that person unless--

> (a) the person by whom the right or opportunity is made available is an individual, and
>
> (b) the right or opportunity is made available in the normal course of the domestic, family or personal relationships of that person.

(5) In this Chapter--

"the acquisition", in relation to an employment-related securities option, means the acquisition of the employment-related securities option pursuant to the right or opportunity available by reason of the employment,

"the employment" means the employment by reason of which the right or opportunity to acquire the employment-related securities option is available ("the employee" and "the employer" being construed accordingly), and

"employment-related securities option" means a securities option to which this Chapter applies.

472 Associated persons

(1) For the purposes of this Chapter the following are "associated persons" in relation to an employment-related securities option--

> (a) the person who acquired the employment-related securities option on the acquisition,
>
> (b) (if different) the employee, and

(c) any relevant linked person.

(2) A person is a relevant linked person if--

(a) that person (on the one hand), and

(b) either the person who acquired the employment-related securities option on the acquisition or the employee (on the other),

are or have been connected or (without being or having been connected) are or have been members of the same household.

(3) But a company which would otherwise be a relevant linked person is not if it is--

(a) the employer,

(b) the person from whom the employment-related securities option was acquired, or

(c) the person by whom the right or opportunity to acquire the employment-related securities option was made available.

473 Introduction to taxation of securities options

(1) The starting-point is that section 475 contains an exemption from the liability to tax that might otherwise arise under--

(a) Chapter 1 of Part 3 (earnings), or

(b) Chapter 10 of that Part (taxable benefits: residual liability to charge),

when an employment-related securities option is acquired.

(2) Liability to tax may arise, when securities are acquired pursuant to the employment-related securities option, under--

(a) …

(b) …

(c) section 476 (acquisition of securities pursuant to securities option).

…

475 No charge in respect of acquisition of option

(1) No liability to income tax arises in respect of the acquisition of an employment-related securities option.

476 Charge on occurrence of chargeable event

(1) If a chargeable event occurs in relation to an employment-related securities option, the taxable amount counts as employment income of the employee for the relevant tax year.

(2) For this purpose--

(a) "chargeable event" has the meaning given by section 477,

(b) "the taxable amount" is the amount determined under section 478, and

(c) "the relevant tax year" is the tax year in which the chargeable event occurs.

(3) Relief under section 481 or 482 (relief for secondary Class 1 contributions or special contribution met by employee) may be available against an amount counting as employment income under this section.

477 Chargeable events

(1) This section applies for the purposes of section 476 (charge on occurrence of chargeable event).

(2) Any of the events mentioned in subsection (3) is a "chargeable event" in relation to the employment-related securities option unless it occurs on or after the death of the employee.

(3) The events are--

(a) the acquisition of securities pursuant to the employment-related securities option by an associated person,

…

(4) For the purposes of subsection (3)(a) securities are acquired at the time when a beneficial interest is acquired (and not, if different, the time when the securities are conveyed or transferred).

…

478 Amount of charge

(1) The taxable amount for the purposes of section 476 (charge on occurrence of chargeable event) is--

$$AG - DA$$

where--

AG is the amount of any gain realised on the occurrence of the chargeable event, and

DA is the total of any deductible amounts.

(2) Section 479 explains what is the amount of any gain realised on the occurrence of a chargeable event.

(3) Section 480 specifies what are deductible amounts.

479 Amount of gain realised on occurrence of chargeable event

(1) This section applies for the purposes of section 478 (amount of charge on occurrence of chargeable event).

(2) The amount of the gain realised on the occurrence of an event that is a chargeable event by virtue of section 477(3)(a) (acquisition of securities) is (subject to subsection (4))--

$$MV - C$$

(3) In subsection (2)--

MV is the market value of the securities that are acquired at the time when they are acquired, and

C is the amount of any consideration given for the securities that are acquired.

480 Deductible amounts

(1) This section applies for the purposes of section 478 (amount of charge on occurrence of chargeable event).

