# TC04872

**Appeal number: TC/2014/01512**

***Income tax – section 62(2) of the Income Tax (Earnings and Pensions) Act 2003 – "buy-out" payments – whether or not earnings in relation to an employment – compensation for the loss of rights to a reward and benefit scheme – the replacement principle - appeal allowed in part***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ALEXANDER GRAHAM REID** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD CHAPMAN**
**MR PETER WHITEHEAD**

**Sitting in public at Manchester on 9 November 2015.**

**Mr Mike Obertelli for the Appellant**

**Mr Matthew Mason, Higher Officer of HMRC, for the Respondents**

DECISION

## Introduction

1. This appeal is against a closure notice issued on 15 April 2013 amending Mr Reid's self assessment tax return for the 2010/2011 tax year to add further employment income in the sum of £25,396. The whole of this £25,396 related to a payment made to Mr Reid by his former employers ("the Payment"), BP plc ("BP"). In short, this appeal turns upon whether or not the Payment constituted taxable "earnings" for the purposes of section 62(2) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003").

## The Factual Background

2. The factual background to the appeal was not in dispute and can be stated briefly.

3. Mr Reid was employed by BP for many years. He ultimately rose to be a technical supervisor for Scotland in the aviation engineering department. His responsibility was for the building and maintenance of trucks.

4. In early 2010, BP announced to Mr Reid and his colleagues that part of its business was going to be transferred to S & J D Robertson North Air Limited ("North Air"). Part of this process involved the proposed transfer of approximately 20 employees from BP to North Air pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regulations" and "the TUPE Transfer" respectively).

5. A three month consultation period followed between BP, North Air and a committee of three employees (of which Mr Reid was one) to deal with various implications of the TUPE Transfer. In particular, this related to payments for the loss of rights to a reward and benefit scheme and also a loyalty payment.

6. The consultation process resulted in an agreement between the employees (through the committee) and BP dated 26 February 2010 ("the Framework Agreement"). The Framework Agreement included the following terms:

> "The Company ("BPI") and Representatives from the BP plc (Air BP UK) non-unionised constituency have reached an agreement concerning the transition of transferring employees from BP plc to the S & J D Robertson North Air Ltd ("North Air") reward and benefits scheme.
>
> The Representatives have completed a consultative exercise on 04th February 2010 and the agreement has been accepted by the constituency.

Upon the TUPE of BP employees on 01st April 2010 (or date thereafter), in-scope employees will move to the North Air reward and benefit scheme and relinquish their access to the BP reward and benefit scheme **(BP Pension Scheme, BP Variable Pay Plan/Annual Operating Bonus, UK Sharematch and Lunch Allowance) [Emphasis added]**.

In return the in-scope employees will receive a "buy-out" arrangement as follows:

Payment 1 – May 2010

Employees will receive a lump sum payment, in the May 2010 payroll, equivalent to the following formulae:

| | | |
|---|---|---|
| 1 | Two years difference in Company contributions between the BP Pension Scheme and the North Air Group Pension | Equivalent to 42% of base salary on 01st May 2010 |
| 2a | For graded employees: Two years difference in the Company planning assumption between BP Variable Pay Plan and the North Air Performance Bonus Scheme | [not included in this decision for reasons of confidentiality] |
| 2b | For non-graded employees (employees at LHR): Two years difference in the Company planning assumption between BP Annual Operating Bonus and the North Air Airfield Operators Discretionary Performance Bonus Scheme | [not included in this decision for reasons of confidentiality] |
| 3 | A payment equivalent to two years of Company contributions to UK Sharematch | [not included in this decision for reasons of confidentiality] |
| 4 | A payment equivalent to two years of lunch allowance, only payable to employees currently in receipt of this payment | [not included in this decision for reasons of confidentiality] |

Payment 2 – May 2011

> Employees in service with the Company on 01st May 2011 will receive a payment equivalent to 3 months base salary plus 30% in the May 2011 payroll."

7. It follows that the rights which were the subject of the buy-out payment were, according to the Framework Agreement, those in bold above. These were, therefore, pension rights, bonus rights, share rights and lunch allowances ("the Scheme Rights").

8. The Framework Agreement was included within a pack of documents sent to each relevant employee ("the Information Pack"). This was accompanied by an undated covering letter which included the following:

> "As you are aware, BP plc ("the Company") is intended to transfer its UK into-plan business to S & J D Robertson North Air Ltd ("North Air") and your employment with North Air will transfer on 01st April 2010 ("Transfer Date"). This is a result of the transfer of storage and into-plane operating agreements into North Air.
>
> In order to comply with the Transfer of Undertakings (Protection of Employment) Regulations 2006, we are required to inform and consult with you about various matters in respect of the transfer. In compliance with the regulations we have consulted with the employee representatives of your constituency on the transfer and how this will affect you. Following this consultation both constituencies have completed a consultation exercise and have confirmed back to the Company the acceptance of the terms of the transfer.
>
> On the Transfer Date, your employment will transfer to North Air, who will become your new employer. Post transfer, you will remain on the same terms and conditions of employment as you were on with the Company, with the exception of the reward and benefits programme. The transfer to the North Air reward and benefits programme has been negotiated with your representatives and details of the "buy-out" from your previous scheme is attached to this letter. Your continuity of employment will not be affected and your service with the Company will count towards your period of service with North Air.
>
> The measures that the Company and North Air will undertake are confirmed in the "final agreement" document that is appended to this letter. If you do not wish to work for North Air you may object to the transfer. This would mean that your employment with the Company ends automatically (by operation of law) on the Transfer Date and you would not be entitled to any "buy-out" or notice pay."

9. The Information Pack included a document entitled "Important Information", tailored to each individual employee. Mr Reid's document included the following:

"BP Reward and Benefit "Buy-Out"

In accordance with the agreement your "buy-out" figure is £25,787 and will be paid in the May 2010 payroll.

Loyalty Payment

In accordance with the agreement, employees in service with the Company on 01st May 2011 will receive a payment equivalent to 3 months base salary plus 30%, in the May 2011 payroll."

10. The Information Pack also included a draft of an agreement to be entered into between BP and each individual employee ("the Compromise Agreement"). This included the following terms:

"1. Termination

Your employment with BP plc will terminate at 12:59 hrs on the Termination Date. Your employment will transfer to S & J D Robertson North Air Ltd at 00:00 hrs on the 01st April 2010. Your original date of joining BP will be maintained and your entire service with BP will be treated as continuous.

