

OLD SQUARE TAX CHAMBERS

*When isn't a share 'employment-
related'?*

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Employment-related securities

- The issue – CGT vs. income tax
- Income tax charges
 - Restricted securities
 - Convertible securities
 - Artificially depressed / enhanced market value
 - Acquired for less than market value
 - Disposed of for more than market value
 - Post-acquisition benefits

Definition in the legislation

- Section 421B ITEPA03:

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

(2) For the purposes of subsection (1)—

(a) securities are, or an interest in securities is, acquired at the time when the person acquiring the securities or interest becomes beneficially entitled to those securities or that interest (and not, if different, the time when the securities are, or interest is, conveyed or transferred), and

(b) “employment” includes a ***former or prospective employment***.

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

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

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

- Substantially same definition in section 471 ITEPA03 for employment-related securities options

How does the legislation work?

- Issued by the employer? Neither sufficient nor necessary
- *Vermilion Holdings Limited* v. HMRC [2021] S.T.C. 1874
- Founder shares – need not always matter
- Context of founder shares – who makes the right or opportunity available?

Founder non-UK resident

- What if founder non-UK resident at time of incorporation?
- Election under section 431 ITEPA03?
- Income tax if becomes UK resident at some point
- Problems in practice / enforcement

Exchanges of shares

- If ERS shares converted > *Charman v. HMRC* [2021] EWCA Civ 1804
- If non-ERS shares converted > back to *Vermilion*
- Fact-sensitive, but if on same terms / same terms *mutatis mutandis* as other non-ERS shareholders, then probably no
- Important point is to recognise that the issue arises and plan accordingly

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