TC01036

Appeal number TC/2009/14771

Income tax – employment income – whether receipt of shares was an emolument from employment within section 19 Income and Corporation Taxes Act 1988 – whether an obligation to deduct PAYE under sections 203F or 203B Income and Corporation Taxes Act 1988

FIRST-TIER TRIBUNAL

TAX

KIERAN ANTHONY ROGERS **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square, London WC1 on 14, 15 and 16 December 2010

Laurent Sykes, Counsel, instructed by Crowe Clark Whitehall for the Appellant

Patrick Way, Counsel, instructed by Howes Percival on behalf of the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against an assessment of income tax for the tax year ending 5 April 2002 in an amount of £2,800,000. Essentially, the main question in the appeal is whether the Appellant is liable to income tax by virtue of being in receipt of an emolument from his employment when he received a transfer of shares in a holding company of the company which employed him. There is a secondary issue as to whether there was a requirement to deduct PAYE if the transfer of shares was an emolument. There was originally a third issue relating to costs, but during the course of the hearing HMRC withdrew their application.

Earlier proceedings

2. The procedural background to this appeal is very unusual and is worth explaining, not least because during the hearing we were, at various points, referred to statements made in witness statements in respect of these earlier proceedings.

3. An assessment to tax gives rise to a statutory debt under section 55 (2) Taxes Management Act 1970 ("TMA"). The debt arises regardless of whether the assessment is under appeal. Usually an application to postpone payment of the tax is made at the same time as the appeal. HMRC usually consent to such postponement applications.

4. In this case, after initially giving consent to postpone payment of tax, HMRC applied for the postponed tax to be released for payment. The application was made to the General Commissioners at a hearing which neither the Appellant nor his representative were able to attend. A request by the Appellant's representative to reschedule the hearing was refused or at least went unanswered before the hearing.

5. By a letter dated 29 July 2008, the General Commissioners informed the Appellant's representative that the tax postponement should be reduced to nil thereby effectively releasing the tax for payment.

6. HMRC then took steps to enforce the statutory debt in the High Court.

7. The Appellant made a further application to the General Commissioners for postponement, to which HMRC objected. The General Commissioners decided in March 2009 that they did not have jurisdiction to change their earlier decision since there was no change of circumstances, as required by section 55 (4) TMA. The Appellant declared dissatisfaction with the decision of the General Commissioners and requested them to state a case for the High Court. The case stated was dated 20 November 2009.

8. While the Appellant was appealing the decision of the General Commissioners to the High Court, HMRC applied to the High Court for summary judgment in respect of the statutory debt resulting from the assessment. The application for summary judgment and an application for a stay

in proceedings pending a decision of the High Court in respect of the decision by way of case stated by the General Commissioners on 20 November 2009 were heard by Floyd J on 12 November 2009. Floyd J decided ([2009] EWHC 3433 (Ch)) to grant a stay and to refuse the application for summary judgment.

9. We understand that HMRC's actions could have had the result of bankrupting the Appellant before he was able to have his appeal against the disputed tax heard.

10. At the same time, HMRC applied to strike out the Appellant's appeal, with costs, before this Tribunal on 22 October 2009. The application was withdrawn by HMRC at a hearing before this Tribunal (Judge Sadler) on 16 November 2009.

11. It will be obvious that the path to the hearing of this appeal has not been trouble-free.

The evidence

12. The evidence in this appeal consisted of three ring binders of documents and oral evidence given by the Appellant, Mr Graham Platts, Mr Michael O'Connor and Mr Bruce Hutchison, all of whom were at one time employees of the Scorex group.

The facts

13. We find the following facts.

The Appellant's employment history before joining Scorex

14. The Appellant's business background is in credit scoring.

15. He joined a finance company known as UDT in 1986 as a deputy manager in their credit scoring division. He joined UDT on the same day as Mr Platts. Mr Platts was an analyst with a mathematics degree from Cambridge University. Mr O'Connor was already working for UDT also as an analyst.