(2) The amount of--

> (a) any consideration given for the acquisition of the employment-related securities option, and
>
> (b) the amount of any expenses incurred in connection with the acquisition of securities, assignment, release or receipt which constitutes the chargeable event,

is a deductible amount.

481 Relief for secondary Class 1 contributions met by employee

(1) Relief is available under this section against an amount counting as employment income under section 476 if--

> (a) an agreement having effect under paragraph 3A of Schedule 1 to the Contributions and Benefits Act has been entered into allowing the secondary contributor to recover from the employee the whole or part of any secondary Class 1 contributions in respect of the gain, or

(b) an election having effect under paragraph 3B of Schedule 1 to that Act is in force which has the effect of transferring to the employee the whole or part of the liability to pay secondary Class 1 contributions in respect of the gain.

(2) The amount of the relief is the total of--

(a) any amount that under the agreement referred to in subsection (1)(a) is recovered in respect of the gain by the secondary contributor before 5th June in the tax year following that in which the gain is realised, and

(b) the amount of any liability in respect of the gain that, by virtue of the election referred to in subsection (1)(b), has become the employee's liability.

(3) If notice of withdrawal of approval of the election is given, the amount of any liability in respect of the gain for the purposes of subsection (2)(b) is limited to the amount of the liability met before 5th June in the tax year following that in which the gain is realised.

(4) Subsection (1) does not apply in respect of a liability to pay Class 1 contributions which is prevented from arising by virtue of section 2(1)(a) of the Social Security Contributions (Share Options) Act 2001 (liability to pay Class 1 contributions in respect of gains replaced by liability to pay special contribution).

(4A) Relief under this section is given by way of deduction from the amount otherwise counting as employment income.

(4B) Relief under this section does not affect the amount to be taken into account--

(a) as employment income in determining contributions payable under the Contributions and Benefits Act, or

(b) as relevant employment income for the purposes of paragraph 3A or 3B of Schedule 1 to that Act.

(5) In this section--

"approval", in relation to an election, means approval by the Commissioners for Her Majesty's Revenue and Customs under paragraph 3B of Schedule 1 to the Contributions and Benefits Act, and

"secondary contributor" has the same meaning as in that Act (see section 7).

696 Readily convertible assets

(1) If any PAYE income of an employee is provided in the form of a readily convertible asset, the employer is to be treated, for the purposes of PAYE regulations, as making a payment of that income of an amount equal to the amount given by subsection (2).

(2) The amount referred to is the amount which, on the basis of the best estimate that can reasonably be made, is the amount of income likely to be PAYE income in respect of the provision of the asset.

700 PAYE: gains from securities options

(1) This section applies where by reason of the operation of section 476 (acquisition of securities pursuant to securities option etc) in relation to an employment-related securities option an amount counts as employment income of an employee.

(2) In a case where the amount counts as employment income by virtue of section 477(3)(a) (acquisition of securities), sections 684 to 691 and 696 have effect as if--

> (a) the employee were provided with PAYE income in the form of the securities by the employer on the relevant date, and
>
> (b) the reference in subsection (2) of section 696 to the amount of income likely to be PAYE income in respect of the provision of the asset were to the amount likely to count as employment income.

…

(4A) For the purposes of this section the amount likely to count as employment income under section 476 means the amount after deducting the amount of any relief likely to be available under section 481 or 482 (relief for secondary Class 1 contributions or special contribution met by employee).

(5) In this section "the relevant date" means the date on which the chargeable event in question occurs.

(6) In this section--

"employment-related securities option", and

"securities",

have the same meaning as in Chapter 5 of Part 7.

710 Notional payments: accounting for tax

(1) If an employer makes a notional payment of PAYE income of an employee, the employer must, subject to and in accordance with PAYE regulations, deduct income tax at the relevant time from any payment or payments the employer actually makes of, or on account of, PAYE income of the employee.

(2) For the purposes of this section--

> (a) a notional payment is a payment treated as made by virtue of any of sections 687, 689 and 693 to 700, other than a payment whose amount is given by section 687(3)(a) or 689(3)(a), and

(b) any reference to an employer includes a reference to a person who is treated as making a payment by virtue of section 689(2).

