Neutral Citation: [2023] UKFTT 00749 (TC)

Case Number: TC08929

FIRST-TIER TRIBUNAL
TAX CHAMBER

Bristol Magistrates Court

Appeal reference: TC/2021/000926

payment following termination of share options – whether section 401 ITEPA applies– no

prior voluntary tax return – Tribunal decision striking out – interaction of sections 12D and section 50(10) Taxes Management Act 1970 – later return - whether section 12D(1)(c) Taxes Management Act 1970 applies – no - whether section 12D disapplied by section 87(4) Finance Act 2019 satisfied - no

Heard on: 22 and 23 June 2023
Judgment date: 05 September 2023

Before

TRIBUNAL JUDGE IAN HYDE
MOHAMMED FAROOQ

Between

PETER HEMINGWAY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant appeared in person

For the Respondents: Christopher Vallis litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The substantive issue in this appeal is whether a payment received by the Appellant shortly after his employer was the subject of a merger is taxable in full as being a payment in connection with the loss of the Appellant's share options or, alternatively, in respect of the loss of his employment rights and so attracting relief on the first £30,000 paid to him.

2. The Appellant further argues that the relevant closure notice was not valid because the enquiry into an earlier voluntary tax return submitted by the Appellant was validated retrospectively by section 12D Taxes Management Act 1970. HMRC argues that the original return was the subject of a final decision by this Tribunal and the retrospective effect of section 12D disapplied by section 87(4) Finance Act 2019.

3. In this decision references to "ITEPA", "TMA" and "FA19" are to sections in the Income Tax (Earnings and Pensions) Act 2003, the Taxes Management Act 1970 and the Finance Act 2019 respectively.

THE FACTS

4. The Appellant represented himself in this appeal. The Appellant supplied to the Tribunal extensive evidence, two witness statements and gave oral evidence. We found the Appellant to be a truthful and honest witness.

5. We find it necessary to note at the outset that, aside from the closure notice point which we address below, the Appellant devoted significant amounts of time and energy in correspondence prior to the hearing, in a case management hearing and in his witness statements to procedural issues around HMRC correspondence and behaviour in the investigation and appeal. This included consistent but oblique challenges to the propriety of HMRC's actions both at an organisational level but also in respect of individual HMRC officers. Indeed, the Appellant made reference to a "guiding hand" behind HMRC and raised concerns that as a result of HMRC behaviour taxpayers were not being given the proper opportunity to defend themselves against HMRC. At the beginning of the hearing the Appellant dropped these allegations. That being the case, in order to prevent HMRC having to challenge the Appellant's witness evidence that went to these issues, we directed at the outset of the hearing that we did not accept as read the Appellant's witness statements and associated evidence such as transcripts of recordings of telephone conversations with HMRC officers, save to the extent its content has been reflected in oral evidence given by the Appellant.

Chronology of events

6. The Appellant is an IT specialist employed at the relevant time by Broadcom UK Ltd ("Broadcom").

7. On 2 June 2006 and 3 May 2007, the Appellant was granted options over shares in Broadcom Corporation, Broadcom's parent company, as part of the Broadcom 1998 stock option scheme made available to employees.

8. In May 2015 a takeover of Broadcom Corporation by Avago Technologies was announced.

9. On 29 May 2015 the Appellant emailed the chief financial officer of Broadcom about whether the merger would result in the cancellation of share options. Broadcom internal counsel replied confirming to the Appellant that all stock options would be cancelled for a cash payment.

10. A Proxy Statement filed with the US Securities and Exchange Commission ("the SEC Statement") provided in Annex A to Schedule l4A the terms of the merger agreement between the Broadcom Corporation group and Avago of 28 May 2015 ("the Merger Agreement"). Annex A provided at 3.7:

> "(c) At the Cash/Stock Effective Time, each outstanding and vested Broadcom Stock Option shall, without any further action on the part of any holder thereof, be cancelled and the holder thereof shall be entitled to receive an amount in cash equal to the positive difference, if any, calculated by subtracting the aggregate exercise price of such Broadcom Stock Option from the product of the number of vested shares subject to such Broadcom Stock Option multiplied by the Equity Award Consideration (subject to any applicable withholding or other Taxes or other amounts required by applicable Law to be withheld). Following the Cash/Stock Effective Time, any such cancelled Broadcom Stock Option shall no longer be exercisable for Broadcom Common Shares and shall entitle the holder of such Broadcom stock Option to only the payment described in this Section 3.7(c), which shall be made by the Broadcom Surviving Corporation or Holdco as of, or within two (2) Business Days following, the Cash/Stock Effective Time..."

11. Further at 6 Annex A provided:

> "Section 6.5 Employee Benefits
>
> (a) With respect to the employees of Broadcom and its Subsidiaries that continue in employment with Holdco or its Subsidiaries following the Effective Times (the "Employees"), for a period of twelve (12) months after the Effective Times, Holdco agrees to provide or cause its Subsidiaries (including the Broadcom Surviving Corporation) to provide each Employee with (i) a base salary or wage rate (as applicable) that is no less favorable to each Employee than in effect for such Employee immediately prior to the Effective Times and (ii) employee benefits (including, without limitation bonus opportunity, severance, retirement health and welfare benefits but excluding equity plans and arrangements) that, in the aggregate, are no less favorable to each Employee than those in effect for such Employee immediately prior to the Effective Times.
>
> (b)…
>
> (c)…
>
> (d)…
>
> (e) The parties hereto acknowledge and agree that all provisions contained in this Section 6.5 with respect to employees of Broadcom and its Subsidiaries are included for the sole and exclusive benefit of the respective parties hereto and shall not create any right (i) in any other person, including employees, former employees, any participant or any beneficiary thereof in any Benefit Plan, Benefit Agreement, Foreign Benefit Plan …"

12. On 8 October 2015 the Appellant queried with Broadcom whether Broadcom would pay any employer National Insurance Contributions that were payable.

