[2017] UKFTT 0188 (TC)

TC05676

Appeal number: TC/2016/03532

CAPITAL GAINS TAX – exercise of options granted under an employee share scheme – the grantor at liberty to satisfy the rights of the option holder on exercise in a number of different ways at its own discretion – the option holder received a cash payment – whether section 144A TCGA applied – held, on the facts, no – whether section 144ZA TCGA applied to disapply the market value rule in determining the option holder's cost of acquisition of the shares acquired – held, yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN DAVIES **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC

Sitting in public at The Royal Courts of Justice, London on 3 February 2017

Jonathan Peacock QC and Sarah Black, Counsel, for the Appellant

Akash Nawbatt QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal by Mr Stephen Davies against amendments to his self-assessments for the tax years 2005/2006, 2006/2007, 2007/2008 and 2010/2011. The disputed amendments relate to an allowable loss for the purposes of capital gains tax ("CGT") claimed in relation to the exercise of share options by Mr Davies in the tax year 2005/2006.

2. I was provided with two bundles of documents but there was no witness evidence. The relevant facts were in some measure agreed, and I invited the parties to prepare an agreed Statement of Facts. They were unable to do so, but instead provided separate Statements of Facts, which, to a large extent, overlapped. From these two statements, I record the agreed facts as follows.

The evidence and findings of fact

3. Mr Davies has been employed by Goldman Sachs since 2 December 1993 and became a managing director in 2006.

4. Mr Davies was granted options under an unapproved employee share option scheme, the Goldman Sachs 1999 Stock Incentive Plan ("the GS 1999 SIP"), in 1999 and 2000. These options were over quoted shares in the Goldman Sachs Group, Inc. ("GS Inc"), whose shares are listed on the New York Stock Exchange and NASDAQ.

5. Paragraph 6 of the Option Award [I had before me the 2000 Year-end Option Award pursuant to the GS 1999 SIP] provided as follows:

> 'Delivery. Unless otherwise determined by the Committee, or as otherwise provided in this Award Agreement, and except as provided in Paragraphs 9 and 10, upon receipt of payment of the Exercise Price for shares subject to 2000 Year-End Options, delivery of Shares shall be effected by book-entry credit to a custody account (the "Custody Account") maintained by you [the option holder] with The Chase Manhattan Bank or such successor custodian as may be designated by GS Inc. No delivery of Shares shall be made unless you have timely returned the enclosed Signature Card. You shall be the beneficial owner of any Shares properly credited to the Custody Account. You shall have no right to any dividend or distribution with respect to such Shares if the record date for such dividend or distribution is prior to the date the Custody Account is properly credited with such Shares. The Firm may deliver cash in lieu of all or any portion of the Shares otherwise deliverable in accordance with this Paragraph 6.'

6. The options vested in – became exercisable by – Mr Davies, and he exercised the options in three stages on 20 October 2005, 13 January 2006 and 30 March 2006 – all within the tax year 2005/2006.

7. Mr Davies filed his tax return on the basis that the exercise of the options gave rise to an allowable loss for CGT purposes in the tax year 2005/2006. The amount of

allowable loss originally claimed was £232,191 but that amount was understated as a result of a wrong US$/£ exchange rate being used. The amended amount is £302,294.

8. Mr Davies used this loss to set against chargeable gains for CGT purposes in the tax years 2005/2006, 2006/2007, 2007/2008 and 20102011. The Respondents ("HMRC") contend that there was no such allowable loss.

9. Enquiries were opened into Mr Davies's tax return for the tax year 2005/2006 on 19 December 2007 and within the enquiry period for all remaining years where losses were carried forward.

10. Closure notices and amendments to self-assessments for the years 2005/2006, 2006/2007, 2007/2008 and 2010/2011 were issued on 17 February 2016.

11. Mr Davies appealed to HMRC on 3 March 2016.

12. A review was requested on 14 April 2016 and a review decision, confirming the amendments, was issued on 7 June 2016.

13. Mr Davies appealed to this Tribunal on 23 June 2016.

14. To expand on these agreed facts, I find facts from the evidence before me as follows.

15. The GS 1999 SIP is a US incentive plan, designed to attract, retain and motivate officers, directors, employees (including prospective employees), consultants and others who may perform services for GS Inc. and its subsidiaries and affiliates. The governing law of the GS 1999 SIP is the law of the State of New York, USA.

