



TC04557

Appeal number: TC/2010/04619

INCOME TAX– employment income – payments made under Compromise Agreement on termination of employment – valuation of employment related shares – whether shares restricted - negative earnings – giving up long dated options - consideration moving from employee as part of Compromise Agreement – Held – Employer operating restriction on shares in practice – valuation should reflect restrictions – Compromise Agreement single bargain representing all rights and obligations of parties – no separate consideration given by employee – appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr Lars Sjumarken

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
 Mr Nicholas Dee (Member)**

Sitting in public at Fox Court, Gray’s Inn Road, London on 15 May 2015

Mr Edward Waldegrave of Pump Court Tax Chambers for the Appellant

Mr J Corbett, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal made by Mr Lars Sjumarken against HMRC's closure notice dated 6 January 2010 for the year 2005-6 relating to income tax due on payments made to him on the termination of his employment with BNP Paribas in 2006.

Background Facts

2. Mr Sjumarken was employed by BNP Paribas ("BNP") as an investment banker, in charge of BNP's EU investment banking division until his contract was terminated on 18 October 2005. A negotiated Compromise Agreement was made between Mr Sjumarken and BNP which was signed on 17 January 2006 and included a termination payment of £117,450, the release of shares under BNP's Share Incentive Plan ("SIP") and cash under BNP's Cash Incentive Plan ("CIP"). Mr Sjumarken also received three months' pay in lieu of notice which was paid to him in November 2005.
3. As an employee of BNP Mr Sjumarken was also eligible for 3,000 long dated share options ("the Long Dated Options") which were granted to him in March 2003 and expired in 10 years. At the date of his redundancy these had not been exercised and were "in the money".
4. The P14 provided by BNP for Mr Sjumarken reflecting the payments made under the Compromise Agreement included payments to him described as Share Incentive Plan £144,632.48 and Cash Incentive Plan £56,863.27 with tax deducted on both of those at 22%.
5. Mr Sjumarken's self-assessment return for 2005-6 did not include tax on the shares received under the SIP. Mr Sjumarken referred to the SIP but stated that it was free of tax because it was an approved scheme. The CIP payment was included as taxable income in his self-assessment return but in the course of subsequent discussions with HMRC Mr Sjumarken stated that this should be treated as a tax exempt redundancy payment.
6. HMRC opened an enquiry into Mr Sjumarken's 2005-6 self-assessment tax return on 24 October 2007. Mr Sjumarken provided further additional information and had a number of discussions with HMRC. HMRC issued a closure notice on 6 January 2010 stating that Mr Sjumarken owed a further £57,836.36 of tax because both the shares granted under the SIP and the cash received under the CIP were taxable income. HMRC undertook a statutory review which confirmed their position which was issued to Mr Sjumarken on 20 April 2010.
7. Mr Sjumarken appealed to this Tribunal on 17 May 2010.

Preliminary Matters

8. This is the re-hearing of a decision given by the First Tier Tribunal on 7 January 2011 which was set aside by a decision dated 15 January 2013 on the basis that there had been a procedural irregularity.

5 *Issues in Dispute*

9. The parties now agree that neither the SIP nor the CIP schemes were approved schemes for UK tax purposes.

10. The issues in dispute are (i) the correct valuation of the SIP shares and whether they should be valued as “restricted” shares and (ii) whether Mr Sjumarken provided consideration to BNP by giving up his Long Dated Options which should be treated as reducing the amount on which he is liable to tax under the Compromise Agreement.

The Law

11. The legislation in this area is complex depending on numerous inter-related definitions all of which we were taken to by Mr Waldegrave. We are setting out here only those definitions and sections which are most significant for this decision.

12. S 272 Taxation of Chargeable Gains Act 1992 (“TCGA 1992”) provides the meaning of market value and is relevant to the basis on which the SIP shares are valued.

20 S 272(1) “*In this Act “market value” in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market*”.

13. The Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”) provides the general definitions of employment income and taxable employment earnings:

(1) S 9 Amount of employment income charged to tax

25 9(2) “*in the case of general earnings, the amount charged is the net taxable earnings from an employment in the year*”.