13. On 17 December 2015 by an email from shareholder services at Broadcom to what appears to be a worldwide employee mailing list, the Appellant was briefed on the Broadcom and Avago merger and provided with information on what would happen to outstanding stock options:

> 'For employees holding outstanding vested stock options at Closing, your merger consideration related to those options will be paid out through your

> local payroll minus any applicable taxes. The payments will be made within two business days following the effective time of the merger. A detailed document will be distributed to holders of outstanding vested stock options contemporaneously with such payment via e-mail or regular mail with a summary of the merger consideration payment, including how the calculation was derived, related to those options.'

14. On 7 January 2016 Broadcom shareholder services mailed the Appellant as follows:

> "United Kingdom
>
> NIC Joint Election – Cash-Out Payment
>
> A joint NIC election in respect of an employee share option (under para 3B of schedule 1 of the Contribution and Benefits Act) may also apply to a cash payment made to an employee in respect of the release of that option on the understanding that the payment is taxable under s477 ITEPA 2003. Avago has confirmed that NICs will be passed on the cash out payment in reliance of the existing NIC election"

15. On 1 February 2016 the merger was effective.

16. On 2 February 2016 Broadcom (being the renamed Avago) filed with the US Securities and Exchange Commission a Form S-8 registration form detailing amongst other things securities to be registered and listing stock option plans. The Broadcom 1998 stock option scheme in which the Appellant participated was not listed.

17. On 3 February 2016 (which according to the Appellant was issued later and backdated) Broadcom issued a payslip to the Appellant showing gross earnings of £35,228.15 which were described as "Notional Share Gain". From that amount £15,679.12 was deducted making a net pay of £19,549.03.

18. On 5 February 2016 the appellant made a formal grievance complaint because of employer NIC deduction.

19. On 8 February 2016 the Appellant printed out a payslip showing a Payment of £40,089.63 in respect of a "notional share gain". The earnings were subject to deduction of tax and NIC including £5,532 of employer NIC and showing a net payment of £19,932.66.

20. At this time Broadcom received advice from their advisers Deloitte that it had incorrectly administered the deduction of the employer NICs in the 8 February payslip in accordance with paragraph 3(A) of the Joint Election, outlined below, but should have applied paragraph 3(B) under which a smaller amount should be paid to the employee to take account of the employer NIC but no deduction made. Overall, the same result in terms of net pay was achieved.

21. On 22 February 2016 the Appellant received a 'Broadcom stock option cash out summary':

> "You are receiving this e-mail because you are an employee who had vested stock options outstanding as of February 1, 2016. As set forth in the Broadcom /Avago business combination Merger Agreement, those stock options have been cancelled in exchange for a cash payment equal to (i) the number of Broadcom shares subject to such vested, unexercised, outstanding option multiplied by the sum of (A) $27.25 and (B) 0.2189 multiplied by the Avago Measurement Price, minus (ii) the aggregate exercise price…
>
> The payments have been fully authorised today and will be sent to you through your local payroll. You will receive the net payment minus any applicable withholding within the next few weeks."

22. On 3 March 2016 the Appellant received a letter from Phil Poole on behalf of Broadcom setting out his compensation package and notifying the Appellant that he would be granted restricted stock units.

23. On 4 March 2016 the Appellant saw a payslip showing earnings of £35,228.15 ("the Payment") deductions of £15,679.12 and net pay of £19,549.03.

24. On 4 March 2016 Broadcom paid the Appellant £19,549.03 ("the Net Payment").

25. On 22 April 2016 the Appellant submitted a voluntary tax return in respect of tax year 2015-16 reporting the Payment as taxable income ("the Initial Return").

26. On 12 May 2016 the Appellant brought a claim in the Employment Tribunal, arguing that the deduction of £4,861.48 of employer NICs amounted to an unlawful deduction of wages. The Appellant argued further that there was a failure by Broadcom to provide an adequate pay statement pursuant to section 11(2) of the Employment Rights Act 1996 ("ERA").

27. On 20 August 2016 the Appellant amended the Initial Return claiming that he was entitled to relief under section 401 ITEPA in respect of the Payment so that the first £30,000 of the payment was exempt from tax.

28. On 28 September 2016 the Employment Tribunal released its decision, as described at paragraphs 47 to 52 below.

29. On 16 March 2017 HMRC purported to open an enquiry into the Initial Return under section 9A TMA ("the Initial Enquiry").

30. On 22 January 2018 HMRC issued a closure notice pursuant to Section 28A TMA refusing the Appellant relief under section 401 ITEPA ("the Initial Closure Notice").

31. On 2 February 2018 the Appellant appealed to this Tribunal against the Initial Closure Notice.

32. In a decision of Judge Popplewell released on 5 January 2019 and considered in more detail at paragraphs 52 to 55 below, this Tribunal struck out the Appellant's appeal against the Initial Closure Notice on the grounds that the Initial Tax Return was not one made pursuant to a notice under Section 8 TMA and the Tribunal did not have jurisdiction to consider the exercise of HMRC's discretion not to treat the return as such ("the 2019 Tribunal Decision").

33. On 15 February 2019 the Appellant gave notice under section 711 ITEPA requiring HMRC to give the Appellant notice under Section 8 TMA in respect of tax year 2015-16.