…

6. Buy-Out Payments

Subject to:

(a) You and your solicitor signing this letter on or before 26 March 2010;

(b) receipt by your Employer of this letter signed by you;

(c) receipt by your Employer of Schedule 1 signed by the Advisor;

(d) you signing a new contract of employment with S & J Robertson North Air Limited on or before 26 March 2010;

and strictly conditional upon your compliance with the terms of this letter, your Employer will pay you on 21st May 2010 the sum of £25,787 (the "Buy-Out Payment") as compensation for the termination of your employment with BP plc and for thereby relinquishing access to the BP reward and benefits scheme.

7. Taxation

> The Buy-Out Payment will be paid subject to the deduction of such income tax and employee National Insurance Contributions as may be required by law.
>
> …
>
> 9. Settlement of Claims
>
> This agreement is made on the basis that you accept the terms set out in this letter in full and final settlement of all claims and rights of action against your Employer or any of its Affiliates arising out of your Employment or its termination in any jurisdiction in the world whether under English and/or foreign law including, but not limited to, any common law claim and the Specific Claims set out below which could be brought before any Employment Tribunal or court of law (but excluding any claim for personal injury or industrial injury of which you are not aware and ought reasonably not to be aware at the date of this letter, any claim for accrued pension rights or any claim to enforce the terms of this letter). You, your Employer and your New Employer each acknowledge that it is your express intention on entering into this agreement that it covers all claims arising out of your Employment or its termination whether known or unknown to one or more of you and whether or not the factual or legal basis for the claim exists, is known or could have been known to one or more of you at the date of this letter or in the future."

11. The Compromise Agreement was also expressed to be in full and final settlement of a long list of specific claims.

12. Virtually all the employees agreed to the TUPE Transfer. In accordance with the requirements of the TUPE Regulations, each transferring employee took independent legal advice and then entered into their respective Compromise Agreement. Mr Reid entered into his Compromise Agreement on or about 26 March 2010.

13. The TUPE Transfer duly took place on 1 April 2010. Pursuant to the Framework Agreement and the Compromise Agreement, Mr Reid was then paid the sum of £25,396 (being the Payment) on 21 May 2010.

14. Mr Reid carried on working for North Air in much the same role as he did for BP. However, he left North Air's employment in about April 2011. This was less than a month before he was due to receive the "loyalty payment" provided for in the Framework Agreement.

15. On 26 October 2011, Mr Reid submitted his 2010/2011 Self Assessment tax return ("the Return"). HMRC opened an enquiry into the Return on 17 April 2012, requesting information about the Payment. Following correspondence between HMRC and Mr Reid's accountant, Archwood Accountants ("Archwood"), and in the absence of agreement, HMRC issued the closure notice on 15 April 2013.

16. The essence of HMRC's position was (and remains) that the Payment is taxable under section 62 of ITEPA 2003 as it was not from the termination of employment but was a payment for relinquishing access to the BP reward and benefit scheme and moving to the North Air reward and benefit scheme. The essence of Mr Reid's position was (and remains) that the Payment was a compensation payment for his loss of or reduction in benefits and, as it was less than £30,000, is exempt pursuant to section 401 of ITEPA 2003.

17. Mr Reid, through Archwood, submitted an appeal to HMRC on 13 May 2013, which HMRC rejected on 17 June 2013. Mr Reid requested a review but this could not be acted upon as he had already issued an appeal to the Tribunal. The appeal to the Tribunal was withdrawn on 18 August 2014, resulting in a further request on 25 August 2014 for HMRC to review the decision. On 25 September 2013, HMRC upheld the decision to reject the appeal.

18. The present appeal arises from a notice of appeal lodged on 21 February 2014. This is out of time. However, HMRC stated that they had no objection to an extension of time being granted to bring the appeal out of time. As such, we do grant such permission.

**The Statutory Framework**

19. The parties were agreed as to the statutory framework.

20. Section 62(2) of ITEPA 2003 deals with the definition of "earnings" for the purposes of the parts dealing with employment income and provides as follows.

> "(2) In those Parts "earnings" in relation to an employment, means –
>
> (a) any salary, wages or fee,
>
> (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."

21. Section 401 of ITEPA 2003 deals with termination of, and certain changes to, employment and provides as follows.

> "(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, or the person's spouse or civil partner, blood relative, dependant or personal representatives.

(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.

(4) For the purposes of this Chapter –

(a) a payment or other benefit which is provided on behalf of, or to the order of, the employee or former employee is treated as received by the employee or former employee, and

(b) in relation to a payment or other benefit –

(i) any reference to the employee or former employee is to the person mentioned in subsection (1), and

(ii) any reference to the employer or former employer is to be read accordingly."

22. Section 403(1) of ITEPA 2003 deals with the charge on payment or other benefit and provides as follows.

"(1) The amount of a payment to which this Chapter 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."

23. In the present case the parties of course accept that the Payment is less than the £30,000 threshold in section 403(1). It follows from section 401(3) that a payment which (without section 401(3)) would fall within both section 62(2) and 401(1) is to be treated as chargeable to tax pursuant to section 62(2) and is not subject to any exemption for the first £30,000.

24. It is clear from section 401(3) of ITEPA 2003 that in a case such as the present the proper approach is to consider the statutory treatment of a payment in the following order: first, whether or not the Payment is taxable pursuant to section 62(2) (if it is, then it is chargeable to tax and the matter ends there), secondly, whether or not the payment falls within section 401(1) (if it does then the rest of the chapter applies subject to exceptions for certain payments and benefits) and thirdly whether or not the payment exceeds £30,000. Clearly, the third of these is not in issue in the present case.

**The Evidence**

25. We heard evidence from Mr Reid. He provided much of the factual detail which is set out in the section above headed "Background". Mr Mason had no questions for Mr Reid in cross-examination. However, we had various questions as to the reasons why the Payment was made.

26. Mr Reid said that the reason for the Payment was that an employee who agreed to the TUPE Transfer would be getting a different package with North Air to that with BP. He said that BP always said the employees would be compensated for their loss. Mr Reid said that this was at BP's instigation rather than the employees'.

27. We also asked Mr Reid whether or not BP ever explained why it wanted to make this payment. To coin Mr Reid's phrase, he said that he, "could not even start to say why they wanted to do this." He said that the consultation process started off with BP saying how much the employees were to be compensated for and that the committee had to control the aspirations of the employees as to how much they would get. Mr Reid said that it was his view that BP was guiding the committee to a pre-determined amount.