(2) S 11 Calculation of net taxable earnings

S11(1) “For the purposes of this Part the “net taxable earnings” from an employment in a tax year are given by the formula –

30 *TE-DE*

Where

TE means the total amount of any taxable earnings from the employment in the tax year and

35 *DE means the total amount of any deductions allowed from those earnings under provisions listed in section 327(3) to (5) (deductions from earnings – general).*

(2) *If the amount calculated under subsection (1) is negative, the net taxable earnings from the employment are taken to be nil instead.*

(3)

5 (3) S 62 Provides the general definition of earnings for these purposes

S 62(1) *“This section explains what is meant by “earnings” in the employment income Parts.*

(2) *In those Parts “Earnings” in relation to an employment, means –*

(a) *any salary, wages or fee,*

10 (b) *any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money’s worth or*

(c) *anything else that constitutes an emolument of the employment”*

(4) Ss 420 – 421A state how consideration is determined when payment is made other than by cash;

15 S 421 (2) *“Where consideration for anything is given in the form of an asset (as opposed to a payment), any reference in this Chapter or any of Chapters 2 to 5 to the amount of the consideration is the market value of the asset”*

20 (5) Ss 471 – 479 deal specifically with options available by reason of employment and determine when tax arises in respect of such options. It was not disputed that the Long Dated Options were securities options available by reason of employment.

S 475(1) *“No liability to income tax arises in respect of the acquisition of an employment- related securities option”*

25 S 476 (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”*

s 477(3) defines chargeable events

“The events are-

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

(b) *the assignment for consideration of the employment-related securities option by an associated person otherwise than to another associated person or the release for consideration of the employment-related securities option by an associated person; or*

35 (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))”*

s 477(6) “A benefit in 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

5 (b) granting or undertaking to grant to another person a right to acquire securities which are subject to the employment-related securities option or to any interest in them

is to be regarded for the purposes of subsection (3)(c) as received in connection with the employment related securities.”

10 (6) S 479 sets out how to calculate the gain arising on the occurrence of a chargeable event:

479 (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) –

15 $MV - C$

(3) In subsection (2) –

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

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

(4)

25 (5) The amount of the gain realised on the occurrence of an event that is a chargeable event by virtue of sections 477(3)(b) (assignment or release of option) is the amount of the consideration given for the assignment or the release.”

14. We were referred to the following authorities:

(1) *Commissioners of Inland Revenue v Crossman* [1937] AC 26

(2) *Lynall v Inland Revenue Commissioners* [1972] AC 680

30 (3) *HMRC v Martin* [2014] UKUT 429.

15. *Documents seen:*

(1) The Compromise Agreement between Mr Sjumarken and BNP dated 17 January 2006, including

35 (a) Clause 8 “.... you confirm and agree that you have no claim or entitlement in relation to any expenses or in respect of any bonus scheme or any share option or any other incentive payment or similar and that

neither the Company [BNP] nor any associated company is liable to make any payment to you in respect of these items”

(b) Clause 7 “ *if you wish to sell your DCS/SIP BNP Paribas Shares [the SIP shares], please complete the Sales Order Form and send it directly to GIS”.*

(2) BNP Share Incentive Plan – SIP – 2004, including

(a) Clause 3 (a) “**Condition of Transfer** ;*The SIP Shares.... will be transferred (subject to 3.c below) to participants as indicated above, provided the participants have been continuously employed with the BNP Paribas Group at the dates of transfer”*

(b) Clause 3 (b) “**Early Transfer**; *The SIP shares will be transferred before the normal dates of transfer if one of the events occurs:*

- *Retirement*
- *Termination of employment due to permanent ill health*
- *Redundancy*
- *.....*

(3) Email from Luke Saunders reward consultant at BNP to Mr Sjumarken of 1 March 2010 referring to the Compromise Agreement and stating that “ *As per this agreement, your entitlement to stock options was forfeited upon termination of your employment”*

(4) Letter dated 31 October 2012 from Mr Marshall-Davies of MD Investment Management providing their opinion of the fair valuation of the SIP shares held by Mr Sjumarken as £68,619.

(5) Letter dated 22 May 2013 from Mr Marshal- Davies of MD Investment Management setting out their opinion of the valuation of the Long Dated Options on BNP shares held by Mr Sjumarken as £130,286.