34. On 23 February 2019 the Appellant called HMRC concerning his letter of 15 February 2019. The Appellant's evidence was that in the call the Appellant established that the letter had not yet been processed and the Original Tax Return was still "logged".

35. On 1 March 2019 HMRC issued a notice to file under Section 8 TMA ("the 2019 Notice").

36. On 1 April 2019 HMRC wrote to the Appellant following the Appellant's call of 23 February noting that:

> "To enable your records to be brought up to date you will need to complete the enclosed 2015-16 Tax Return
>
> The previously submitted Tax Return for 2015-16 has to be replaced on your records by a Tax Return that has been served on you"

37. On 11 April 2019 the Appellant filed a new return in respect of 2015-16 ("the Second Return")

38. On 29 October 2019 HMRC sent a tax calculation to the Appellant reflecting the Appellant's claim for relief under section 401 ITEPA and indicating a tax refund was due. The letter began:

> "thank you for the amendment to your tax return"

39. On 5 November 2019 the Appellant wrote to HMRC challenging the calculation of the refund and including the following:

> "Thank you for the above calculation dated 29 October 2019 indicating overpayment of £11,997.60. On page 1 of the calculation you thank me for the amendment to my tax return but I have not amended my tax return. For the avoidance of doubt this letter is **not** an amendment either."

40. On 28 November 2019 HMRC gave notice under section 9A TMA of intention to inquire into the Second Return ("the Second Enquiry").

41. On 5 December 2019 HMRC issued a closure notice under Section 28A TMA determining that the Payment should be taxed under section 477 ITEPA ("the Second Closure Notice").

42. On 30 January 2020 the Upper Tribunal granted leave to the Appellant to appeal the 2019 Tribunal Decision.

43. On 11 August 2020 the Appellant sought permission from the Upper Tribunal to withdraw his appeal from the 2019 Decision, which was granted.

44. On 9 March 2021 the Appellant appealed the Second Closure Notice to this Tribunal.

Employment contract and the NIC Joint Election

45. Under the terms of the appellant's employment contract he was entitled to participate in the Broadcom Corporation plan:

> "4.4 The Employee will be entitled to participate in the Broadcom Corporation 1998 Stock lncentive Plan, at the discretion of the Broadcom Corporation subject to the Rules of the Plan, details of which will be provided to the Employee upon request…
>
> 12.1 If this Agreement is terminated because of the liquidation of the Company for the purpose of amalgamation or reconstruction or if a third party agrees to acquire the whole or substantially the whole of the undertaking and assets of the Company and the Employee is offered employment with such amalgamated or reconstructed company or third party on terms which taken as a whole are not less favourable in all material respects than the terms of this Agreement the Employee shall have no claim against the Company in respect of such termination."

46. As part of the Appellant's participation in the Broadcom stock option plan Broadcom and the Appellant entered into a joint election form on 2 June 2006 permitting Broadcom in defined circumstances to deduct employer NICs from payments made to the Appellant ("the Joint Election"). The Joint Election provided:

> "WHEREAS:
>
> …
>
> (D) the employee and Broadcom… have agreed to enter into this election pursuant to paragraph 3B(1) all of the Social Security Contributions and Benefits Act 1992 whereby the employer transfers its liability to pay any secondary Class 1 National Insurance contributions arising from a chargeable event with respect to all options unrestricted stock units granted to the

employee during the period commencing on or after [June 2,2006] and ending on February 28, 2014…

NOW, THEREFORE, IT IS HEREBY AGREED as follows…

DEFINITIONS

…

"Chargeable Event"	Any event with respect to an option or RSU giving rise to a charge under Section 4(4)(a) of the Act (being within sections 439, 476 or 477 of ITEPA 2003)

…

PAYMENT

(A) upon the occurrence of a Chargeable Event with respect to the exercise of an Option…the Employee shall pay the Employer NI, at the Employee's election, in one of the following forms:

(I) direct remittance…:and/or

(II) sale of a sufficient number of the shares…

(B) upon the occurrence of a Chargeable Event with respect to the cancellation, assignment or release of an Option or RSU:

(I) where such payment is made by Broadcom, Broadcom shall before making such payment deduct from it an amount equal to the Employer NIC and shall pay the Employer NIC to the Inland Revenue…"

The Employment Tribunal Decision

47. On 12 May 2016 the Appellant brought a complaint in the Employment Tribunal against Broadcom for unlawful deduction of wages and a failure by Broadcom to provide an adequate pay statement pursuant to section 11(2) ERA.

48. The Appellant's complaint was that Broadcom in making the Payment of £35,228.15 had deducted £4,861.48 of employer NICs without authority to do so. Specifically, the Appellant argued that the Joint Election did not apply where the Appellant had not exercised the share options himself.

49. Further, the Appellant argued that;

(1) The cancellation of the share options was not a chargeable event for the purposes of the Joint Election

(2) the enforced sale was not a cancellation or a release of the option

(3) the transaction was not tax compliant and therefore ineffective

50. Broadcom's submissions included arguing that:

> 'On 4 March 2016 the claimant was paid £19,549.03 in relation to a gross cash cancellation payment of £35,228.15 for vested and outstanding options over shares in the respondent's parent company'

51. The Tribunal found on 27 September 2016 that the Payment was a discretionary payment and did not fall within the definition of wages for the purposes of section 27 ERA. The Tribunal went on to hold that the payment amounted to a chargeable event for the purposes of the Joint

Election and that the cancellation or termination of share options is what was envisaged by clause 3(B). Accordingly, the deduction of the employer NICs from the Payment was made in accordance with the Joint Election.

The 2019 Tribunal Decision

52. In a decision of Judge Popplewell released on 5 January 2019 ([2019] UKFTT 11(TC)), this Tribunal struck out the Appellant's appeal from the Initial Closure Notice.