28. Mr Reid closed his evidence by making the point that he felt that HMRC had treated the employees inconsistently. He said that he knew of some employees who had not had to pay tax on their payment and others who had. He said that he was effectively making a stand.

29. HMRC did not adduce any written or live witness evidence.

**Mr Reid's Case**

30. Mr Obertelli's sole argument on behalf of Mr Reid, which he put very briefly, was that the Payment was compensation for the loss of pension rights following the termination of his employment with BP.

**HMRC's Case**

31. The recurring theme in Mr Mason's skeleton argument and his oral submissions was that the Payment was from Mr Reid's employment.

32. Mr Mason referred us to various authorities in order to explain the relevant legal principles as to what constitutes "earnings".

33. *Hamblett v Godfrey* [1987] STC 60 related to civil servants who were employed at GCHQ. A payment was made following the withdrawal of rights including the right to be a member of a trade union. HMRC's case was that the payment was an emolument arising out of the employees' employment whereas the employees' case was that it was compensation for the loss of rights previously enjoyed. The Court of Appeal held that it was an emolument and so was chargeable to tax. Purchas LJ stated as follows at 68-69:

"Finally, I wish to refer to *Brumby (Inspector of Taxes) v Milner* [1975] STC 215, [1975] STC 644; [1976] STC 534; [1975] 1 WLR 958. [1976] 1 WLR 29, [1976] 1 WLR 1096. I adopt, with gratitude and respect, the approach of Walton J in that case ([1975] STC 215 at 226, [1975] 1 WLR 958 at 964):

> 'The crucial question is at once seen to lie within an extremely small legal compass. Did the terminal payments so received by Mr Milner and Mr Quick arise "therefrom" – that is to say, from their office or employment with the company?'

I pause at this stage to record that the payment in question, the terminal payment, was the final distribution of a trust fund which had been set up for the benefit of the employees of the company, which received its funds from the dividends and profits of the company, and distributed them year by year to the employees. But the event which gave rise to the appeal was either the amalgamation or cessation in its formal shape of the company, requiring the distribution of the funds of the trust.

Later Walton J, summarising in particular the *Hochstrasser* case, said ([1975] STC 215 at 229, [1975] 1 WLR 958 at 968):

> 'It appears to me that the correct test as stated by Lord Radcliffe is that, for any sum paid to the employee to be assessable to income tax, it must be paid to him 'in return for acing as or being an employee', and for no other reason.'

So, in my judgment, the approach that the court should take, and, indeed, that Knox J did take, is to consider the status of the payment and the context in which it was made. The payment was made to recognise the loss of rights. I am now going to paraphrase, I hope accurately, from the findings of the Special Commissioners and the employers' letter and other records.

The rights, the loss of which was being recognised, were rights under the employment protection legislation, and the right to join a union or other trade protection association. Both those rights, in my judgment, are directly connected with the fact of the taxpayer's employment. If the employment did not exist, there would be no need for the rights in the particular context in which the taxpayer found herself. So, I start from the position that those are rights directly connected with employment. Purely by way of contrast, to underline that approach, if for instance the employers had for some reason or other best known to themselves objected to some social or other activity which their employees or some of them enjoyed, such as joining a golf club or something of that sort (I think Lord Diplock mentioned payments in the hunting field), but whatever it is, activities not connected with the employment, then a payment made by an employer to recognise the

> voluntary or, indeed, the compulsory withdrawal if the employer had sufficient influence with the committee of the golf club concerned, then that I can readily acknowledge would be a payment made to a person who was an employee but was not made in the circumstances which would satisfy the words of s181; that is that the payment must arise 'therefrom". I only mention that analogy to emphasis the point which I seek to make.
>
> There is no doubt in this case that the employment protection legislation goes directly to the employment of the taxpayer with the employer. The right to join a union, in my judgment, also falls directly to be considered as in connection with that employment, because without the employment there is no purpose in joining the union except for esoteric or personal reasons which are not relevant in this case. But I can again see a situation in which person involved in particularly sensitive areas of government service might be required to abandon their right of freedom of speech. In such a case, it would clearly have to be considered on the facts involved in the individual case to see whether the abandonment of that fundamental right was in fact connected and arose on the employment or not, and it would clearly differ from case to case."

34. Neill LJ agreed with Purchas LJ and stated as follows at 71:

> "It is clearly not enough that the payment was received from the employer. The question is, was the payment an emolument from the employment. In other words, was the employment the source of the emolument?"

35. Mr Mason also referred us to the Upper Tribunal decision in *Kuehne & Nagel Drinks Logistics Ltd v Revenue and Customs Commissioners* [2010] UKUT 457 (TCC) ("*Kuehne (UT)*") which upheld the decision of Judge Hellier in the First-tier Tribunal reported at [2009] UKFTT 379 (TC) ("*Kuehne (FTT)*") and was itself upheld by the Court of Appeal reported at [2012] EWCA Civ 34 ("*Kuehne (CA)*"). Judge Hellier found as a fact in the First-tier Tribunal that there were two dissociable reasons for the payment; first, as compensation for the loss of pension expectations and secondly in order to ensure a 'smooth transfer' by avoiding industrial action.

36. Mr Mason particularly relied upon the following extract from Newey J's judgment in *Kuehne (UT)*:

> "[74] In my judgment, the right approach is, as Viscount Simon indicated in *Tilley v Wales (Inspector of Taxes)* (1943) 25 TC 136 at 150, [1943] AC 386 at 393, 'to use the words of the statute'. The relevant statute is now ITEPA, s62(2) of which defines 'earnings'. The fact that a payment has characteristics of capital may mean, as Miss Simler recognised, that the payment does not fall within this definition and, hence, that it is not taxable. If, on the other hand, the definition does extend to the payment in question, the payment will, as it seems to me, be taxable regardless of whether it might in other contexts be

> regarded as capital rather than income. That is probably why lump sums payments such as were at issue in *Hamblett v Godfrey* and *Shilton v Wilmshurst* are taxable. It is presumably also why the £200 payments made in the present case for loss of the beer allowance are accepted to be taxable."