(6) Email to Mr Sjumarken from Mr Collard at BNP dated 4 February 2014 stating that “*I confirm that the remaining 1335 BNP PARIBAS SHARES in your account are SIP shares and were restricted shares”.*

(7) Spreadsheet prepared by Mr Sjumarken setting out the vesting profile of his SIP shares from 2004 – 2008 including SIP shares granted between 2003 and 2005.

(8) Letter dated 14 May 2014 from T Henchley, Employment Tax Manager at BNP to HMRC responding to HMRC’s questions about the 2004 SIP stating that “*Once the transfer of shares has occurred the employee has unfettered rights to shares i.e. there is no restriction”.*

(9) No documents were provided relating to the CIP scheme.

(10) No documents were provided relating to the Long Dated Options.

Witness evidence:

Mr Sjumarken

16. Mr Sjumarken provided a witness statement dated 20 November 2013 and
5 provided oral evidence to the Tribunal, he was cross-examined by Mr Corbett. Mr
Sjumarken appeared to the Tribunal as a clear and convincing witness. He told us that
he had limited access to some of the documentation relating to this case because of
moving from the UK to Switzerland in 2007, because he could not locate some papers
10 after his divorce and because much of the information was on his work computer
which he could not access after he left BNP.

The Compromise Agreement

17. Mr Sjumarken explained that he was made redundant by BNP on 17 October
2005 and was paid three months' pay in lieu of notice plus a sum payable under a
15 Compromise Agreement of £117,000 and the release of shares held under the SIP and
cash under the CIP. Mr Sjumarken took legal advice in respect of the Compromise
Agreement. He was originally offered a compromise payment of £60,000 but this was
increased to £117,000 after negotiations.

18. He signed the Compromise Agreement with BNP under some time pressure;
being told that the agreement was "take it or leave it" and had to be signed by 5pm on
20 17 January 2006, the day on which he received it. His interpretation of the
Compromise Agreement was that he provided "significant consideration" by giving
up the Long Dated Options, in exchange for the £117,000 payment made to him. Mr
Sjumarken accepted that Clause 8 of the Compromise Agreement which dealt with
bonus schemes and share options had appeared in earlier drafts of the agreement as
25 well as the 17 January 2006 version which he signed.

19. BNP withheld basic rate tax on all payments made to Mr Sjumarken under the
Compromise Agreement. Mr Sjumarken had been told by BNP representatives that
they would withhold basic rate tax on the maximum potential value of all payments
and that it was up to the employee to determine whether some of those amounts
30 should be tax free. Mr Sjumarken believed that this was in line with BNP's general
policy and did not necessarily indicate, as HMRC suggested, that tax was actually due
on the full amount.

The SIP Shares

20. Between 18 October 2005 and 17 January 2006 Mr Sjumarken discussed with
35 BNP's head of HR Compensation his rights under the bank's SIP scheme. It was
made clear to him that the SIP shares would be transferred from the general BNP trust
into an account at BNP Security Services in his name but would remain under the
original restrictions limiting the number of shares which could be sold, with the shares
vesting over a period of three years.

21. In response to the Tribunal's questions Mr Sjumarken told us that he understood that BNP had instructed BNP Security Services to hold the shares subject to the same restrictions as BNP had applied. He spoke to BNP Security Services a couple of times each year to check his account. In particular he spoke to them in late 2006 because he
5 wanted to sell his shares but was told that only 1,070 were available for sale, the remaining 1,800 were subject to restrictions. He actually sold 1,500 of his shares in 2008 by which time all selling restrictions were lifted.

The Long Dated Options

22. Mr Sjumarken said that he was not aware at the time when he signed the
10 Compromise Agreement that this would result in the confiscation of his Long Dated Options; he understood that he was merely blocked from making further claims for performance based compensation for 2005 or any earlier years. The Long Dated Options had been awarded in 2003 and were convertible into BNP shares from March 2005 and the options were exercisable from March 2006. The Long Dated Options
15 were held in an account in his name at BNP Security Services

23. However BNP did confiscate his Long Dated Options (which were in the money in 2006) under the Compromise Agreement. Mr Sjumarken estimated that their value at that time was £130,286 and that this should be treated as consideration given by him under the Compromise Agreement. This should be treated as negative earnings
20 and offset against the taxable payments made to him under the Compromise Agreement.