53. The ground for doing so was that, as the Initial Tax Return was not one given under Section 8 TMA, the Tribunal did not have jurisdiction.

54. The detailed facts leading to that decision were summarised by the Tribunal and bear repeating for the purposes of this appeal:

> "(3) The appellant submitted a voluntary return in April 2016 for the tax year 2015/2016, and subsequently amended that return on 20 August 2016 to reflect his view that the compensation payment attracted relief under section 401 ITEPA.
>
> (4) On 16 March 2017 HMRC opened an enquiry into that return pursuant to section 9A TMA 1970.
>
> (5) On 22 January 2018 HMRC closed that enquiry pursuant to section 28A TMA 1970. The stated conclusion in that letter (the closure notice) was that the appellant was not entitled to relief under section 401 ITEPA.
>
> (6) The appellant appealed against that conclusion to HMRC on 27 January 2018 and subsequently to this Tribunal on 2 February 2018.
>
> (7) On 13 April 2018 the appellant wrote to Mrs G Carwardine of the Solicitors Office and Legal Services Department of HMRC indicating, amongst other things, that:
>
> > 'My understanding is that the closure notice being appealed purports to be issued under section 28A Taxes Management Act 1970 (TMA) and that would be dependent on a valid enquiry opened under s. 9A TMA to enquire into a return under s.8 TMA that in turn requires that I am given notice by an officer of the Board to make a return. I am not aware of any notice by an officer of the Board to make a return for the tax year ended 5 April 2016 and instead believe my return was "voluntary" meaning that an enquiry under s.9A TMA and the subsequent closure notice is not valid. I apologise for raising this now, particularly as HMRC's Statement of Case may be in the late stages of preparation but I have only recently become aware of this point made by the FtT.'
>
> There then follows a link to the First-tier Tribunal Decision of *Patel* (Patel [2018] TC 06426).
>
> (8) In her letter of 27 June 2018 written to the appellant, Gill Carwardine indicated that her understanding from Mr Hemingway's letter of 13 April was that he did not want it to be treated as a return under section 8 TMA 1970. She explained HMRC's policy about accepting returns voluntarily on the same basis as returns received in response to a notice issued under section 8 TMA 1970 and indicated that this was the case provided that the intention of the taxpayer was that it should be treated as such.
>
> (9) She then went on to say:
>
> > 'As you have indicated that you do not want your return to be treated as a voluntary return, this will mean that it was not a section 8 return and the subsequent enquiry into that return open under section 9 Taxes

> Management Act 1970 was not valid and the conclusion at the end of that enquiry is not a valid decision that can be appealed to the Tribunal. If you choose for this to be the case. it also means that you won't have established your liability for the tax year in question. HMRC will subsequently make an assessment for the amount of tax believed to be due. You will have the right to appeal this decision so you will be able to get the substantive issue before the Tribunal via this means. Alternatively, if you would like your return to be treated as a voluntary return, the same statutory consequences will follow as if it were a return submitted in response to a section 8 notice, including powers to enquire under section 9A Taxes Management Act 1970. This option would mean that the conclusion is valid and is a decision that can be appealed to the Tribunal. If you choose this option, there is also a strong likelihood that your appeal proceedings will be halted pending the final determination of any appeals (including applications for permission to appeal) to the Upper Tribunal or other Court of Record against the First-tier Tribunals decision in Patel & Patel.'

(10) The appellant responded to that letter by way of his letter dated 30 June 2018. He pointed out that HMRC appeared to be in default of their obligation to supply a statement of case, and then went on to say that it was his view that the enquiry had been closed, his tax return amended and an appealable decision thus made:

> 'The fact that HMRC may not have opened an enquiry validly does not entitle HMRC to deny that a return was made, particularly where a subsequent enquiry was made into the return. I cannot make any sensible representations to HMRC about the letter to me dated 27 June 2018, so there is nothing further that HMRC will need to consider from me and therefore no reason for a stay.'

(11) By way of a letter dated 31 July 2018 to HMCTS, Gill Carwardine made this application for the appellant's substantive appeal to be struck out. The basis of that application is, as mentioned at [5] above that:

(a)the appellants tax return for 2015/2016 was not submitted pursuant to a notice under section 8 TMA 1970;

(b)the appellant had suggested in his letter of 13 April 2018 that he did not want the return treated as a voluntary return to which HMRC's discretionary treatment (i.e. to treat it as if it had been served pursuant to a section 8 notice to file) should 496 apply; and

(c)accordingly, the enquiry opened into the return was not a valid enquiry; any closure notice closing that enquiry was not a valid closure notice; there was therefore no appealable decision within the ambit of section 31 TMA 1970 and so the First-tier Tribunal has no jurisdiction to hear the appeal and must strike it out'

55. The Tribunal decided (at [39]) that the Initial Return had not been made pursuant to a notice under section 8 TMA and that the Tribunal had no jurisdiction to interfere in HMRC's exercise of its discretion not to treat the Initial Return as made pursuant to a section 8 TMA notice (paragraphs [24] to [27]]).

56. However, the route to create a valid appeal and so resolve the substantive issues in this matter was identified as the Appellant's right to give notice under section 711 ITEPA requiring HMRC to serve a notice under section 8 TMA:

> '[45] I imagine that HMRC will issue a notice to file, the appellant will then submit his 2015/2016 tax return on the basis that he is due the refund which

> he claimed, initially, by amending his 2015/2016 tax return. HMRC will enquire into that return and probably close that enquiry very quickly, arriving at the same conclusion that they have arrived at in the closure notice. The appellant will appeal, probably on the same grounds that he has made his substantive appeal and the matter will proceed to a hearing in the usual way.'