37. Further, Mr Mason relied upon the First-tier Tribunal decision of *Andrew Hill v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 295 (TC) (Judge Tony Beare and Mr Michael Sharp). He particularly relied upon the following paragraphs:

> "[16] The application of that language in the case of a transfer falling with the TUPE Regulations is not entirely straightforward. This is because, in the case of such a transfer, and ignoring the terms of the TUPE Regulations themselves, there is clearly a cessation of one employment (in this case, Mr Hill's employment by GM) and the commencement of another employment (in this case, Mr Hill's employment by Saab City). However, the TUPE Regulations specifically say that a transfer under the regulations "shall not operate so as to terminate the contract of employment of any person employed by the transferor … but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee". So it [is] quite clear that, at least as a matter of general law, Mr Hill's original contract of employment with GM should be regarded as having continued without a termination and Saab City should be regarded as having stood in the shoes of GM following the transfer.
>
> [17] Left to our own devices, we would have thought that the tax legislation should be applied on the same basis – that is to say that there was no termination of Mr Hill's employment with GM as a result of the transfer under the TUPE Regulations and, instead, there was simply a change in the terms of his duties under that single, ongoing employment. Having said that, we note that this is not the view which was taken by the First-tier Tribunal in *Kuehne & Nagel Drinks Logistics Ltd and Others v Revenue and Customs Commissioners* ([2009] UKFTT 379). In that case, the tribunal considered that the deeming language in the TUPE Regulations should be limited to its particular purpose and should not be taken into account in applying ITEPA.
>
> …
>
> [23] We do not see any meaningful difference between the facts in those cases and the facts in the present one. In each case, the relevant employee receives a payment from his employer as compensation for a change in the terms of his employment contract and the payment is properly characterised as an emolument from employment."

38. Applying these principles, Mr Mason submitted that the Payment constituted taxable earnings for the following reasons.

39. First, Mr Mason makes the point that the onus of proof rests upon Mr Reid. He also notes that, pursuant to section 50(6) of the Taxes Management Act 1970, assessments stand unless the appellant produces evidence that he or she has been overcharged by such assessments.

40. Secondly, Mr Mason referred us to the wording of the documents within the Information Pack and in particular paragraph 6 of the Compromise Agreement. He said that Mr Reid was required to meet various conditions in order to receive the Payment, which particularly included signing the agreement by 26 March 2010, receipt of signed documents by BP and, crucially, signing a new contract of employment with North Air. Mr Mason said that if Mr Reid had not met these conditions no payment would have been due.

41. Thirdly, paragraph 7 of the Compromise Agreement expressly referred to payments being subject to tax and national insurance.

42. Fourthly, Mr Mason argued that there was not in fact any termination of Mr Reid's employment, as the Compromise Agreement provided that his original date of joining BP would be maintained and that his entire service with BP would be treated as continuous. As Mr Mason put it in his skeleton argument, "HMRC submit that there has been no termination of employment and that the payment made was a compensation payment for the change of the appellant's terms and conditions of employment."

43. Finally, Mr Mason relies upon *The Queen (on the Application of Weston) v Commissioners of Inland Revenue* 76 TC 207 for the proposition that the different taxpayers have been treated differently does not itself give rise to unfairness. In particular, he drew our attention to paragraph [12] of the judgment of Moses J in which he stated as follows:

> "[12] As I have said, the obligation of the Revenue to treat taxpayers fairly does not mean that they all have to be charged a tax, if it appears that the facts brings them within a particular statutory charge, when there may be all sorts of reasons why it is not practical in the interests of good management to do so."

**Discussion**

***Findings of fact***

44. As set out above, the facts were not in dispute and Mr Reid was not cross-examined. The matters set out in paragraphs 2 to 14 above are therefore to be treated as findings of fact.

45. We also draw the following conclusions, again as findings of fact:

(1) The Payment was paid as compensation for loss of the Scheme Rights. This comprised compensation for the loss of the expectation of pension rights, compensation for the loss of the expectation of bonus rights, compensation for the loss of the expectation of share rights and (where applicable) compensation for the loss of the expectation of lunch allowances. We reach this conclusion for the following reasons. First, the Framework Agreement is clear in saying this. Secondly, this is reflected in the Compromise Agreement. Thirdly, the consultation process appears to have focused upon reaching an agreement as to how much employees would lose from the lower level of comparable benefits with North Air as against BP and how much they should receive in compensation for that loss.

(2) We also note that there is no evidence of any other reason for the Payment. Mr Reid said that he did not know why BP were prepared to make the payment and no alternative was put to him by Mr Mason. It is not for us to speculate as to any possible hidden agenda by BP and we do not do so.

(3) We expressly reject any suggestion that the Payment was made as an inducement to enter into the relationship with North Air or to accept any different terms of employment. Again, there was no evidence of this and it was not put to Mr Reid. We note that the position may well have been different in respect of the loyalty bonus if it had been paid. However, it was not paid and HMRC have not suggested that the potential for it to have been paid has any impact upon this appeal.

(4) The different elements of the Payment and of the Scheme Rights are divisible, as the Framework Agreement set out separate provision for the independent calculation of each of them. Although the amount included as the Payment in the Compromise Agreement was a single figure, we find that it is in principle capable of being broken down in accordance with the formula in the Framework Agreement (albeit that we were not given the figures to do so ourselves).

(5) The reference to the payment of tax at paragraph 7 of the Compromise Agreement in fact says nothing more than that any tax due is to be paid. This begs the question as to whether or not tax is due and, if so, how much. We reject Mr Mason's submission that this means that this is an acceptance or agreement that tax is in fact payable.

(6) Mr Reid's employment did in fact terminate. This is clear from the language of the Framework Agreement and the Compromise Agreement. In particular, the Compromise Agreement expressly deals with the date and time of termination at paragraph 1. The legal effects of the deeming provisions in the TUPE Regulations are set out below.

46. Unfortunately, there are certain matters upon which we had insufficient evidence to be able to reach findings of fact. We were not told how the Payment was to be broken down in accordance with the formula in the Framework Agreement. Similarly, we have no evidence at all about the share scheme which BP operated and

which was the basis of the compensation for the loss of share rights. Further, we were not told whether or not Mr Reid received compensation for the loss of the lunch allowance. We deal with the consequences of not having this information below.

47. Before leaving the findings of fact, we make the point that we found Mr Reid to be a very honest and straightforward witness. We have no reservations at all about his credibility.

***Issues***

48. The remainder of this decision deals with the following issues:

(1) The significance of any inconsistent treatment of taxpayers.

(2) The effect of the TUPE Regulations.

(3) The relevant legal principles as to the identification and tax treatment of earnings.

(4) Whether the test is to be applied to the Payment as a whole or to its constituent parts by reference to the proportion that relates to each of the Scheme Rights being compensated.