(3) Subsection (4) applies if, because the payments actually made are insufficient for the purpose, the employer is unable to deduct the full amount of the income tax as required by subsection (1).

(4) The employer must, subject to and in accordance with PAYE regulations, account to the Commissioners for Her Majesty's Revenue and Customs at the relevant time for an amount of income tax equal to the amount of income tax the employer is required, but is unable, to deduct.

(5) PAYE regulations may make provision--

(a) with respect to the time when any notional payment (or description of notional payment) is made;

(b) applying (with or without modifications) any specified provisions of the regulations for the time being in force in relation to deductions from actual payments to amounts deducted or accounted for (or required to be deducted or accounted for) in respect of any notional payments;

(c) with respect to the collection and recovery of amounts deducted or accounted for (or required to be deducted or accounted for) in respect of notional payments.

(6) Any amount--

(a) which an employer deducts as mentioned in subsection (1), or

(b) for which an employer accounts as mentioned in subsection (4),

is to be treated as an amount of tax which, at the time when the notional payment is made, is deducted in respect of the employee's liability to income tax.

(7) "The relevant time" means subject to subsection (7A))--

(a) in subsection (1), any occasion--

(i) on or after the time when the notional payment is made, and

(ii) falling within the same income tax period,

on which the employer actually makes a payment of, or on account of, PAYE income of the employee;

(b) in subsection (4), any time within 14 days of the end of the income tax period in which the notional payment was made.

INCOME TAX (PAY AS YOU EARN) REGULATIONS 2003 (SI 2003/2682)

37--(1) This regulation applies if a relevant payment is made to an employee after the employment has ceased--

(a) by the former employer in respect of the former employment, or

(b) by any other person in respect of an obligation of the former employer,

and the payment has not been included in Form P45.

(2) The person making the payment must deduct tax at the basic rate in force for the tax year in which the payment is made.

(5) The person making the payment must record the following information in a deductions working sheet (which the person must prepare for the purpose if one has not already been prepared for that tax year).

(6) The information is--

(a) the date of the payment,

(b) the amount of the relevant payment, and

(c) the amount of tax deducted on making the payment, or to be deducted or accounted for under regulation 62(4) or (5) (notional payments).

(7) The person making the payment must also notify the employee of the information mentioned in paragraph (6) without unreasonable delay.

62--(1) This regulation applies if an employer makes a relevant payment which is a notional payment (including a notional payment arising by virtue of a retrospective tax provision) to an employee.

(2) The employer must, so far as possible, deduct tax required to be deducted in respect of a notional payment in accordance with any of the provisions listed in paragraph (3) from any relevant payment or payments which the employer actually makes to the employee at the same time as the notional payment.

(3) The provisions are--

regulation 37	PAYE income paid after employment ceased.

(4) If the employer cannot deduct the full amount of tax as required by paragraph (2) from another relevant payment made at the same time as the notional payment, the employer must, so far as possible, deduct the tax from any payment or payments which the employer makes later in the same tax period.

(5) If the relevant payments actually made are insufficient to enable the employer to deduct the full amount of tax due in respect of notional payments, the employer must account to the Board of Inland Revenue for any amount which the employer is unable to deduct.

(6) Regulations 23(5) and 28(5) (deductions on cumulative or non-cumulative basis not to exceed the overriding limit) do not apply to the extent that the tax to be deducted is in respect of a notional payment.

APPENDIX 2

CGT consequences of our decision

Introduction

1. Tax law adopts a number of approaches to the possibility of (domestic) double taxation. In a schedular system such as the UK still has, despite the rewriting of it in Income Tax (Trading and Other Income) Act 2005 (ITTOIA), there are explicit rules governing the priority of one type of income over another – see eg s 4 ITTOIA. There is not, and there never has been, any such rule giving priority as between income tax and CGT. In some suitable cases the conflict is solved by making a transaction explicitly exempt from the tax on gains: for example, all assets representing loan relationships are treated as qualifying corporate bonds for the purposes of the Taxation of Chargeable Gains Act 1992 (TCGA) as it applies to corporation tax and so they are exempt from tax under the provisions of that Act. But the general rule governing any conflict is found in ss 37 and 39 TCGA.