57. We note that this is precisely what the Appellant subsequently did.

ISSUES IN THIS APPEAL

58. There are two issues in this appeal:

(1) Whether the Payment is taxable under section 401 ITEPA and so subject to relief on the first £30,000 under section 403 ITEPA or taxable under section 477 ITEPA and so taxable in full ("the Substantive Issue"); and

(2) Whether the Second Closure Notice was invalid because the enquiry into the First Tax Return was validated retrospectively by section 12D Taxes Management Act 1970. The Appellant further argues that the Initial Return is still in existence and therefore the Second Return is an amendment to it. That being the case, the Initial Closure Notice is valid and, as there cannot be two closure notices, the Second Closure Notice is invalid. HMRC argues that the Initial Return was the subject of a final decision by this Tribunal in the 2019 Tribunal Decision and in any event the retrospective effect of section 12D disapplied by section 87(4) Finance Act 2019 ("the Section 12D Issue").

59. It is convenient to deal with the two issues separately.

60. Aside from the Substantive Issue there is no issue between the parties as to the amount of tax payable. Specifically, we are not concerned with the different iterations of payslips save to the extent that they have a bearing on the above substantive issues.

61. Neither party was able to confirm that the calculation of the amount to be paid to stock option holders as described in the merger agreement matched the amount paid to the Appellant but it was assumed by both parties to be the case for the purpose of the appeal.

THE SUBSTANTIVE ISSUE

the relevant legislation

62. Section 401 ITEPA provides insofar as relevant:

> '(1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with–
>
> (a) the termination of a person's employment,
>
> (b) a change in the duties of a person's employment, or
>
> (c) a change in the earnings from a person's employment, by the person...
>
> (2) Subsection (1) is subject to subsection (3) and sections 405 to 414A (exceptions for certain payments and benefits).
>
> (3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter.'

63. Section 403(1) ITEPA provides:

> "(1) The amount of a payment or benefit to which this section applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold."

64. Section 476 ITEPA provides insofar as relevant:

> ‘(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…’

65. Section 477 ITEPA provides insofar as relevant:

> ‘(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) …
>
> (b)…
>
> (c) the receipt by an associated person of a benefit in connection with the employment-related securities option (other than one within paragraph (a) or (b))…
>
> (6) A benefit in money or money's worth received in consideration for or otherwise in connection with–
>
> (a) failing or undertaking not to acquire securities pursuant to the employment related securities option, or
>
> (b)…
>
> is to be regarded for the purposes of subsection (3)(c) as received in connection with the employment-related securities option.’

66. Section 472(2)(a) ITEPA provides a definition of associated person which includes:

> ‘the person who acquired the employment-related securities on the acquisition’

the Appellant’s arguments

67. The Appellant accepts that the Payment has been made in the course of his employment and that Broadcom purported to make the Payment in connection with the loss of the share options, for example the e mail of 22 February 2016. However, in accordance with the terms of the share option plan agreements, upon change of control his share options were cancelled for no value. The Payment was a voluntary payment unrelated to the rights that ceased to exist a month earlier.

68. Under his terms of employment the Appellant was entitled to participate in the Broadcom 1988 stock option plan. The takeover meant there was no longer a Broadcom stock option plan and so the Appellant lost the right set out in his employment contract to participate, see the clause 3.7(c) and 6.5 of the merger agreement, specifically the exclusion in 6.5(a) (ii):

> “Section 6.5 Employee Benefits
>
> (a) **With respect to the employees of Broadcom and its Subsidiaries** that continue in employment with Holdco or its Subsidiaries following the Effective Times (the “Employees”), for a period of twelve (12) months after the Effective Times, **Holdco agrees to provide** or cause its Subsidiaries (including the Broadcom Surviving Corporation) to provide **each Employee with (i) a base salary or wage rate (as applicable) that is no less favorable**

> **to each Employee than in effect for such Employee immediately prior to the Effective Times** and (ii) employee benefits (including, without limitation bonus opportunity, severance, retirement health and welfare benefits **but excluding equity plans and arrangements**) that, in the aggregate, are no less favorable to each Employee than those in effect for such Employee immediately prior to the Effective Times." (emphasis added)

69. The payment was more than a month after the two-day timescale set out in clause 3.7(c) of the merger agreement. It was therefore a payment for something different. The Employment Tribunal found the payments to be *ex gratia.*

70. Broadcom accepted that the Payment was not within section 477 ITEPA because, having initially issued a payslip on 8 February 2016 showing deduction of employer NIC, after the Appellant had objected to the deduction, Broadcom issued the amended payslip seen by the Appellant on 4 March 2016 which showed a reduced gross amount and no deduction from the payment of employer NIC. The net payment of £19,549.03 was the same. Under the Joint Election, Broadcom could deduct employer NIC "upon the occurrence of a Chargeable Event with respect to the cancellation, assignment or release of an Option".

71. A chargeable event was defined in the Joint Election to include:

> "**Any event with respect to an option or RSU giving rise to a charge** under Section 4(4)(a) of the Act (**being within** sections 439, **476 or 477 of ITEPA 2003)**" (emphasis added)

72. Broadcom therefore in not applying the Joint Election accepted section 477 did not apply.

73. Further the Payment, which took into account the employer NIC in reducing the Gross Payment from £40,089.63 to £35,226.15, was not commensurate with the stock option value and therefore had to be for something else being a discretionary payment for loss of the contractual right to participate in stock option plans. The Appellant did not agree to participate in the new stock option plans and left.