Discussions with HMRC

24. Mr Sjumarken described the correspondence and discussions which he had with HMRC during 2009 leading up to the issuance of the Closure Notice in January 2010.
25 As a result of discussions with Mr Clague of HMRC Mr Sjumarken believed that HMRC had agreed to treat the SIP shares as tax free and the CIP cash as 50% taxable. Mr Sjumarken said that the issuing of the closure notice ignored these two clear agreements about the tax treatment of the payments made to him.

Valuation of the SIP shares and Long Dated Options

30 25. Mr Sjumarken said that the SIP shares clearly had restricted rights and the £144,632.48 value placed on them by HMRC was far too high. The correct valuation was in line with that provided by MD Investment Management in their letter of 31 October 2012, £68,619. The value of the Long Dated Options which he gave up as part of the Compromise Agreement should also be valued on the basis suggested by
35 MD Investment Management at £130,286.

Mr Marshall-Davies

26. Mr Marshall-Davies appeared on behalf of the Appellant. He is a financial consultant and the CEO of MD Investment Management and a former employee of Credit Suisse and BNP. He worked as futures and options trader for 10 years. Mr
40 Marshall-Davies did not provide a written witness statement to the Tribunal but

referred to the valuation letters provided by MD Investment Management and gave oral evidence to the Tribunal.

27. Mr Marshall-Davies told us that he had no experience in valuing restricted shares but that in coming to his valuation he had used a model based on taking
5 derivative instruments (put and call equity options) which recreated the same economic effect as the restricted shares, protecting either only the downside risk in the BNP share value or both the downside and upside risk.

28. In valuing the Long Dated Options Mr Marshall-Davies explained that he had applied the standard Black Scholes formula and added market information about
10 future interest rates and expected market volatility in the BNP shares.

Taxpayer's Arguments

The value of the SIP Shares

29. The SIP shares were valued by BNP and taxed by HMRC at their market value
15 of £144,632.48 in February 2006. Mr Waldegrave argued that this was not their correct valuation for tax purposes because they were subject to restrictions. Despite the terms of the SIP (2004 rules) and the statement made by Mr Henchley of BNP in May 2014, in practice the SIP shares belonging to Mr Sjumarken were moved out of BNP's employee benefit trust and put into an account in his name at BNP Security
20 Services (the custodian part of BNP's banking business). While held in that account they retained the restrictions about when they vested as set out in the SIP terms. This was confirmed to Mr Sjumarken by Mr Collard (4 Feb 2014 email) and is supported by the fact that when Mr Sjumarken attempted to sell the shares (in response to take-over activity) in late 2006 he was told that only 1,070 of his total holding was
25 available for sale because the remaining shares were restricted.

30. Authorities which had considered the meaning of "market valuation" suggested that any actual restrictions on sale should be taken account of in determining an asset's value as made clear in the *Lynall* decision. The SIP shares should therefore be
30 valued taking account of the restricted dates on which they vested in accordance with the valuation provided by Mr Marshall-Davies for Mr Sjumarken; either by looking at the costs of hedging the down side price risk in the value of the shares for the period while the restrictions were in place through a put option or by hedging both the downside and upside risk in the value of the shares while the restrictions were in place
35 through put and call options. Mr Marshall-Davies' valuation had taken the mid-point produced by these two approaches to valuing the shares and given an estimate of £68,619 as their value which should be accepted by the Tribunal.

The Long Dated Options.

31. Mr Sjumarken had received the £117,000, the CIP cash and the SIP shares as
40 part of his Compromise Agreement settlement, but, in accordance with clause 8 of the Compromise Agreement he had also given up his rights to any share options which he

held, which were Long Dated Options over BNP shares. He was not given any choice but to give these up. BNP made clear that this provision of the Compromise Agreement was not negotiable. The giving up of these rights represented consideration moving from Mr Sjumarken to his employer and should be treated as an expense of employment under s 11 ITEPA and as in the *Martin* decision “negative earnings”, being a payment made from the employee to the employer, the mirror image of earnings. In determining the amount liable to tax on the gain realised on the SIP shares, the appropriate proportion of the consideration given in the form of the Long Dated Options should be taken account of.