16. Awards under the GS 1999 SIP may, according to clause 6 of the GS 1999 SIP document, be made in the form of options, stock appreciation rights, dividend equivalent rights, restricted stock, restricted stock units or other equity-based or equity related awards, which the committee appointed by the board of directors of GS Inc determines to be consistent with the purpose of the GS1999 SIP and the interests of GS Inc.

17. It is provided by clause 2.2 of the GS 1999 SIP document that no grantee of an award shall have any of the rights of a shareholder of GS Inc with respect to shares subject to such an award until the delivery of such shares. The general rule provided by that clause is that a grantee of an award has no right to dividends or similar rights derived from shares subject to an award, for which the record date is prior to the date of delivery of the shares concerned.

18. There was with my papers a document headed "Award Summary 2000 Year-End Restricted Stock Unit Award and 2000 Year-End Stock Option Award". This document was, I find, a memorandum describing the rights and entitlements of persons eligible for awards under the GS 1999 SIP, including Mr Davies.

19. In relation to the 2000 Year-End Option Award, the award consisted of options to buy shares. It is stated in the memorandum that: '[a]t the discretion of the SIP Committee, instead of delivering Shares upon the exercise of your 2000 Year-End Options, the firm may deliver a cash payment equal to the fair market value of the Shares you would have purchased less the Strike price for the Shares (*e.g.*, in the case of exchange controls, foreign investment limitations or other local restrictions)'. The Strike Price was the closing price on the New York Stock Exchange of a share on the date the 2000 Year-End Options were granted.

20. The memorandum stated that 2000 Year-End Options must be exercised in accordance with the procedures adopted by the SIP Committee as in effect from time to time, and that '[d]elivery of Shares upon the proper exercise of your 2000 Year-End Options generally will be by book entry to the custody account that you must have established with The Chase Manhattan Bank. As noted above, GS Inc may elect to make a cash payment in lieu of delivering Shares'.

21. GS Inc provided an electronic system for employees to exercise their share options. By 2006, the relevant custodian had become Mellon Investment Services. The details of Mr Davies's exercise of options on 20 October 2005, 13 January 2006 and 30 March 2006 were as follows.

22. On 20 October 2005, he exercised options (which had been granted on 7 May 1999) over 2,800 shares. Those shares were sold on the same day – the fair market value and the sale price of each share being the same - $120. This was a 'cashless for cash' exercise. This is a procedure whereby, at the direction of the option holder (Mr Davies) shares were issued by GS Inc to him and were sold in the market, at the option holder's expense and risk. A sufficient part of the proceeds of sale was applied in covering the option holder's obligation to pay the exercise price (the Strike Price), together with any applicable taxes (in Mr Davies's case, US federal withholding tax) and fees, and the remaining part of the proceeds was transferred to the option holder.

23. On 13 January 2006 Mr Davies exercised options (which had been granted on 7 May 1999) over 2,863 shares. Again, the shares were sold on the same day – the fair market value and the sale price of each share being the same - $133.2430. Again, the options were exercised on a 'cashless for cash' basis.

24. On 30 March 2006, Mr Davies exercised options (which had been granted on 7 May 1999) over 1,605 shares. Again, the shares were sold on the same day – the fair market value and the sale price of each share being the same - $158.6221. Again, the options were exercised on a 'cashless for cash' basis.

25. There was with my papers a letter from Computershare Shareowner Services, formerly BNY Mellon Shareowner Services, who I find to have been, or to have been connected to, the custodian Mellon Investment Services, dated 29 September 2016, addressed to GS Inc. The letter comments on the option exercised by Mr Davies and confirms that his exercises of options were dealt with together with other similar exercises on the same day and that in all cases common stock was issued for Mr Davies's account.

26. I also had with my papers a letter dated 5 October 2016 from a Mr Eric Dias, Vice President, Equity Compensation, GS Inc to a Mr Housden at Goldman Sachs International, London. That letter explains that in Mr Davies's case the process by which he exercised his share options was a 'settlement of share options' and not 'a right to a cash payment based on Goldman Sachs' share price'. The letter also explains that in a 'cashless for cash' exercise, all of the shares issued to Mr Davies are sold on the market as explained above (at paragraph 22).