(5) Application to each of the Scheme Rights being compensated.

(6) The quantification of any chargeable tax.

***Inconsistency***

49. Mr Reid said during his evidence that part of his motivation for bringing this appeal was that HMRC were treating people in his situation inconsistently. We are sympathetic to the frustration which this has caused Mr Reid. However, we agree with HMRC that this is not relevant to the present appeal. Our obligation is to consider how Mr Reid's Payment is to be treated. This is not affected by any conclusions which HMRC may have reached about anybody else.

***The TUPE Regulations***

50. As set out above, we have found as a matter of fact that Mr Reid's employment with BP terminated. HMRC argue that Mr Reid's employment did not terminate because of the deeming provisions of the TUPE Regulations.

51. The applicability of the TUPE Regulations in the context of tax law was considered by Judge Hellier in *Kuehne (FTT)*. He reached the conclusion that the continuous employment which is deemed by the TUPE Regulations does not mean that there is no termination of employment for the purposes of ITEPA 2003. In particular, he stated as follows at [45] to [47]:

> [45] The regulations also raise another issue which was debated before me: that is whether they have any effect in relation to, or in relation to the operation of, ITEPA. In other words: for the purposes of

ITEPA is the change of employer to be ignored because there was no termination of the contract of employment and after the transfer the employment contract is to be treated as originally made with the transferee (Reg 4)?

[46] In my view the TUPE regulations do not have that effect. That is for the following reasons:-

(a) The purpose of the Directive, as displayed by the third recital, is to protect an employee in particular in relation to his rights. That purpose does not clearly extend to matters of taxation and indeed the whole thrust of the recitals appears to me to relate only to the position of the employee vis à vis his employer.

(b) Article 3(1) deals only with the transferor's rights and obligations – vesting them in the transferee. It does not deal with the rights and obligations of any other person (other than, by implication, the employee). It does not require the change in employer to be ignored or the employee to be treated for all purposes as having always been employed by the transferee. It does not seem to me that the purpose of the Directive as evinced in the recitals requires a broader interpretation of its words. Article 4(1) of the Directive provides that "the transfer of the undertaking ... shall not in itself constitute grounds for dismissal by the transferor or transferee." It does not require the termination of the employment to be ignored.

(c) As a result, the obligation incurred by the UK as a result of the Directive is limited (in the context of this appeal) to (i) vesting the transferor's rights and obligations in the transferee and (ii) providing that the transfer is not grounds for dismissal.

(d) Any regulation made implementing the directive would therefore be subject to a presumption that that limitation was to be read into its construction.

(e) Although section 2(2)(b) extends the power to make regulations to matters arising out of or related to the Directive, the language of Regulation 4 displays nothing which evinces any intention to require the deeming to have any effect otherwise than as between the employer and employee. Regulation 4(2) enacts the requirement of Article 3(1). It does no more than vest the transferor's obligation and rights in the transferee. There is no deeming that the change in employment is to be generally ignored or deeming the employee always to have been employed by the transferor. Regulation 4(1) appears wider, providing that the transfer shall not operate to terminate the contract of employment and that the contract "have effect after transfer as if originally made [with] the transferee". The first part of this provision appears to me to reflect the requirement of Article 4(1) that the transfer

itself should not be grounds for dismissal, and should be read in that light not as a general deeming provision but as one limited to the rights and obligations of the employee under the employment relationship. The second part of the provision might be read as having wider effect but its linkage to the first part by "but", and its requirement that the contract "have effect" is in terms of the obligations between employer and employee (rather than "be deemed to have been" so made), makes clear that it is limited to an effect upon the rights and obligations between the new employer and the employee.

(f) In an oft quoted passage, Nourse J in *IRC v Metrolands (Property Finance) Ltd* [1981] STC 193 at 208 said:

> 'When considering the extent to which a deeming provision should be applied, the court is bound and entitled to ascertain for what purpose and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are."

He then went onto deal with what should be done where it was not clear what the purposes were. In this case however it is clear what the purposes of Reg 4 are. They are to ensure the safeguarding of an employee's rights on the transfer of an undertaking and to enact in UK law the requirements in the Directive in relation to the position between employer and employee. That purpose does not extend to the analysis of the parties' relationship for the purpose of ITEPA. The logical consequences of the deeming provided for by Reg 4 must be limited for the purposes of that regulation.

(g) Nor do the extension of the regulatory powers by section 38(2) ERA affect that conclusion. It seems to me that if wider effect (and effect on the operation of tax provision) were possible or intended in pursuance of that power, much wider words would have been needed in the regulations.

As a result I conclude that for the purpose of this decision, in deciding whether the payment came from employment, so far as is relevant I should treat the employees as first employed by S&N and then by KNDL. As a consequence the payment was made in connection with that change of employment.

[47] I am fortified in that conclusion by the decisions of the Court of Appeal in *Deg-Deutch v Kushy & Ors* [2001] 3 All ER 878 which had regard to the need to carry out a deeming provision to achieve the legislative purpose only, and House of Lords in *Powerhouse Retail Ltd v V M Burroughs* [2006] UKHL 13. In that case the question was whether the TUPE regulations meant that a pre-transfer employment had not ended on transfer for the purpose of a limitation provision which prevented claims being brought more than six months after an

> "employment" terminated. Their Lordships held that the "employment" was the employment with the transferor despite the relevant TUPE provision."

52. We acknowledge that *Kuehne (FTT)* is a First-tier Tribunal decision and is not binding upon us. However, we note that there was no issue taken with Judge Hellier's analysis either at Upper Tribunal level or in the Court of Appeal. In any event, we entirely agree with Judge Hellier's analysis for the reasons which he gives and we respectfully adopt it in full for the purposes of this decision.

53. It must be said that we are of the view that whether or not Mr Reid's employment is to be treated as either terminated or continuous has little relevance for tax purposes in the context of the present case. This is because (as set out below) a payment can be from employment regardless of whether or not the party which makes the payment is also the recipient's employer. Insofar as HMRC's argument is that the payment relates to a change in the terms of or benefits from Mr Reid's employment, this argument is equally applicable in the present case regardless of whether his employment is treated as continuous or instead treated as terminating with one employer and then commencing with another. The question remains whether or not the payment is from Mr Reid's employment.

***The relevant legal principles as to the identification of earnings***

54. We make the point at the outset that we agree with Mr Mason that the burden of proof is upon Mr Reid. Mr Obertelli (correctly) did not dispute this.

