[2013] UKFTT 111 (TC)

TC02529

Appeal number: TC/2012/01134

INCOME TAX – Employment Income – Employment related securities option – Chargeable event – Redundancy of employee – Failure by employer to comply with agreement to issue shares – Cash amount paid to employee - Whether a chargeable event – Whether receipt by employee of a benefit in connection with a "Failing to acquire securities" – IT(EP)A 2003 S477.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CATHERINE RAWCLIFFE **Appellant**

- and -

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

TRIBUNAL: SIR STEPHEN OLIVER QC
ANTHONY HUGHES FCA

Sitting in public at 45 Bedford Square, London on 19 September 2012

The Appellant in person

Joanne Bartup for the Respondents

DECISION

1. Ms Catherine Rawcliffe, the Appellant, appeals against an amendment to her self-assessment return for the year ended 5 April 2008. The grounds for the amendment are said to have been the understatement of her taxable income by £14,692. A total of £5,979 is claimed as tax due from her.

2. Ms Rawcliffe was, until 14 December 2007, employed by ACI Ltd. ACI Ltd is a UK company and is a subsidiary of ACI Inc, a US company.

3. Ms Rawcliffe was, during the course of her employment, granted four options to acquire stock in ACI Inc. The options were not part of an approved company share option plan. The agreements governing Ms Rawcliffe's options required her to exercise them within, among other things, one month of ceasing employment with ACI Ltd. The agreements further provided that the options were not exercisable where the exercise would otherwise violate relevant securities regulations and any attempt to exercise the options would be "invalid and of no force and effect".

4. Ms Rawcliffe had, on 27 September 2007, been notified of the termination of her employment on grounds of redundancy. She had appealed and her appeal was rejected following a "hearing" on 6 December 2007.

5. On 17 December 2007 Ms Rawcliffe applied to have the period for executing her options extended. This was refused on 7 January 2008.

6. On or about 17 December 2007, ACI Inc notified Ms Rawcliffe that, because of its failure to file its "Form 10-K" for the fiscal year to 30 September 2007, it was "not current with its SEC reporting obligations". Consequently, she was told, the option was "suspended" and exercise was prohibited. ACI Inc offered to make a cash payment to her "in full and complete settlement of your vested options" and the amount was expressed to depend upon a formula based on the closing price on 14 January 2008. Following the refusal of her request to have the option period extended, she accepted the offer and in February 2008 she received a payment of £14,692 in settlement of her option rights.

7. ACI Ltd operated PAYE on the payment and deduced basic rate tax.

The Law

8. Income Tax (Employments and Pensions) Act 2003, Chapter 5, covers "securities options". By Section 471 (1) the Chapter is said to apply 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". By subsection (2) "employment" includes a former employment. Section 476 of the same Act states that if a chargeable event occurs in relation to an employment related

securities option, the taxable amount counts as employment income of the employee in the relevant tax year. Section 477 (6) states:

> "(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 sub-section (3)(c) as received in connection with the employment-related securities option"

Subsection (3)(c) refers to the receipt by an associated person of a benefit in connection with employment-related securities option, and makes it a chargeable event.

The contentions of the Parties

9. The payment by ACI Ltd was, Ms Rawcliffe contended, effectively the same as the outcome of her exercise of her options; it should be treated for tax purposes in the same way. She based this contention on a passage from a Guidance publication of HMRC entitled "Approved Company Securities Option Plans", 08/01/08. So far as relevant this reads:

"**Will I be taxed when I exercise my option to buy shares?**

If you received your option under an approved company share option plan after 28 April 1996, you will not be taxed when you exercise it to buy shares if you exercise it

- under an approved scheme, and
- at least three years and no more than ten years after you received it or
- within three years of the date of grant, if the exercise is upon leaving the company because of injury, disability, redundancy or retirement at an age specified in the plan and you exercise the option within six months of leaving the company.
- Special rules apply if you received your share option between 17 July 1995 and 28 April 1996.
- However, if your option is not within the rules of an approved plan
- when granted or exercised, or,
- if you exercise your option;
- within three years of the date of grant, *unless the exercise is upon leaving the company because of injury, disability, redundancy or retirement and you leave it within six month of leaving the company* or
- more than ten years after the date of grant.