27. Mr Nawbatt QC, for HMRC, in his submissions raised a factual issue. He invited me to find how the grantor of Mr Davies's share options met its obligations to Mr Davies, following Mr Davies's exercises of the options. He submitted that it was not clear from the evidence before me that Mr Davies had received shares in GS Inc as opposed to cash settlements. He submitted that the burden of proof on this issue was on Mr Davies and that, absent any witness evidence, the burden of showing that Mr Davies had received shares had not been discharged. All we knew from the evidence, he submitted, was that Mr Davies had received cash on the exercise of his options.

28. He submitted that the letter dated 29 September 2016 from Computershare Shareowner Services was not evidence that any shares had been delivered to Mr Davies. That letter stated in relation to 'all option exercises from all individuals initiated on any given day' that 'the corresponding number of common stock are issued on behalf of each individual through a custodial account to satisfy such option exercises as a whole'. I am satisfied from the text of that letter and from the evidence which I have referred to, as a whole, and find, that, as Mr Peacock QC submitted, GS Inc. met its obligations to Mr Davies on the exercises by him of his share options by the delivery of the shares concerned to him by a credit to a custody account set up in his name and that the shares, once delivered, were sold through the custody account.

The issues of law for my decision

29. The parties are agreed that there are two issues of law for me to decide. They are: (1) whether the options exercised by Mr Davies in the tax year 2005/2006 were 'cash-settled' options for the purposes of section 144A Taxation of Chargeable Gains Act 1992 ("TCGA") by virtue of a cash payment made by GS Inc; and (2) whether section 144ZA TCGA (which provides rules for the disapplication of the market value rule in the case of an exercise of an option) applies to the exercises of options by Mr Davies in the tax year 2005/2006, given the discretion allowed to GS Inc to discharge its obligations by delivering shares or making a cash payment.

The relevant statutory provisions

30. Special provisions apply to the CGT treatment of options and assets acquired by their exercise.

31. Section 144 TCGA relevantly provides as follows:

> '(1) Without prejudice to section 21 [general provisions concerning assets and disposals], the grant of an option, and in particular-

(a) the grant of an option in a case where the grantor binds himself to sell what he does not own, and because the option is abandoned, never has occasion to own, and

(b) the grant of an option in a case where the grantor binds himself to buy what, because the option is abandoned, he does not acquire,

is the disposal of an asset (namely of the option), but subject to the following provisions of this section as to treating the grant of an option as part of a larger transaction.

(2) If an option is exercised, the grant of the option and the transaction entered into by the grantor in fulfilment of his obligation under the option shall be treated as a single transaction and accordingly-

(a) if the option binds the grantor to sell, the consideration for the option is part of the consideration for the sale, and

(b) if the option binds the grantor to buy, the consideration for the option shall be deducted from the cost of acquisition incurred by the grantor in buying in pursuance of his obligations under the option.

(3) The exercise of an option by the person for the time being entitled to exercise it shall not constitute the disposal of an asset by that person, but, if an option is exercised then the acquisition of the option (whether directly from the grantor or not) and the transaction entered into by the person exercising the option in exercise of his rights under the option shall be treated as a single transaction and accordingly-

(a) if the option binds the grantor to sell, the cost of acquiring the option shall be part of the cost of acquiring what is sold, and

(b) if the option binds the grantor to buy, the cost of the option shall be treated as a cost incidental to the disposal of what is bought by the grantor of the option.

…

(5) This section shall apply in relation to an option binding the grantor both to sell and to buy as if it were 2 separate options with half the consideration attributed to each.

(6) In this section references to an option include references to an option binding the grantor to grant a lease for a premium, or enter into any other transaction which is not a sale, and references to buying and selling in pursuance of an option shall be construed accordingly.'

32. Following the decision of the Court of Appeal in *Mansworth (Inspector of Taxes) v Jelley* [2003] STC 53, which went against the inspector, section 144ZA, TCGA was enacted (by section 158 Finance Act 2003). It provides relevantly as follows:

'(1) … this section applies where-

(a) an option is exercised, so that by virtue of section 144(2) or (3) the grant or acquisition of the option and the transaction resulting from its exercise are treated as a single transaction, and

(b) section 17(1) ("the market value rule") applies, or would apply but for this section, in relation to-

(i) the grant of the option,

(ii) the acquisition of the option (whether directly from the grantor or not) by the person exercising it, or

(iii) the transaction resulting from its exercise.