55. The authorities relied upon by Mr Mason themselves refer to a large number of other cases. The following are of particular assistance in the present case.

56. The central question is whether or not the payment is paid in return for or as a reward for acting as or being an employee. In *Hochstrasser v Mayes* [1960] AC 376 Viscount Simonds said as follows at 388 (the reference to Upjohn J being the first instance judgment in the case):

> "Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon. 'In my judgment,' he said, 'the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.' In this passage the single word 'past' may be open to question, but apart from that it appears to me to be entirely accurate. Applying the law thus stated to

> the facts of the present case, the learned judge held that the sum of £350 was not a profit 'therefrom,' that is, arising from the office or employment."

57. Payments can be treated as earnings even if made by parties other than the recipient's employer. In *Shilton v Wilmshurst* [1991] 1 AC 684, Lord Templeman said as follows at 693:

> "There is nothing in section 181 or the authorities to justify the inference that an 'emolument from employment' only applies to an emolument provided by a person who has an interest in the performance by the employee of the services which he becomes bound to perform when he enters into the contract of employment.
>
> If section 181 applies only to an emolument provided by an employer or by a third party who has an interest in the performance by the employee of his contract of service with the employer, there are difficulties in defining the "interest" which makes the employee liable to pay tax on the emoluments under section 181. Mr. Thornhill suggested that if the £75,000 had been paid by a shareholder in Southampton Football Club Ltd. interested in the dividends and capital value of his shares or if the £75,000 had been paid by a sponsor of the Southampton football team interested in obtaining valuable publicity or if the £75,000 had been paid by a philanthropic millionaire supporter of Southampton sentimentally interested in the fortunes of the club, then the £75,000 would or might have been an emolument from the employment of Mr. Shilton by Southampton. But, he said, as the £75,000 was provided by Nottingham Forest, who were only interested in the £325,000 payable if Mr. Shilton agreed to play football for Southampton, section 181 does not apply. I prefer the simpler view that an emolument arises from employment if it is provided as a reward or inducement for the employee to remain or become an employee and not for something else."

58. The character of a payment which is made in satisfaction of or to replace a contingent right to another payment is generally treated in the same way as that contingent right. In *Mairs v Haughey* [1994] 1 AC 303, Lord Woolf stated as follows at pages 318 to 319:

> "On this appeal, as the first step in their argument, it was submitted on behalf of the revenue that in law a payment made to an employee under the enhanced redundancy scheme (unlike a statutory redundancy payment) would have been taxable as an emolument from his employment. This submission is inconsistent with the actual treatment by the revenue of such payments in accordance with a long-standing statement of practice issued by the revenue dealing with such non-statutory redundancy payments. The practice was issued at the same time as a press release in conjunction with the announcement by the Chancellor of the Exchequer of his budget proposals on 10 March 1981. The press release recorded that the statement of practice clarified

the 'treatment of non-statutory redundancy payments.' The statement of practice includes the following passage:

> 'A payment made under a non-statutory redundancy scheme may in law be taxable in full under Schedule E if the scheme is part of the conditions under which the employees agree to give their services, or if there is an expectation of payment on their part. However, in practice the Inland Revenue accept that in the case of a genuine redundancy the only tax liability on lump sum payments made under redundancy schemes is under section 187 [of the Act of 1970, now section 148 of the Act of 1988], even though the payment may be calculated by reference to the length of service or the amount of remuneration, or is conditional on continued service for a short period consistent with the reasonable needs of the employer's business.' (Section 148 is of no relevance to the present issue.)

I recognise that the revenue are only departing from the position set out in the statement of practice for the purpose of establishing a step in their argument as to what they regard as being the correct position in relation to a payment made to 'buy out' an employee's contingency redundancy rights and not in relation to those redundancy rights themselves. Nonetheless I am concerned about the revenue adopting this approach since I do not understand the policy reasons for treating a payment genuinely made in lieu of receiving a redundancy payment in a different way from an actual redundancy payment. It is inevitable that if a payment is made in substitution for a payment which might, subject to a contingency, have been payable that the nature of the payment which is made in lieu will be affected by the nature of the payment which might otherwise have been made. There will usually be no legitimate reason for treating the two payments in a different way. However, I say no more on this subject since I am satisfied that the present practice of the revenue as described in the statement of practice accords with the position in law of payments made to an employee on redundancy under a non-statutory redundancy scheme."

59. The treatment of a payment which is solely for the loss of pension rights was considered by Judge Hellier in *Kuehne (FTT)* as follows at paragraph [79] to [88] in the context of what he referred to as "the replacement principle".

> "(v) The Replacement Principle
>
> [79] In *Mairs v Haughey* employees were entitled to enhanced redundancy scheme (ERS) rights under their contracts with Harland & Wolff. Under a privatisation scheme it was proposed that they transfer to a new company (H&W2). The new company would then be acquired by a private buyer. The scheme would not find a private buyer unless the ERS rights were changed and other changes were made to the employees' terms and conditions. The loss of the ERS rights was

the largest bone of contention in discussion with the unions. In the end Mr Haughey was offered employment with the new company which he accepted, and at the same time accepted that if he turned up to work after the buyout of H&W2 had been completed, he would then work under new terms which excluded the ERS and would receive an ex gratia sum. After his transfer to H&W2 (under his old conditions of service) on 8 August 1989, the buyout took place on 21 August. Mr Haughey turned up to work: whereupon Mr Haughey's terms and conditions changed and he received the ex gratia payment. It was found that the payment could be divided into amount A which was made for the giving up the loss of the ERS rights, and amount B reflecting changes to other terms and conditions. The argument in the case concerned whether or not amount A was taxable as an emolument from the employment.

[80] In the House of Lords Lord, Woolf accepted that amount A was not an inducement to become or remain employed with H&W2. He then found that a redundancy payment was not taxable under Schedule E being a payment made to relieve the employee from the unfortunate consequences of becoming unemployed. He said that it was 'inevitable that if a payment is made in substitution for a payment which might, be subject to a contingency, have been payable that the nature of the payment which is made in lieu will be affected by the nature of the payment which might otherwise have been made. There will usually be no legitimate reason for treating the two payments in a different way.' The payment of amount A derived its character from the nature of the payment it replaced and was not taxable under Schedule E.