32. Alternatively, rather than being treated as negative earnings, the payment should be netted off before Mr Sjumarken’s taxable earnings were calculated and deducted either from the value of the SIP shares or as a pro-rata deduction against everything he received under the Compromise Agreement. Mr Waldegrave disagreed with HMRC’s analysis of the application of s 477(6) and (3) ITEPA; on his analysis the surrender of the Long Term Options was not a chargeable event under s 477(6). There had been no “surrender” of the option rights by Mr Sjumarken; on the contrary he believed he still had those rights until he attempted to exercise them some time after the date of the Compromise Agreement.

33. The giving up of the Long Dated Options was a separate bargain and was not part of the Compromise Agreement. Mr Sjumarken was not aware that the Long Dated Options were intended to be included in Clause 8 of the Compromise Agreement.

34. Those Long Dated Option rights should be valued using the Black Scholes method and applying assumptions about the 8 year forward interest rate and the liquidity of the BNP shares as had been done by Mr Marshall-Davies, giving a value of £130,286.

HMRC’s Arguments.

The SIP Shares

35. In respect of the SIP shares HMRC said that the onus was on the taxpayer to demonstrate that they were restricted shares. The Compromise Agreement and the terms of the SIP clearly suggested that there would be no restrictions on sale on termination of employment. The reference to the form for selling the shares at Clause 7 of the Compromise Agreement supported this as did Mr Henchley’s email of 14 May 2014. The SIP shares should be valued at their nominal value. The contractual terms of the SIP and the Compromise Agreement overrode anything which actually happened in practice. This evidence was to be preferred over the statements made to Mr Sjumarken by Mr Collard since he was not authorised to make those statements by BNP and no information had been provided about his status as the author of those remarks.

The Long Dated Options

36. Mr Corbett said that the Long Dated Options did not belong to Mr Sjumarken to give up, they had lapsed according to their terms as a result of the termination of his employment, there was nothing to be confiscated, since they had never vested in Mr Sjumarken. Mr Sjumarken already had a contractual right to the SIP shares and the CIP cash, he did not need, and in any event could not, give up the Long Dated Options as part of the Compromise Agreement. The fact that Mr Sjumarken was not aware until later that these Long Dated Options had lapsed as a result of the termination of his contract was not relevant to HMRC's analysis.

37. In Mr Corbett's view the Long Dated Options could not be negative earnings because they were not earnings; they were specifically excluded from being earnings under s 475(1) ITEPA. If it was possible for Mr Sjumarken to give up the Long Dated Options, a chargeable event occurred on the release of the Long Dated Options under the Compromise Agreement in accordance with s 477(3)(b) ITEPA with the gain being calculated under s 479(5). If this is not correct then the Long Dated Options fell within the specific head at s 477(6) ITEPA (failing or undertaking not to acquire securities).

38. The taxable amount which fell into charge under s 477(3)(b) was £57,000; the difference between the originally offered sum and the final payment made under the Compromise Agreement which was allocable to the release of the Long Dated Options. The Long Dated Options were part of the bargain made by Mr Sjumarken under the Compromise Agreement and explained why the offer from BNP was raised from £60,000 to £117,000.

39. Mr Corbett said that the actual valuation of the SIP shares and the Long Dated Options had not been considered by HMRC and he asked for further time, if relevant, to allow HMRC's valuation team to consider this issue.

Decision

40. *Facts Found:*

(1) Clause 8 of the Compromise Agreement which referred to any option rights of Mr Sjumarken had appeared in early drafts of the agreement, it was not inserted only in the Compromise Agreement which Mr Sjumarken was told he had to sign on 17 January 2006.

(2) The 2004 SIP document did not contain restrictions on SIP shares granted and transferred on redundancy; Clause 3b provided that shares would be transferred before the normal transfer dates on redundancy.

(3) Mr Sjumarken attempted to sell all of his SIP shares in late 2006 but was told by BNP Security Services that this was not possible because restrictions applied.

40 *The SIP Shares;*

41. The documentation which we saw about BNP's SIP scheme was limited. The SIP document which was provided was a 2004 document but we were invited to accept that its terms applied to all of Mr Sjumarken's SIP shares.

42. This 2004 scheme document suggested that that the SIP Shares were to vest immediately on termination of employment: Clause 3b of that document makes this clear and is supported by the letter from Mr Henchley to HMRC. HMRC also relied on clause 7 of the Compromise Agreement as evidence that the shares were immediately available for sale

43. We do not agree that clause 7 of the Compromise Agreement is indicative of the legal nature of Mr Sjumarken's rights to the SIP shares, to our mind it is merely setting out an administrative procedure about how to sell the shares, should they be available for sale. However, we do accept that the intention of BNP on the basis of the 2004 SIP document was that SIP shares granted to an employee who had been made redundant should vest immediately.