(2) If the option binds the grantor to sell-

(a) the market value rule does not apply for determining the consideration for the sale, except, where the rule applies for determining the consideration for the option, to that extent (in accordance with section 144(2)(a));

(b) the market value rule does not apply for determining the cost to the person exercising the option of acquiring what is sold, except, where the rule applies for determining the cost of acquiring the option, to that extent (in accordance with section 144(3)(a)).

(3) If the option binds the grantor to buy-

(a) the market value rule does not apply for determining the cost of acquisition incurred by the grantor, but without prejudice to its application (in accordance with section 144(2)(b)) where the rule applies for determining the consideration for the option;

(b) the market value rule does not apply for determining the consideration for the disposal of what is bought, but without prejudice to its application (in accordance with section 144(3)(b)) where the rule applies for determining the cost of the option.

(4) To the extent that, by virtue of this section, the market value rule does not apply for determining an amount or value, the amount or value to be taken into account is (subject to section 119A) the exercise price.

(4A) In subsection (4) above "exercise price", in relation to an option, means the amount or value of consideration which, under the terms of the option is-

(a) receivable (if the option binds the grantor to buy), or

(b) payable (if the option binds the grantor to sell),

as a result of the exercise of the option (and does not include the amount or value of any consideration for the acquisition of the option (whether directly from the grantor or not)).

(5) Subsections (5) and (6) of section 144 shall apply for the purposes of this section … as they apply for the purposes of that section.'

33. Section 144A TCGA (cash-settled options) provides relevantly as follows:

'(1) In any case where-

(a) an option is exercised; and

(b) the nature of the option (or its exercise) is such that the grantor of the option is liable to make, and the person exercising it is entitled to receive, a payment in full settlement of all obligations under the option,

subsections (2) and (3) below shall apply in place of subsections (2) and (3) of section 144.

(2) As regards the grantor of the option-

(a) he shall be treated as having disposed of an asset (namely, his liability to make the payment) and the payment made by him shall be treated as incidental costs to him of making the disposal; and

(b) the grant of the option and the disposal shall be treated as a single transaction and the consideration for the option shall be treated as the consideration for the disposal.

(3) As regards the person exercising the option-

(a) he shall be treated as having disposed of an asset (namely, his entitlement to receive the payment) and the payment received by him shall be treated as the consideration for the disposal;

(b) the acquisition of the option (whether directly from the grantor of not) and the disposal shall be treated as a single transaction and the cost of acquiring the option shall be treated as expenditure allowable as a deduction under section 38(1)(a) from the consideration for the disposal; and

(c) for the purpose of computing the indexation allowance (if any) on the disposal, the cost of the option shall be treated (notwithstanding paragraph (b) above) as incurred when the option was acquired.

(4) In any case where subsections (2) and (3) above would apply as mentioned in subsection (1) above if the reference in that subsection to full settlement included a reference to partial settlement, those subsections and subsections (2) and (3) of section 144 shall both apply but with the following modifications-

(a) for any reference to the grant or acquisition of the option there shall be substituted a reference to the grant or acquisition of so much of the option as relates to the making and receipt of the payment or, as the case may be, the sale or purchase by the grantor; and

5 (b) for any reference to the consideration for, or the cost of or of acquiring, the option there shall be substituted a reference to the appropriate proportion of that consideration or cost.

(5) In this section "appropriate proportion" means such proportion as may be just and reasonable in all the circumstances.'

10 **The issue under section 144A TCGA**

34. Mr Peacock, for Mr Davies, addressed the issue raised by section 144A TCGA (cash-settled options) by submitting that section 144A(1)(b) requires the grantor of the option to be liable to make a payment of cash in full settlement of all obligations under the option so that there is no delivery of the underlying subject-matter (here, 15 shares in GS Inc).

35. He submitted that GS Inc were permitted by the GS 1999 SIP arrangements to make a cash payment equal to the fair market value of the shares that would have been purchased by the person exercising the option(s) less the Strike Price for those shares, but that this was not an obligation on GS Inc to make a cash payment. In other 20 words, section 144(1)(b) was not engaged because GS Inc (as grantor of the option(s)) was not required, by the nature of the option(s) or its/their exercise to make a payment of cash in full or partial settlement of all its obligations under the option(s).

36. He claimed support for this submission from the letter dated 5 October 2016 from Mr Dias to Mr Housden, mentioned above. He relied on the evidence that in each case 25 where Mr Davies had exercised option(s) there had been delivery of shares, which had been sold in the market by or on behalf of Mr Davies and submitted that the evidence showed that the cash Mr Davies received had been the proceeds of such sales, and not payments made by GS Inc under the option(s).