74. The reference in the payslips to "notional share gain" encompasses a loss of equity plan rights.

75. Accordingly, the best analysis of the tax treatment of the Payment is that it is for the loss of the right to participate in the stock option plans and so "a change in the earnings from a person's employment" within section 401(1)(c) ITEPA. As such the Appellant benefitted from the £30,000 threshold in section 403(1).

HMRC's arguments

76. Mr Vallis noted that not only was the burden of proof on the Appellant in the Section 12 Issue but also section 401(3) ITEPA specifically provides that Chapter 3 of ITEPA does not apply to any payment or other benefit if it is chargeable to income tax apart from Chapter 3. Section 477 is in chapter 5 and therefore the Appellant has to show not only that section 401 applies but that there is no chargeable event within section 476.

77. Section 476 requires a payment to be 'in connection with' the employment-related securities option. 'In connection' with was a broad term and it was clearly satisfied in this case thus:

(1) The terms of the merger agreement provided that vested options in Broadcom would be cancelled and the option holder would receive payment from Broadcom;

(2) In the 17 December 2015 email shareholder services at Broadcom told employees that:

> ‘For employees holding outstanding vested stock options at Closing, your merger consideration related to those options will be paid out…’

(3) On 3 February 2016 the Appellant received a payslip which purported to pay him a lump sum;

(4) On 4 March 2016 the Appellant then received a lump sum from Broadcom; and

(5) Broadcom's position in the Employment Tribunal was that the Appellant;

> ‘was paid £19,549.03 in relation to a gross cash cancellation payment of £35,228.13 for vested and outstanding options over shares in the respondent’s parent company’

78. Even if the Payment is not within section 477(3)(c) it is within section 477(6) being a benefit in consideration or in connection with failing to acquire securities. For this purpose ‘failing’ need not be construed as requiring some culpability, see *Catherine Rawcliffe* [2013] UKFTT 111(TC):

> “18. Turning now to the words of Section 477 (6), the issue is whether the benefit, i.e. the £14,692 received by Ms Rawcliffe was, “in connection with failing... to acquire securities pursuant to the employment-related securities option.” We think it was. The statutory provision does not state that the employee's act or failure to act is to be the cause of the “failing” to acquire the securities. As we read it, “the failing” can be attributable to the act or inaction of employee, employer or any other person. It is equally applicable whether, as here, the plan or system for the grant of options over employee-related securities fails to operate properly or whether (as was not the case) the failure is caused by the employee's oversight or inability to provide funds to meet the striking price.”

79. The Employment Tribunal decision is of no assistance to this Tribunal as it was deciding a different issue, namely whether the Payment was ‘wages’ within the ERA, save that its decision includes a summary of what Broadcom thought it was doing in making the Payment.

80. Further, it did not matter that the payment was made a month later rather than the two days promised by the shareholder services e mail of 17 December 2015 as it was still clearly made “in connection with” the loss of the options. The merger was effective on 1 February 2016 and the payslip referencing the Payment was dated 3 February 2016, two days later even though payment was made on 4 March 2016.

Discussion

81. We agree with HMRC that section 476 takes priority over section 401 by virtue of section 401(3).

82. The Appellant argued that the loss to which the compensation related was the loss of the right to participate in the 1988 plan and therefore his employment rights were varied. We accept that the point is arguable but we agree with HMRC that the Payment was intended and was most closely connected to the loss of the Appellant’s share options. Indeed, in cross examination the Appellant accepted that he would not have had the Payment had he not held the options. The fact that Broadcom made the payment later and potentially of a different amount than that originally represented as payable does not alter the position. The documents and e mails which we have seen make it clear that the Payment was made for the loss of the stock options.

83. It might also be said that the Appellant lost the right to participate in stock option plans generally. Whilst the arrangements were not made clear to us in evidence, the Appellant was offered alternative share options but chose not to take them up. We are not in a position to

measure the equivalence of the old and new options but we find that to the extent the Appellant lost the right to participate in share options generally (rather than the 1988 plan and/or the options he held prior to the merger), that loss was due to the Appellant's actions not the merger and resulting Payment. The Appellant's concession that he would not have received the Payment but for holding the stock options also points to the Payment relating to the loss of the options rather than a more generic right to participate.

84. We do not find the deduction of the employer NIC and the operation of the Joint Election to be significant.

85. We therefore accept HMRC's arguments on the Substantive Issue and find that the Payment was made 'in connection with' an employment-related securities option within section 476 and not for the loss of employment rights as argued by the Appellant. If necessary we would also find that section 477(3)(c) applied as the payment is within section 477(6), being a benefit in consideration or in connection with failing to acquire securities.

THE SECTION 12D ISSUE

Relevant legislation

86. Section 12D TMA provides insofar as relevant;

> '(1) This section applies where–
>
> (a) a person delivers a purported return ("the relevant return") under section 8, 8A or 12AA ("the relevant section") for a year of assessment or other period ("the relevant period"),
>
> (b) no notice under the relevant section has been given to the person in respect of the relevant period, and
>
> (c) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.'
>
> (2) For the purposes of the Taxes Acts–
>
> (a) treat a relevant notice as having been given to the person on the day the relevant return was delivered, and
>
> (b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).
>
> (3) "Relevant notice" means–
>
> (a)in relation to section 8 or 8A, a notice under that section in respect of the relevant period;
>
> (b)…"

87. Section 87 FA19 introduced section 12D TMA with transitional provisions in section 87(4) as follows:

> '87(4) However, those amendments do not apply in relation to a purported return delivered by a person if, before 29 October 2018–
>
> (a) the person made an appeal under the Taxes Acts, or a claim for judicial review, and
>
> (b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, 8A or 12AA of TMA 1970 or paragraph 3 of Schedule 18 to FA 1998 because no relevant notice was given.'