2. Those sections provide (in broad terms) that there is excluded from the consideration for the disposal of an asset (for the purposes of TCGA) and money or money's worth charged to income tax or taken into account in computing income, and there is deducted from the sums allowable as a deduction for those purposes any expenditure allowable as a deduction in computing any income for the purposes of income tax. This will usually result (but need not) in any chargeable gain or allowable loss being reduced to nil. But it doesn't exempt it or prevent a charge arising in the first place.

3. How the do these provisions apply to the chargeable gain in this case? The first question is whether there is in the circumstances of this case any money or money's worth taken into account in computing the employment income charge under s 476 which has also been included in the consideration for disposal of assets. The answer appears to be no. The CGT computation starts correctly with the consideration for the disposal of the shares acquired as a result of exercising the options. The s 476 charge has as its starting point the market value of the shares acquired as a result of the exercise, which is not the same thing. In fact there is no requirement in s 476 that the shares acquired should have been disposed of, and every reason not to make that a requirement (or the charge could be avoided simply by continuing to hold the shares). Section 37 TCGA does not therefore apply.

4. Section 39 applies to expenditure. The expenditure for the purposes of the CGT computation consists of the exercise price in the options and the costs of the transaction. The former, the amount paid for the acquisition of the shares, features as part of DA in the calculation of the amount of the charge in s 478 . It seems therefore clearly to count as deductible in computing income (after all DA stands for "deductible amounts"). The transaction costs (amounting to $333) relate to the total transaction of acquisition and sale – as shown on the Citigroup record. It is not clear if, in arriving at the amount on which PAYE was charged, the amount likely to count as employment income, the employer deducted these costs, but in the absence of clear

evidence either way we assume they were so deducted and that they fall to be treated as falling within s 39 TCGA.

5. On the face of it and looking just at ss 37 and 39 TCGA, the chargeable gain in this case is greater than that reported, since the costs all fall to be excluded, but the consideration for the disposal does not. Fortunately for the appellant that is not the whole story, as there is special legislation on this type of case to be found in ss 119A and 120 TCGA. Each of them refers to an amount counting as employment income under s 476: but that leads to the question which one applies in this case?

Sections 119A and 120 TCGA: which applies?

6. We have found it difficult to see from a first or even second reading which of the sections applies.

7. Considering s 119A TCGA we have difficulty in seeing that the case with which it deals encompasses this case. S 119A(1) applies to the disposal of an asset consisting of "employment-related securities" (ERS). In this case the disposal concerned is of the shares in Qlik Technologies Inc acquired by the appellant following the exercise of his options granted to him by reason of his employment, so we need to see if they are ERS (which a common sense view would suggest they are, given that we have held that the appellant acquired his options by reason of his employment). Section 119A(7) says that in that section ERS has the same meaning as in Chapters 1 to 4 of Part 7.

8. Chapter 1 is a general Chapter applying to the whole of Part 7, while Chapters 2 to 4 (which consists of seven Chapters in all) contains specific charges to tax in relation to securities with different characteristics. In each of those Chapters there is a definition section which states that ERS has the meaning given by s 421B(8) (which is in Chapter 1), so it is not immediately clear why s 119A refers to Chapters 2 to 4 rather than just to Chapter 1 or to s 421B(8).

9. In s 421B(8) we find that ERS means "securities or an interest[1] in securities to which Chapters 2 to 4 apply" but in considering what that means we are bidden by words in parenthesis to ignore any provision of those Chapters which limits the application of the Chapter to a particular description of ERS. If we then go to Chapter 2, for example, we find that s 422 states simply "This Chapter applies to [ERS] if they are (a) restricted securities, or (b) a restricted interest in securities". By virtue of the parenthetical words in s 421B(8) we have to ignore that the securities are "restricted" securities, so we are left with the statement that the ERS that Chapter 2 applies to are ERS and that is all: except that there is a definition section in Chapter 2, s 432 which takes us back to s 421B(8) so that we have gone full circle! And the same apparent circularity is present in each of Chapters 3A to 3D and 4, each with their own definition section pointing back to s 421B(8).