37. Mr Peacock submitted that section 144A TCGA was primarily designed to engage 30 options over subject-matters which cannot be delivered – such as financial indices. Such options, by their nature, impose on the grantor an obligation (on exercise) to make a cash payment, and confer an entitlement on the grantee (on exercise) to receive a payment. The options in issue in this appeal were not of that type.

38. Mr Nawbatt submitted that there was no warrant for the restrictive construction of 35 section 144A TCGA advanced by Mr Peacock. On a purposive construction, he submitted that the section should be construed as applying wherever an option is settled for cash, regardless of whether the option gave the grantor a choice between a cash settlement or a share settlement.

39. He drew my attention to the provisions for partial settlement in cash in section 40 144A(4) TCGA, making the point that this was an indication that section 144A was not intended to apply only to the limited class of options over subject-matters which

cannot be delivered, but was evidently intended to apply to options which were settled partly in cash and partly in another way – for example, by delivery of shares.

40. Mr Nawbatt submitted that where, as in this case, the option holder is entitled to receive either shares or cash (depending on the choice of the grantor), where he does in fact receive cash, such cash is received pursuant to an entitlement under the option to receive cash, and it is paid pursuant to an obligation on the grantor under the option to pay cash.

41. I was referred to the decision of the Upper Tribunal (Asplin J and Judge Berner) in *Trigg v Revenue and Customs Commissioners* [2016] UKUT 165 (TCC); [2016] STC 1310 for their summary of the modern approach to statutory construction, which is to have regard to the purpose of a particular provision and to interpret its language, so far as possible to give effect to that purpose, and the application of that purposive approach to construction – see: *ibid.* [12] to [16]. The Upper Tribunal made the point that the purpose of a statutory provision which is to be discerned in particular from the words used will very often be the same as the literal meaning of those words (*ibid.* [16]).

42. Mr Nawbatt accepted in argument that if I were to find (as I have) that GS Inc met its obligations to Mr Davies under the options on their exercise by the delivery of the shares concerned to him by a credit to his custody account, and that the shares, once delivered, were sold through the custody account, then section 144A TCGA could have no application in this case.

43. I therefore decide this issue in Mr Davies's favour. I add, however, that I am not attracted to the wider construction of section 144A(1)(b) urged upon me by Mr Nawbatt. In my judgment the wording of the section strongly points to the necessity of the terms of the option itself imposing an obligation on the grantor to make a cash payment and conferring an entitlement on the grantee to receive a cash payment from the grantor. Where, as in this case, the terms of the option do not impose such an obligation or confer such an entitlement, but any payment of cash made is made at the unilateral discretion of the grantor, I consider that section 144A has no application.

The issue under section 144ZA TCGA

44. Mr Peacock took me through the history of the decision of the Court of Appeal in *Mansworth v Jelley*, the subsequent guidance issued by the Revenue, its critical reception by the profession and the new provisions, plainly consequent on the decision in *Mansworth v Jelley*, which were enacted by section 158 Finance Act 2003 – inserting section 144ZA into the TCGA.

45. Although this was interesting background, I do not find it otherwise helpful in determining the issue arising in this appeal under section 144ZA, because Mr Davies's options were exercised after section 144ZA came into force. My task is to construe section 144ZA and to determine its application (if any) to the facts of this case.

46. The parties are agreed that Mr Davies's options in issue in this appeal come within section 144ZA(1). That is, it is agreed that, in the case of each option, the grant of the option and the transaction resulting from its exercise are to be treated for CGT purposes as a single transaction, and that the market value rule (under section 17(1) TCGA) applies, or would apply but for section 144ZA, in relation to the grant of the option or the transaction resulting from its exercise.

47. This, however, is the extent of the agreement between the parties on the effect of section 144ZA. Mr Peacock submits, that although the effect of section 144ZA, when it applies, is to alter the market value rule otherwise applicable, the section only applies where the terms of both subsection (1) and either of subsection (2) or (3) are met.

48. He further submits that the terms of section 144ZA(2) – the applicable subsection dealing with options binding a grantor to sell – do not apply in this case.