[81] Miss Simler says that in this appeal the employees gave up no rights to 20 payments for the lump sum: the payments were not made to buy out contingent rights; as a result one cannot apply Lord Woolf's reasoning. Mr Maughan replies that in *Hamblett v Godfrey, Holland v Geogheyhan* and *Bird v Martland* a payment was made in respect of the removal of rights rather than in exchange for them and in each case was analysed by reference to the rights removed. Here pension rights were removed.

[82] I agree with Mr Maughan to this extent. If the payment in this appeal were one which could be said to have been made only to recognise the removal of the pension rights then it would have derived its character from the nature of the rights for which it compensated. Those rights were to the future accrual of additional pensions (with the consequential obligation for the further funding of the pension scheme by S&N) contingently upon the employees' continued employment during the continuation of the scheme. It seems to me that the cases Mr Maughan cites show that there should be no difference between the taxation of a sum paid in exchange for the removal of an employer's direct obligation to pay a pension, and a sum voluntarily paid in recognition of the removal of an employer's informal voluntary practice of paying a pension or in recognition of an action of the employer which had the effect of extinguishing a right to accrue (and

> to receive) greater future pension payments. The payments would derive from the expected pension payment.
>
> [83] Mr Maughan then says that *Tilley v Wales* is binding authority that a sum paid in lieu of a pension is not taxable, and accordingly that a sum paid in recognition of the loss of a greater pension would also not be taxable.
>
> [84] Mr Tilley had an absolute right to a 10 year fixed amount pension whenever he left his employer's service. He exchanged that right for a lump sum. Viscount Simonds said that the pension would not have been taxed under the statutory heading of remuneration from an employment but under the statutory heading of 'pension'. A sum received in exchange for that pension right could therefore not be taxed as an emolument.
>
> [85] The same dichotomy between the taxation of earnings and pensions is present in ITEPA: pensions are separately described and taxed in Part 9 of that Act. Accordingly it seems to me that the logic of their Lordships in *Tilley v Wales* applies in the context of today's legislation so that, unless specifically brought into tax in Part 9, a sum received simply and solely in exchange for renouncing a pension right is not taxable under Part 2 of ITEPA.
>
> [86] For the reasons above it seems to me that as a consequence a sum paid simply and solely to recognise the removal of a voluntary pension or the removal of an expectation of a pension should be treated in the same way as a sum paid solely in exchange for a vested pension right and therefore not be treated as from employment.
>
> [87] I can see no basis for distinguishing the reasoning of *Tilley v Wales* if the lump sum in this case could be said to have been paid simply and solely for the loss of the pension rights and not for something else as well.
>
> [88] But in this appeal it seems to me that the payments were not just made for the loss of expectation. They were not simple ex gratia payments reflecting the fact that something had been taken away. Instead they were payments also made to secure the future good service of the employees. If that second reason is enough to make them taxable then, for the reasons which follow, I do not believe that they are saved by the reasoning in *Tilley v Wales* and *Mairs v Haughey*.

60. Again, *Kuehne (FTT)* is not binding upon us and Judge Hellier's comments at paragraphs [79] to [88] are in any event *obiter* given the finding that the payment in that case was not solely for the loss of pension rights. However, it is still a compelling and in our view an accurate analysis of the law.

61. *Kuehne (CA)* makes it clear that, where a payment is made for more than one reason, the payment will be taxable if any one of those reasons is from employment. Mummery LJ stated as follows at [46]:

> "[46] Sixthly, the relevant 'weighing up' exercise which was emphasised in the appellant's submissions was in fact properly carried out by Judge Hellier at the correct stage, that is when he evaluated the evidence and reached his conclusions of the facts relevant to the question whether the payments were emoluments from employment. There was no further exercise of weighing up the two 'dissociable reasons' for the payment which the judge was required to conduct in order to answer that question. He had already answered the statutory question by his finding that the threat of industrial action was a substantial cause of the payments. The sufficiency of that finding of necessary relevant connection or link between the emolument and the employment is not cancelled out or diminished by the finding of the presence of another factor, such as the pension compensation for loss of a right unrelated to an emolument from employment."

62. Finally we note that the question as to what payments are to be treated as being earnings is of course a fact sensitive one.

***The ability to apportion the Payment***

63. It is clear from *Kuehne (CA)* that it is not possible to apportion a payment where the two or more reasons for it being made are dissociable. This is because the very fact that one of the substantial reasons for it being made is an emolument from employment is enough to give the payment its character as earnings.

64. However, we are of the view that the position is different where a payment has different components which are paid for different reasons. In such a case, it is logical that the payment can be apportioned because the payment is in reality a number of different entitlements paid in one lump sum rather than separately.

65. We are supported in this view by the Lord Woolf's comments in *Mairs v Haughey*, above, at page 318:

> "Notwithstanding the gallant arguments of Mr. Coghlin on behalf of the revenue to the contrary, I am quite satisfied that the special commissioner and the Court of Appeal were right to conclude that this was not a situation where the aggregate sum, consisting of the two elements, should be regarded as being paid as an inducement to the employees to become or remain employed by H. & W.3. As Mr. Park submitted on behalf of the taxpayer, there was no need for any such inducement. Whether you approach the issue as being one to be resolved by construing the documents which resulted in the change in the terms of employment or look at the substance and reality of the situation which brought about the change in the conditions of employment, the total payment was made for the two separate identifiable considerations referred to in the letter of 6 July 1989 and,

> in particular, in the employee's reply slip of acceptance. The payment was in consideration of (i) the new terms and conditions of employment and (ii) the termination of the enhanced redundancy scheme. It is true that neither of the two elements are exclusively referable to either element of the consideration. However, as was accepted by Mr. Coghlin, if the payments were being paid for two considerations, the special commissioner was entitled to apportion the payments between the considerations (as to which see *Tilley v. Wales* [1943] AC 386), and, this being so, it cannot be said that the apportionment adopted was wrong. In these circumstances on the documents and the evidence I have no difficulty in rejecting the revenue's first and primary contention."

66. We also note that at all levels of *Kuehne* it was accepted without discussion that of the £5,000 payment made to each employee the £200 beer allowance was taxable regardless of the treatment of the £4,800 relating to the loss of pension expectations.