10. A possible way out of this circle is in s 421B(1). That says:

---

[1] "Interest in securities" is defined in s 420(8) to exclude an option.

> "Subject as follows (and to any provision contained in Chapters 2 to 4A) those Chapters apply to securities, or an interest in securities, acquired by a person where the right or opportunity to acquire the securities or interest is available by reason of an employment of that person or any other person."

11. This meets the appellant's case exactly: his right to acquire the shares was available to him by reason of his employment, as we have held. But how much simpler it would have been to have said in s 119A(7) TCGA that ERS means securities acquired by a person "where the right or opportunity to acquire the securities or interest is available by reason of an employment of that person or any other person" or to refer directly to s 421B(1). Our eyes were diverted from s 421B(1) by the beguiling fact that s 421B(8) promised a definition of the very term that is used in s 119A TCGA.

12. It is therefore the case that the appellant here has disposed of ERS, but to fall within s 119A TCGA that disposal has to be the first disposal of ERS after an event "other than a disposal" which gives rise to a "relevant" income tax charge (this is in s 119A(1)(b), since s 119A(1)(a) does not apply here as the disposal of the shares does not in itself give rise to any income tax charge). One of the events listed in s 119A(3) that gives rise to such a charge is one arising by virtue of s 477(3)(a) – an acquisition of securities pursuant to an ERS option, which is the event in this case. That would seem to get us home and dry on s 119A TCGA but for one thing: the opening words of s 119A(3) defining an event giving rise to a relevant income tax charge require that the event is one which gives rise to an amount counting as employment income "in relation to employment-related securities". S 119A(3)(a) to (d) are clearly dealing with such securities. But s 119A(3)(e) is dealing with the exercise of an option to acquire securities, and such an option, a "securities option" (see s 420(8)) is not a security for the purposes of Part 7 – see s 420(5)(e). However "in relation to" is a widening term, and it does not seem to be too much of a stretch to say that "the acquisition of securities pursuant to the employment-related securities option" is an event (the one in s 477(3)(a)) which results in an amount counting as employment income which is an amount of income "in relation to" the ERS, the shares acquired. We therefore consider that s 119A TCGA is capable of applying in this case, but it has been a hard slog to get there.

13. As to s 120 TCGA it also seems on the face of it capable of applying because s 120(4) refers to ss 476 and 477. But it is necessary to consider the effect of s 120(9). That tells us that sub-s (4) must be construed by reference to Chapter 5 of Part 7 "as originally enacted". This is significant because a large part of Part 7 as originally enacted was replaced, and other parts amended heavily, by Schedule 22 FA 2003 with almost immediate effect. The s 476 under which the appellant has been taxed is the version as substituted by paragraph 10(1) Schedule 22 FA 2003, the date of grant of the options being after 16 April 2003 (see paragraph 10(2) Schedule 22 FA 2003). It follows that s 120 TCGA only applies if there is an amount which counted as employment income for the purposes of the original s 476. In this case as the options were granted after 2003 they must fall within the FA 2003 version, and s 120 TCGA does not apply. A further indication that it is only options falling within the scope of ITEPA as originally enacted with which s 120 TCGA is concerned is the reference to amounts counting as employment income under ss 476 *and* 477. In the

FA 2003 version of ITEPA only s 476 covers such amounts, s 477 being a definition section for "chargeable event". But in ITEPA as originally enacted s 477 is an independent charging section alongside s 476. We consider therefore that s 120 TCGA does not apply, but we think s 120 as it stood following amendment by FA 2003 goes about establishing that it does not apply to our case in an unnecessarily opaque way. We do however understand why there are puzzling aspects to the two sections we have considered here as we are aware that s 119A TCGA was inserted, and s 120 amended, by Schedule 22 FA 2003 and that Schedule, of formidable complexity, was drafted under extreme time pressures, and that it is a tribute to the Parliamentary Counsel who drafted it under those pressures that it is as good as it is.