44. Nevertheless, Mr Sjumarken provided clear evidence, which we did not doubt, that he had been told by a representative of BNP Security Services that the shares were restricted and more significantly, when he tried to sell his whole holding in 2006 he was told that this was not possible. He provided us with a detailed schedule of the dates when each tranche of shares held by him could be sold.

45. On the basis of this evidence we have concluded that, despite what was said in the SIP document, in fact the SIP shares were restricted in practice and that their "market valuation" for the purpose of s 272 TCGA 1992 should reflect that fact, as suggested by the authorities to which Mr Waldegrave referred including *Crossman* where it was stated by Lord Russell of Killowen "*I can find nothing in the sub-section which would justify me in holding that the vendor on the hypothetical sale is to be considered as selling something which is affected by fewer restrictions than those to which it was subject in the testator's hands*". [page 68]

46. Given HMRC's comments about their need to consider valuation issues further at this stage the Tribunal leaves it for further discussion between the parties to agree a valuation of the shares assuming that they were restricted on the basis of the schedule provided by Mr Sjumarken and to revert to the Tribunal if an agreed valuation is not possible.

The Long Dated Options

47. As far as the Long Dated Options were concerned, the amount of information provided about their terms was even more limited. Mr Sjumarken clearly viewed these as his assets and therefore something which he had given up as part of the Compromise Agreement. It is not possible to ascertain whether, as HMRC suggest, the terms of these options were such that they automatically lapsed on Mr Sjumarken's redundancy so that Mr Sjumarken had no asset to give up on the termination of his employment contract.

48. If they did not lapse automatically on termination of Mr Sjumarken's employment, it is very clear that those options were cancelled as a result of the Compromise Agreement under clause 8 which had always been included as part of the document which was negotiated by Mr Sjumarken, his lawyers and BNP. We did not see any evidence other than Mr Sjumarken's own understanding of the position, that the sum paid to Mr Sjumarken, at least from BNP's perspective, excluded any value ascribed to the Long Dated Options. On the face of the Compromise Agreement, those were part of the bargain made by both sides.

49. Mr Sjumarken's argument, though not put in precisely these terms, seemed to be that since he did not understand the full implications of Clause 8, it should not be treated as part of the agreement made with BNP. On the basis of the evidence which we have seen and taking account of Mr Sjumarken's ability to understand the document and the fact that he had engaged legal advisers, we can see no basis on which it might be possible to argue that this element of the agreement should be treated as void or voidable on the basis of mistake or misrepresentation.

50. For these reasons we do not accept that the giving up of the Long Dated Options, even if this was legally possible by Mr Sjumarken, can be treated as a separate, additional bargain under which Mr Sjumarken gave consideration to BNP and so cannot further reduce the amount on which Mr Sjumarken should be liable to tax.

51. Equally, we do not agree with HMRC that the Long Dated Options can be directly ascribed to the increase in the offer made to Mr Sjumarken from £60,000 to £117,000. We have seen no evidence that it was the Long Dated Options which were the basis of this increase in the compromise sum. Our view is that any sum which might notionally be allocated to the Long Dated Options was deducted as part of the overall bargain represented by the Compromise Agreement which settled on the £117,000 payment, the release of the SIP shares and the CIP cash which was effectively net of any value ascribed to those option rights.

Negative Earnings.

52. Mr Sjumarken's secondary arguments relying on concepts of negative earnings and the arguments in *Martin* can only apply if we accept that the value of the Long Dated Options had not already been taken account of in the financial settlement agreed as part of the Compromise Agreement, which we do not, therefore we have not considered this secondary argument.

Conclusion

53. For these reasons Mr Sjumarken's appeal is accepted in respect of the valuation of the SIP Shares, which should be on the basis that they are restricted and the parties should agree a valuation on that basis but is rejected in respect of any additional deduction available for the value of the Long Dated Options.

54. 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)”
5 which accompanies and forms part of this decision notice.

**RACHEL SHORT
TRIBUNAL JUDGE**

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RELEASE DATE: 10 AUGUST 2015