- you will have to pay income tax on the gain you make by using your option to buy shares".

10. Ms Rawcliffe relied on the words of exclusion printed in italics (by us) above. She accepted that her options were "not within the rules of an approved plan when granted or exercised". She acknowledged that she had not exercised the options. But, she pointed out, had she exercised the options the gain would, according to the Guidance publication set out above, have been excluded from charge because of her redundancy. She had, she told us, relied on that Guidance. Her reading had been the same as, apparently, that of her tax advisors.

11. HMRC's response was to say that, whatever message its Guidance publication might have given, the letter of the law was clear. Ms Rawcliffe's option was, by reason of Section 471, an option to which Chapter 5 applied. A "chargeable event" within Section 477(3) and (6) had occurred when she received the £14,692 payment from ACI Ltd. The payment had been a "benefit in connection with employment-related securities options" (subsection 3(c)) because it had been "received in consideration for or otherwise in connection with failing….. to acquire securities pursuant to the employment-related securities options":(subsection (6)(a)).

12. Ms Rawcliffe had two responses on the law. First, she argued, the £14,692 payment was not to be regarded as a benefit for the purposes of Section 499(3)(c). Although she was "associated person", she had not "failed to acquire" the securities that had been the subject-matter of the options. Her employers, and particularly ACI Inc had committed the failure because of their non-compliance with SEC Reporting requirements. She, by contrast, had taken every available step to secure the exercise of her option rights.

13. Second, she contended on the strength of the decision in *Wilcock v Eve* 67 TC 223, [1995] STC 18, that the £14,692 payment was not an emolument; it had not been obtained in respect of her employment. Nor had it been obtained by her "by reason of" her employment.

Conclusions

14. We deal first with the implications of the Guideline publication. It is as illiterate and as potentially misleading as any official publication that we have come across. We acknowledge that Ms Rawcliffe was misled by the words quoted above into drawing the wrong conclusion as to the tax implications of receiving the £14,692 payment. What we cannot accept, however, is that Ms Rawcliffe would have foregone the payment or done something different had the wording of the Publication been clearer. It was a situation where she had to "take it or leave it". Even if she had had a "legitimate expectation" as to the tax results, she did not lose out by taking the payment. Even if this Tribunal had some form of public law jurisdiction, we would not have been inclined to make any order against HMRC. (Ms Rawcliffe might have a more productive response from the Revenue Adjudicator).

15. But, misleading though the offending words are, there are other pointers in the Guidance publication that support HMRC's position. The Publication is headed "Approved Company Securities Option Plans". Then, the Question and Answer that follow the offending Question and Answer set out above, read as follows:

"**Will I be taxed if I benefit from my option in any other way?**

If you benefit in any other way from your share option – apart from exercising it to buy shares – you will normally have to pay income tax on the amount of the "gain"."

16. The situation here is that Ms Rawcliffe never exercised any option. The words of this latter Question and Answer are against her. She did benefit "in any other way", i.e. by receiving the payment in response to her giving up all rights against her employers.

17. This brings us to the points of construction raised by Ms Rawcliffe. Taking the *Wilcock v Eve* decision (of 1995) first, we mention that, since then the law has been changed. The whole of the Chapter of which Section 477 forms part was brought in by Finance Act 2003. The question is no longer whether the payment or benefit was received "in respect of" or "by reason of" the employment of the person in question (as had been the issue in *Wilcock v Eve*). The question is whether Ms Rawcliffe, as an employee or a former employee, received the £14,692 payment in the form of a benefit in connection with an employment-related securities option as that expression is explained in Section 477 (6).

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. Try as we will, we cannot find any necessary implication in the wording and context of Section 477 to produce a reading that is more favourable to Ms Rawcliffe's construction.

19. For those reasons we have to dismiss Ms Rawcliffe's appeal.

20. 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.

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE

RELEASE DATE: 8 February 2013