14. The operative rule in s 119A(2) TCGA (which we think does apply) is that "the relevant amount" is treated as part of the cost of acquisition of the shares allowable under s 38(1)(a) TCGA in computing a gain on the disposal of them. That relevant amount, the amount counting as employment income (s 119A(4)) is £87,025. Deducting that as s 38(1)(a) costs give a revised chargeable gain as follows:

A Consideration for disposal	£93,836 (as returned)
less	
B Actual Cost of shares (exercise price plus transaction costs)	£6975 less amount excluded under s 39 TCGA £6975 = nil
C Deemed cost of shares under s 120(4) TCGA	£87,025
Gain A – (B + C)	£6811

15. That there is apparently a gain of any amount is surprising and non-intuitive.. In this case the gain is covered by the annual exemption for the first £10,100 of gains. But it is mere happenstance that this is the case. In others the cost of the shares that is apparently left out of account (because it counts as DA) might be larger, or there may be other gains which use up the annual exemption, so we need to reconsider this non-intuitive result.

16. The cause of the gain is clearly the exclusion of the cost of shares from the CGT computation on the grounds that they have been taken into account in the Chapter 5 Part 7 computation as DA. (It can be seen that the gain differs marginally from the amount of the actual cost of the shares and that difference is almost certainly explained by slightly different assumptions about exchange rates being made). Those costs have also reduced the amount which is deducted under s 119A TCGA. We cannot see that there is anything in ss 39 or 119A TCGA or Chapter 5 that gainsays this treatment. Since we have not had the benefit of argument on this point it is possible that we are wrong about this, and the gain is actually nil. In this case, as we have said, it will not make any difference to the amount of relief which the appellant

may be entitled to, but it is a point HMRC should consider when dealing with any claim the appellant makes.

17. Finally we have noted that in making this computation the amount that counts as employment income for the purposes of s 119A TCGA is not reduced by the amount of any relief under s 481 – see s 119A(5)(b) TCGA. This is an odd proposition to state as s 481 provides that the amount concerned is given as a relief against the amount counting as employment income, and not as a deduction in computing it, and we would not expect it to be taken into account in determining the amount that counts as employment income. We further note as supporting our view that s 700(4A) had to make it explicit that the amount of employment income on which PAYE is operated is taken after giving the relief. (The position under s 120 TCGA seems to be the opposite. In ITEPA as originally enacted s 481 is part of the deductible amounts and so clearly reduces the employment income amount, but there is nothing in s 120 to prevent this deduction).

How can the CGT overcharge be reduced?

18. Again we are in some difficulty. The tax calculation accompanying the s 29 TMA assessment notice in its first column shows the appellant's chargeable gain of £75,773 and tax of £7,577.30. The second column shows the same figures, and so the further assessment does not charge any amount of chargeable gains or any CGT. This is correct as there is no loss of CGT with the meaning of s 29(1) TMA. We have given our reasons above for concluding that the consequence of our holding that the income tax assessment should stand good is that the amount of the chargeable gain made by the appellant on the disposal of the shares is of such an amount that no CGT is payable.

19. That conclusion did not follow from any argument put forward by the appellant who naturally enough was not appealing against the amount of the chargeable gain. But our upholding of the assessment under s 476 has the inevitable consequence that the computation of the chargeable gain is incorrect, because it does not take into account the expenditure treated by s 119A TCGA as falling within s 38 TCGA. Neither s 119A nor s 38 are dependent on a claim being made. But the question that then arises is whether the Tribunal, and if not the Tribunal the appellant, has the power to amend the self-assessment or otherwise to have things done so as to give effect to the consequences for CGT of our decision on income tax?

Does s 284 TCGA apply?

20. It seems to us that the first question is whether s 284 TCGA has any role to play in this situation. It provides that a decision on appeal against an assessment to income tax is conclusive so far as liability to CGT depends under any provision of TCGA on the provisions of the Income Tax Acts. This is the case here as liability to CGT depends on s 476 and we have decided on appeal that s 476 applies.