The Appellant's arguments

88. The Appellant argued that the Second Closure Notice was invalid because the coming into force of section 12D retrospectively validated the Initial Closure Notice by deeming the Initial Return to have been made pursuant to a notice under section 8 TMA.

89. The Appellant's grounds of appeal in the 2018 appeal did not include the argument that the Initial Return was not a return under section 8 TMA. The carve out in section 87(4) therefore does not apply because the condition in section 84(4)(b) is not satisfied. Section 12D accordingly applies to the Initial Return.

90. The Appellant also argued that HMRC's subsequent processing of the Second Return showed not only that the Initial Return was still in existence but also HMRC treated the Second Return as an amendment to the still extant Initial Return. Thus:

(1) On 23 February 2019 HMRC said that the first return had not been "unlogged"

(2) HMRC self-assessment (SA) notes made reference to being unable to unlog the return (for example notes of 28 March 2019 and 26 November 2019): and

(3) In their letter of 29 October 2019 HMRC thanked the Appellant for the amendment to the return, which necessarily must mean they were treating the Second Return as an amendment to the Initial Return

91. As HMRC were still treating the Initial Tax Return as valid, section 12D(1)(c) is satisfied and so section 12D validates the Initial Return. The Initial Enquiry is therefore also valid. The Appellant's notice of 15 February 2019 under section 711 ITEPA was therefore invalid. The repayment amendment of 29 October 2019 cannot be an amendment under section 9 ZA TMA because it was made more than 12 months after the filing date for the Initial Return. The Second Enquiry is invalid because the Initial Enquiry is still alive.

92. If the Second Enquiry is invalid then the Second Closure Notice is invalid and the Appellant is not liable for the tax that is subject to this appeal.

93. Separately, the 2019 Notice was not valid because a notice can only be issued under section 8(1) TMA:

> "[f]or the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax …for that year"

94. HMRC already knew the amount of tax that was due.

HMRC's arguments

95. HMRC objected to the Appellant's argument on a number of grounds.

96. First, as the Appellant withdrew his appeal to the Upper Tribunal, the 2019 Tribunal Decision stands and this Tribunal does not have jurisdiction to consider arguments in respect of the Initial Closure Notice which was the subject of that appeal. Section 12D cannot be intended to reopen concluded appeals.

97. Second, section 12D does not in any event apply because ultimately HMRC did not treat the First Return as being made pursuant to a section 8 TMA notice and so section 12D(1)(c) is not met. Prior to section 12D, it was HMRC policy to treat voluntary returns as having been made pursuant to a Section 8 TMA notice provided there was no objection from the taxpayer to it being so treated. In his letter of 13 April 2018 prior to the hearing the Appellant argued that the Initial Return was voluntary, not made pursuant to Section 8 and therefore invalid. HMRC therefore applied their policy and ceased to treat the initial return as made pursuant to a Section 8 notice. Section 12D cannot therefore apply and, as pointed out by the Tribunal in

the 2019 Tribunal Decision, this Tribunal does not have jurisdiction to challenge the exercise of that discretion.

98. Third, the disapplication of the retrospective effect of section 12D as set out in section 87(3) FA19 applies in that by virtue of the letter of 13 April 2018 one of the Appellant's grounds of appeal was that the purported return was not a return under Section 8 (section 87(3)(b)).

99. In any event even if, according to the Appellant, the Initial Return should take precedence over the Second Return this does not help the Appellant as the Initial Closure Notice would be valid from which the Appellant would have no right to appeal and this appeal would need to be struck out.

100. To the extent that the Appellant argues that the enquiry into the First Return remains on HMRC's system, even if it has not been "unlogged", this is irrelevant. Whether there is a valid return, enquiry and closure notice must be judged by the actions of HMRC not internal processing.

Discussion

101. We find the Appellant's purpose in raising this argument unclear. In the course of the hearing the point was made by Mr Farooq to the Appellant that were the Appellant to win on this point, there was nothing to stop HMRC from opening another enquiry and restarting the process all over again. The Appellant accepted the points but did not in express terms withdraw the ground of appeal and so we address his arguments.

Conclusiveness of the 2019 Tribunal Decision

We find the application of section 12D TMA and the transitional provisions in section 87(4) FA19 in circumstances where there has been concluded litigation based on the law as it stood at the time to be difficult. HMRC made a generic argument that irrespective of section 87(4), a concluded appeal must be treated as final. As a general principle that is true, section 50(10) TMA provides:

> "(10) where an appeal is notified to the tribunal the decision of the tribunal on the appeal is final and conclusive"

102. However, HMRC produced no authority as to the interaction of section 50(10) and section 12D.

103. We are conscious this issue might need proper argument with a represented appellant but in our view section 50(10) TMA applies and so the Tribunal's striking out of the Initial Appeal in the 2019 Tribunal Decision, which was ultimately not appealed (section 50(11)), is determinative of that appeal notwithstanding section 12D. To hold otherwise would invite the reopening of decided appeals.

104. Our determination that section 50(10) overrides section 12D is sufficient to dispose of the Section 12D Issue. However, we have considered the Appellant's other arguments on the assumption we are wrong on the interaction of sections 50(10) and 12D.

Section 12D TMA

105. Section 12D TMA only applies where HMRC treats the relevant return as made pursuant to a valid notice (section 12D(1)(c)). HMRC did originally so treat in accordance with its then policy but then withdrew that treatment following the Appellant's letter of 13 April 2018. For this purpose it is irrelevant that the Appellant changed his position in his letter of 30 June 2018 as it is HMRC's application of its policy that matters not the Appellant's position.