***Application to the Scheme Rights***

*Overview*

67. We have already found that the loss of the Scheme Rights was the sole reason for the Payment being made.

68. We reject Mr Mason's submission that the existence of conditions upon obtaining the Payment were sufficient to make the Payment an emolument of employment. The conditions relating to signatures and acceptance of the agreements were formalities required for a binding agreement, particularly in the light of the TUPE Regulations. At first sight, the requirement to enter into a contract of employment with North Air might tend in favour of the Payment being an emolument of that employment. However, as set out above, there is no evidence that the Payment was an inducement to enter into employment with North Air or an inducement to accept any change of terms. When seen in the light of the only reason for the Payment being compensation for loss of the Scheme Rights, the condition of entry into employment means nothing more than that the trigger for payment is employment with North Air. This is consistent with the fact that only transferring employees received the Payment. This is unsurprising; given that the payment was to compensate for the difference between BP's scheme and North Air's scheme, this could only be possible for transferring employees as non-transferring employees would have no benefits from North Air to add to. Being a trigger or context for payment is different to saying that the payment is an emolument of employment.

69. Mr Mason argued that Mr Reid should be treated the same way as the employees in *Hamblett v Godfrey*. We accept that there are similarities between the cases as the Payment was compensation for a change in contract terms, albeit that in the present case the change comes about through a comparison between BP's terms and North Air's rather than a change in the course of continuous employment. However, the reason why the payment in *Hamblett v Godfrey* was treated as earnings was because of the analysis of the lost rights which were being recognised by the

payment. We take the same approach in the present case and, for the reasons set out above, find that the lost rights which were being recognised by the Payment were the Scheme Rights.

70. However, the finding that the loss of the Scheme Rights was the sole reason for the Payment being made is not an end to the matter. The Payment is effectively a lump sum *in lieu* of contingent rights. The rights in question are the Scheme Rights and the contingency is that of continued employment with BP and the expectation of the continuation of those Scheme Rights. It follows that the replacement principle engages, with the effect that the contingent rights compensated for by the Scheme Rights should be treated the same way as the rights or expectations which are being replaced. This requires an analysis of each of the Scheme Rights.

71. Similarly, Mr Mason's reliance on *Andrew Hill* is merely an example of analysing the nature of the right which has been lost. Again, this reinforces the fact sensitivity of such cases.

72. We note that Mr Obertelli's sole argument was that the Payment was in respect of the loss of expectation of pension rights. For the reasons set out above, we do not accept that the treatment of the loss of expectation of pension rights is determinative of the Payment as a whole.

*Pension*

73. We find that the compensation for the loss of pension expectations is not an emolument of Mr Reid's employment. The position in the present case is precisely the same as the one considered by Judge Hellier at paragraphs [79] to [87] of *Kuehne (FTT)*, as the sole reason for this element of the Payment being made was for the loss of pension expectations.

74. This element of the Payment is therefore a lump sum payment in respect of a contingent right to additional pensions and, by virtue of the replacement principle, should have the same character. The contingency is Mr Reid's continued employment during the continuation of the pension scheme. This part of the Payment is therefore derived from the expected additional pensions rather than from (or an emolument of) employment.

75. For the reasons set out at paragraphs [79] to [87] of *Kuehne (FTT)* (again, because we are of the view that those reasons are correct in law rather than because they are binding upon us) the lump sum payment is not taxable as earnings. We therefore allow the part of the appeal which relates to the compensation for the loss of expectation of pension rights.

*Shares*

76. In keeping with our finding of fact that the Payment was by way of compensation for the loss of the Scheme Rights, we find that the part of the Payment which relates to shares was by way of compensation for the loss of the expectation of future payments into BP's UK Sharematch scheme. It might be that BP's scheme was

a share incentive plan with an expectation of tax free benefits for Mr Reid. In such circumstances, the relevant element of the Payment would be treated the same way. However, no witness or documentary evidence has been provided to us to reach such a conclusion. Further, without any evidence as to how BP's scheme operated or its terms or conditions, we cannot know whether or not the tax treatment is affected by payments being by way of a lump sum in lieu of share contributions or other benefits.

77. We bear in mind that the burden of proof is upon Mr Reid. The closure notice can only be disturbed to the extent that Mr Reid discharges that burden. Mr Reid was professionally represented both at the hearing and throughout these proceedings and could have presented oral or documentary evidence dealing with the different elements of the Payment separately rather than treating compensation for loss of pension rights as determinative of the Payment as a whole. It follows that Mr Reid has failed to establish that the element of the Payment relating to shares is not chargeable to tax and we dismiss that part of the appeal.

*Bonus*

78. We note that the bonus is referred to in the Framework Agreement as the, "BP Variable Pay Plan/Annual Operating Bonus." The very title is sufficient to give the impression that the payments were additions to salary or emoluments which achieve the same effect. We heard no evidence to dispel this impression. This would mean that the element of the Payment which relates to bonus constitutes earnings as the contingent right which is substituted by the payment is a reward for employment and is either salary or an emolument of that employment. In any event, we have not seen any evidence of the terms of the bonus plan which this part of the Payment relates to. We repeat our conclusion at paragraph 77 in respect of the element of the Payment which relates to the expectation of bonus payments. Again, Mr Reid has failed to establish that this element of the Payment is not chargeable to tax and we dismiss that part of the appeal.

*Lunch allowance*

79. We do not know whether or not the Payment included any provision for a lunch allowance. If it did then, pursuant to the replacement principle, the £2,600 payment will be treated in the same way as it was treated during Mr Reid's employment with BP. We repeat our conclusion at paragraph 77 in respect of the element of the Payment which relates to the expectation of the lunch allowance. Again, Mr Reid has failed to establish that this element is not chargeable to tax and (insofar as it formed part of the Payment and therefore even relevant) we dismiss that part of the appeal.

***Quantification***

80. The Payment was not broken down for us and so we are unable to make a finding as to the precise amount of the Payment is chargeable to tax. However, we do have the formula for carrying out this calculation as the Framework Agreement provides that the sum attributable to pensions is equivalent to 42% of Mr Reid's base salary on 1 May 2010.

81. As such, we find that the amendment to the self assessment return made by the closure notice is to be reduced by the amount equivalent to 42% of Mr Reid's base salary as at 1 May 2010. If the parties are unable to agree this sum then we invite written submissions limited to this issue and (unless either party requests an oral hearing) we will release a further decision upon the point.

82. We note that the lack of information as to which bonus scheme Mr Reid was on or whether or not he received a lunchtime allowance do not affect the quantification as the only reduction to be made is in respect of the pension.

**Decision**

83. For the reasons set out above, we allow the appeal in part, with the effect that the amendment to the self assessment return made by the closure notice is to be reduced by the amount equivalent to 42% of Mr Reid's base salary as at 1 May 2010.

84. 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.

**RICHARD CHAPMAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 9 FEBRUARY 2016**