21. We do not think that s 284 TCGA has effect to enable us or anyone else to amend the self-assessment. It is, we think, merely establishing what the correct amount of any chargeable gain is. It means for example that a person cannot say that an amount falls to be excluded under s 37 TCGA which is greater than the amount

that ends up ,the conclusiveness of the income tax decision is given effect to. In days before self-assessment it might have been given effect to by a late appeal against the CGT assessment if it was not still open on appeal, but again it is not open to a taxpayer to appeal against their own self-assessment – s 31(1)(d) TMA.

Do ss 9ZA or 9ZB TMA apply?

22. What other remedies might there be? A person who has made a return and self-assessment under s 9A may amend it but only within twelve months of the filing date - s 9ZA TMA. Under s 9ZB TMA an officer of HMRC may correct a return if there is anything in the return that the officer has reason to believe is incorrect in the light of information available to the officer. That would be the case here, but again there is a time limit of nine months after the filing date. In both cases the time limit expired more than three years ago.

Does Schedule 1AB TMA apply?

23. A possible remedy where the time limit expired only a few months ago is s 33 of, and Schedule 1AB to, TMA (recovery of overpaid tax etc. *née* error or mistake relief). There is of course no error or mistake in the appellant's return, but that is not a requirement of Schedule 1AB. It requires a belief that tax which has been paid, or assessed but not paid, is not due. The appellant is now in a position to make that claim. We cannot, without further evidence, take a position on whether all the other conditions of the relief are met, and we must leave it to the parties to investigate that if appropriate.

Does s 32 TMA apply?

24. Finally there seems to be a possible remedy which does not have any time limit, and which has been held, or at least suggested, to be appropriate to this kind of situation, and that is s 32(1) TMA, which reads:

> "If on a claim made to the Board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period, they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly."

25. The somewhat old-fashioned tone of this provision suggests, correctly, that it is of ancient lineage. Section 164 of the Income Tax Act (ITA) 1803 also contained a provision allowing the assessing authorities to vacate all or part of an assessment if there was a double charge. The 1803 Act did not mention the "same cause", but that term is in ITA 1806. In s 171 ITA 1842 the term used was "matter or cause", but "matter" disappeared in ITA 1918 and is not present in any subsequent manifestation. But the use of "matter" does help to elucidate the meaning of "cause", which is an unusual usage in modern taxing provisions.

26. Section 32 is not without case law. The case that seems to come closest to the situation in the appeal is *Bye (HM Inspector of Taxes) v Coren* 60 TC 116 (*Coren*). In that case Mr Coren had been assessed to CGT on certain transactions in metals, and he had not appealed against the assessment. Subsequently the Inland Revenue raised

assessments on him and his wife to income tax on the basis that they were chargeable to income tax under Case I of Schedule D as traders in metals. When the appeals against those income tax assessment came before the General Commissioners for the Division of Highbury, the Commissioners were persuaded by counsel for the Corens that the income tax assessments could not stand in the face of the CGT assessment which was final, and that if they determined the income tax matter against his client that would amount to impermissible double taxation, a proposition for which he prayed in aid s 32 TMA. The Inspector argued that this was a case of alternative assessments and in the event that the Commissioners found for him on Case I, the CGT assessment would be reduced to nil by the operation of what is now s 37 TCGA 1992.

27. On appeal to the High Court, Scott J (as he then was) said that

> "No-one has ever supposed for a moment that the Revenue were intending to levy double taxation or doing anything other than keep open the various alternatives until the uncertainties as to whether the taxpayers had been engaging in trade and, if so, whether they had been so doing as individuals or partners had been resolved. It was obviously intended by the Revenue that if it were established that the taxpayers had been trading the capital gains tax assessment would fall away, and that if it were established that the taxpayers had not been trading the income tax assessments would fall away."