49. This is because, he submits, the options in this case did not bind GS Inc to sell shares. Mr Peacock points to the ability of GS Inc to meet their obligations on the exercise of options in a number of ways, between which it is at liberty to make its own choice – by obtaining shares from the market, by providing cash in lieu, by transferring treasury shares or by issuing new shares. He cited *In re V.G.M. Holdings, Limited* [1942] 1 Ch 235 (a decision of the Court of Appeal) as authority for the proposition that an issue of shares is not a sale of shares.

50. Mr Peacock made a general submission that section 144ZA was never intended to apply to all options, but only to such options whose terms bind the grantor either to buy or to sell. He prayed in aid the opening words of section 144ZA(4) – 'to the extent that, by virtue of this section, the market value rule does not apply for determining an amount or value' – as indicating that section 144ZA is not a 'universally applicable' provision which 'turns off the market value rule'. I observe at this point that, in my judgment, the opening words of section 144ZA(4) simply refer back to the words 'to that extent' in section 144ZA(2)(a) and (b).

51. Mr Nawbatt, submitted that section 144ZA was enacted specifically to prevent taxpayers who exercised employee share options from claiming allowable losses on the basis of the decision in *Mansworth v Jelley*. Thus, the present case was one plainly within the class of cases to which the section was intended to apply. He submitted that Mr Peacock had not provided any convincing explanation as to why Parliament would have intended the market value rule upheld in *Mansworth v Jelley* to apply to employee share options where the grantor had a discretion as to how it discharged its obligations on the exercise of the options, but not to employee share options where there was no such discretion, but the grantor was bound to sell shares.

52. He submitted that Mr Peacock's suggested construction of section 144ZA(2) ignored section 144(5) and (6), which provided for a wider definition of buying and selling.

53. As indicated above, by section 144ZA(5), the provisions of section 144(5) and (6) are to apply for the purposes of section 144ZA as they apply for the purposes of section 144.

54. Of particular importance, in my judgment, is the application of section 144(6) to section 144ZA. By section 144(6), references to buying and selling in pursuance of an option are to be construed in accordance with the general provision that references to an option (which includes 'in particular' an option binding the grantor to sell and an option binding the grantor to buy) include references to an option binding the grantor to grant a lease for a premium, or enter into any other transaction which is not a sale.

55. Thus, references to buying and selling in pursuance of an option in section 144ZA are to include references to entering into any other transaction which is not a sale.

56. The opening words of section 144ZA(2) – 'If the option binds the grantor to sell' – must, in my judgment, be construed as including a reference to an option which binds the grantor to enter into any other transaction which is not a sale.

57. In this case, there is no doubt that on the exercise by Mr Davies of his options and payment of the exercise price, GS Inc (the grantor of the options) was bound, by the option terms, to deliver the shares which were the subject of the exercised options or to effect an equivalent transaction to satisfy Mr Davies's rights under the exercised options. I accept that this might have been, at the discretion of GS Inc., by delivering a cash payment equal to the fair market value of the shares less the Strike Price, by obtaining shares from the market, by issuing new shares or by transferring treasury shares. But despite this discretion as to how GS Inc could discharge its obligations under the options on exercise, it remains the case that the options bound GS Inc. to enter into a transaction of some sort which would effectually satisfy Mr Davies's entitlement to the shares which were the subject of the exercised options.

58. In my judgment, the correct construction of section 144ZA(2) TCGA (being part of section 144ZA, which, I accept, was enacted in order to reverse the effect of the decision in *Mansworth v Jelley* generally, as Mr Nawbatt submitted) is that it applies, to disapply the market value rule in the case of an option binding the grantor to enter into 'any other transaction', in the sense of some other transaction, which is not a sale.

59. Mr Peacock's argument, in my judgment, lays a stress on the meaning of 'any other transaction' as any other particular or specific transaction, which those words cannot bear. Parliament's intention in applying section 144(6) to the construction of section 144ZA was, in my judgment, to make it of broader application than Mr Peacock would accept.

60. I therefore conclude that both subsection (1) and subsection (2)(b) of section 144ZA TCGA apply to Mr Davies's acquisitions of shares on the exercises of his options within the tax year 2005/2006.

My decision

61. In consequence, the appeal is dismissed. Mr Peacock asked that I give a decision in principle – and Mr Nawbatt did not demur. This is my decision in principle. I direct the parties to dispose of the appeal by agreement, having regard to my decision in principle, with liberty to relist the appeal for final determination if this proves impossible.

Further appeals

62. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2017