106. For the purposes of applying section 12D(1)(c) it is appropriate to look at how HMRC ultimately applied its policy and it ultimately did not treat the relevant return as made pursuant

to a valid notice. Accordingly, we agree with HMRC that Section 12D is not engaged and does not retrospectively validate the Initial Return.

Section 87(4)(b) FA19

107. We do not agree with HMRC that the conditions in section 87(4)(b) FA19 for the disapplication of the retrospective effect of section 12D have been met in that the issue of the Initial Return was not in the end one of the Appellant's grounds of appeal.

108. We agree that the Appellant's letter of 13th April 2018 amounts to the submission of new grounds of appeal:

> 'I am not aware of any notice by an officer of the Board to make a return for the tax year ended 5 April 2016 and instead believe my return was "voluntary" meaning that an enquiry under s.9A TMA and the subsequent closure notice is not valid. I apologise for raising this now, particularly as HMRC's Statement of Case may be in the late stages of preparation…" (*Hemingway* at 8(7))

109. However, the Appellant changed his position when he replied to Mrs Carwardine on 30 June 2018. The position was as summarised by this Tribunal in the 2019 Tribunal Decision at [8(10)]:

> '(10) The appellant responded to that letter by way of his letter dated 30 June 2018. He pointed out that HMRC appeared to be in default of their obligation to supply a statement of case, and then went on to say that it was his view that the enquiry had been closed, his tax return amended and an appealable decision thus made:
>
> > 'The fact that HMRC may not have opened an enquiry validly does not entitle HMRC to deny that a return was made, particularly where a subsequent enquiry was made into the return. I cannot make any sensible representations to HMRC about the letter to me dated 27 June 2018, so there is nothing further that HMRC will need to consider from me and therefore no reason for a stay.'

110. In the later letter of 30 June 2018 the Appellant seeks to argue, consistent with his position in the hearing that *Patel* [2018] TC 06426 was wrongly decided, and that the return was nevertheless valid.

111. In our view therefore, the net result of the correspondence was that the Appellant was not arguing that the Initial Return was voluntary. Accordingly, it cannot be said for the purposes of section 87(4)(b) FA19 that;

> "(b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, …because no relevant notice was given"

112. In our view therefore the conditions in section 87(4) for the disapplication of the retrospective effect of section 12D are therefore not met.

Whether Initial Return still in existence

113. We are not persuaded by the Appellant's argument that the Initial Return was still in existence and, that being the case, the Second Closure Notice was invalid. The Appellant's evidence for this assertion is twofold. First the Appellant points to the references by HMRC to the Initial Return remaining "logged" and second that HMRC treated the Second Return an amendment to the Initial Return.

114. Further, we do not attach any weight to HMRC referring to the Second Return as an amendment of a return (for example, HMRC's letter of 29 October 2019). The Appellant did

not think he was amending a return (his letter of 5 November 2019) and we find it much more likely that HMRC were simply using standard letter templates which did not suit the unusual facts of the Appellant's tax compliance history.

115. Following the 2019 Tribunal Decision and as recommended by the Tribunal, the Appellant initiated a process through section 711 ITEPA to generate a fresh tax return and HMRC's actions thereafter appear to us to be entirely in accordance with the enquiry process as set out in TMA.

116. Even if the Appellant has uncovered some fact about the processing of his tax matters at HMRC (the existence and significance of which we are not persuaded), we have not been shown any provision in the relevant legislation or other relevant principle that directs us to look at the internal workings of HMRC's case management system in this manner. Indeed, to do so would create additional evidential burdens on HMRC in the most routine appeals.

Decision on Section 12D Issue

117. We therefore reject the Appellant's arguments on the Section 12D Issue on three grounds:

(1) We find that, even if section 12D TMA would otherwise apply, the effect of section 50(10) TMA is that the 2019 Tribunal Decision should be treated as conclusive as to the validity of the Initial Return.

(2) That, as HMRC ultimately did not exercise their policy to treat the Initial Return as made pursuant to a valid notice under section 8 TMA, the condition in section 12D(1)(c) is not satisfied and so section 12D does not apply to validate the Initial Return.

(3) We reject the Appellant's arguments that the Initial Return was still in existence and so the Second Return, Second Enquiry and/or Second Enquiry Notice were invalid.

118. For completeness we reject HMRC's argument that that the conditions for the disapplication of the retrospective effect of section 12D in section 87(4) FA19, specifically in section 87(4)(b), have been met in that the issue of the Initial Return was ultimately not one of the Appellant's grounds of appeal.

DECISION

119. For the reasons set out above we therefore dismiss the Appellant's appeal.

120. Finally, we also record that at the end of the hearing Mr Vallis made an application for costs under section 29 of the Tribunal, Courts and Enforcement Act 2007 and rule 10 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009. Under Rule 10 the Tribunal may award costs:

> "(b) if the Tribunal considers that a party...has acted unreasonably in bringing, defending or conducting the proceedings"

121. Mr Vallis argued that the Appellant had shown excessive zeal, conceding in the hearing that the section 12D Issue would not get him anywhere in the long run. There was no good reason why the Appellant pursued the Section 12D Issue and the hearing could have been dealt with in a single day.

122. For the Appellant's part he blamed HMRC's behaviour in the lead up to the hearing, difficulties in agreeing the paper and electronic bundles and poor presentation of the arguments on section 12D.

123. In the hearing we declined to make a costs award against the Appellant and now confirm that decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

124. 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.

IAN HYDE
TRIBUNAL JUDGE

Release date: 05th SEPTEMBER 2023