28. He went on to say on the question of what would happen if the Commissioners had upheld the Case I assessment:

> "In any event, the present case is not, in my judgement, one in which the relevant statutory provisions place a double taxation burden on the taxpayers' shoulders. I have been referred to ss 31 and 154 of the Capital Gains Tax Act 1979. Section 31(1) provides as follows:
>
> > 'There shall be excluded from the consideration for a disposal of assets taken into account in the computation under this Chapter of the gain accruing on that disposal any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts.'
>
> Section 154 provides:
>
> > 'Any assessment to income tax or decision on a claim under the Income Tax Acts, and any decision on an appeal under the Income Tax Acts against such an assessment or decision, shall be conclusive so far as under Chapter II of Part II of this Act, or any other provision of this Act, liability to tax depends on the provisions of the Income Tax Acts.'
>
> It is clear, therefore, that once an income tax assessment has been made in respect of a particular sum and has become final, that sum cannot be made the subject of a capital gains tax assessment against the person subject to the income tax assessment. In the present case the capital gains tax assessment has already been made and has become final. The income tax assessments have not yet become final and may never become final. Section 31 does not yet, in my view, bite. But suppose the hearing before the Commissioners had continued

> and the Commissioners had dismissed the appeals and confirmed the income tax assessments. The position would then have been reached that s 31 would apply and would require the conclusion that the capital gains tax assessment ought not to have been made. In those circumstances, the taxpayers would, in my judgement, be liable to pay under the income tax assessments but would have two possible avenues for relief against the earlier capital gains tax assessment.
>
> Section 32(1) of the Taxes Management Act 1970, provides:
>
> > 'If on a claim made to the Board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period, they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly.'
>
> I have been told that this provision was intended to provide relief against double taxation. It would enable Mr. Coren, on whom the capital gains tax assessment was made, to reclaim the whole capital gains tax in the event that the income tax assessment on him and Mrs. Coren together was confirmed."

29. It can be seen that the fact that there were two taxes involved, income tax and CGT, was not seen by Scott J as a bar to the operation of s 32 TMA.

30. The only issue is this case whether the income tax assessment under s 29 TMA and the self-assessment to CGT are in respect of the "same cause". In *Coren* the chargeable gain arose as a result of the disposal of the metals, and so did the Case I profit, and it seems it was obvious to Scott J that this was the "same cause". In this case the gain also arose from the disposal of the shares, but the income tax charge arose on their acquisition, microseconds before the disposal. But we consider it would be pedantic in the extreme, not to say perverse, for us to hold that that makes a difference. We would hold that a "cause" covers all aspects of the same transaction, and we are fortified in this view by the very existence of ss 119A and 120 TCGA which clearly see a sufficient nexus between the acquisition and the disposal for there to be given the relief for which they provide.

31. We would further add that in *Coren*, Scott J suggested that another remedy for the Corens would be a late appeal against the CGT assessments which he strongly hinted should be accepted by HMRC, and this remedy was also suggested by Lawton LJ in the Court of Appeal. The High Court hearing was in November 1984 and the assessments for 1978-79 and 1979-80, so the gap was longer in that case than it is in this. Of course one difference is that then a taxpayer could appeal against any assessment, but now they cannot appeal against a self-assessment. But it does suggest that should the appellant be entitled to claim under s 33 of, and Schedule 1AB to, TMA, HMRC should look sympathetically on such a claim being made late in the circumstances here. But if they accept that s 32 TMA applies, and that it has no time limit, the question of a late claim does not arise.

Conclusion on CGT

32. This rather lengthy disquisition on remedies for the appellant leads to this conclusion. HMRC have made it clear in correspondence that if they succeeded on

the charge on employment income the CGT aspect of the self-assessment should be amended. The Tribunal pointed out that this was not something they could do unilaterally, but has suggested that there are avenues open to the appellant, which realistically involve him either claiming relief under Schedule 1AB TMA and asking for his claim to be admitted even though it is slightly out of time, or claiming relief under s 32 TMA, or both. We are confident that, in the light of what is accepted about CGT in the correspondence and the Statement of Case, Mr Oborne will ensure that any claims made by the appellant are dealt with appropriately.