16. The Appellant, Mr Platts and Mr O'Connor ("the Team") were based in an office in Cockfosters in north London and soon became a close-knit team. They had complementary skills. The Appellant had experience of granting credit, Mr Platts had a mathematical background and between the three members of the Team they had the necessary software skills.

17. The Team had spent two years working for UDT when another colleague, George Wilkinson, was approached by a company called Infolink. At this stage Infolink was not a competitor, although it would eventually become one when it became part of a group called Equifax. The Appellant already had had business dealings with Infolink. The approach to Mr Wilkinson by Infolink gave the Team and other colleagues an opportunity to move en masse to Infolink.

18. The Team had some misgivings about Infolink's corporate culture and somewhat rigid regime, so instead of joining Infolink's offices in Croydon, they set up an independent office in Windsor to maintain their independence and flexibility.

19. The Appellant perceived that there was a promising market opportunity for the Team because they were, in his view, "smarter" and had more experience than their competitors. They also recognised that there was a close relationship between credit scoring and credit referencing and believed that they could develop Infolink's business by exploiting that relationship. In the words of the Appellant:

> "We felt we were creating something and whilst we all wanted to own part of the business, this did not happen. We aspired to be part owners of the business given our combined skills, our likely contribution to the success of the organisation and our contacts with the Financial Services sector. We wanted to be more than ordinary employees. We wanted to create value and share in the benefits as owners and shareholders of the business."

20. The Team were not able to persuade Infolink to give them the equity stake in the business which they desired. According to the Appellant, Mr Platts did most of the negotiating but in the end it came to nothing. In any event, frustrated by the rigid corporate regime of Infolink (the Appellant mentioned an incident where he had to travel to Croydon from Windsor to explain the purchase of a £15 office clock), the Appellant decided that he wanted to leave Infolink.

The Appellant meets Jean Michel Trousse and joins Scorex

21. In 1987 the Appellant met Jean Michel Trousse ("JMT") at a conference, after which JMT tried to recruit the Appellant through a “headhunter”. The Appellant turned down this approach because he did not want to leave the other members of the Team and other colleagues, as he put it, "in the lurch".

22. In 1988 JMT made another approach to the Appellant, this time over a dinner and offered a more attractive salary. At the time, the Appellant was also concerned about the financial status of Infolink and whether it was able to compete with larger market participants. As a result of this approach, the Appellant decided to join JMT.

23. JMT was a French citizen who owned the Scorex group of companies. He had previously been employed by the leading credit scoring company, Fair Isaac & Company. He had founded the Scorex group in 1986 but his two original consultants left in 1988. The group was virtually a start-up with only one client (Next/Grattan). The turnover of approximately £100,000 was derived almost entirely from that one client.

24. The Appellant was employed by Scorex (UK) Ltd ("Scorex UK") from 1988. He eventually left the group in 2003, when the main operating companies

in the Scorex group were acquired by a competitor, Experian Limited ("Experian"), a subsidiary of GUS plc.

25. The corporate structure of the Scorex group is somewhat complicated. JMT owned 100% (via a nominee, Marie-Rose Pisarello) of Scorex NV, a Dutch Antilles incorporated company. Scorex NV, in turn, owned 100% of the shares of Scorex BV. Scorex BV, in a joint-venture with Experian, owned 51% of the A shares and 60% of the B shares in Scorex UK, with Experian owning 49% of the A shares and 40% of the B shares. Other entities in the Scorex group were also jointly owned directly or indirectly by Scorex BV and by companies associated with Experian. Before the joint venture with Experian there had been a joint venture with Grattan in similar proportions. Grattan sold its interest to Equifax, terminating the joint venture prior to Experian's involvement.

26. When the Appellant agreed to join the Scorex group he had offered to buy some shares and co-invest in the business. The Appellant wanted to invest approximately £10,000 to acquire an equity stake in the business. However, JMT apparently did not want him to participate in the ownership of the group at that stage.

The Team is reunited at Scorex

27. Shortly after the Appellant joined the Scorex group, which at that time employed only a handful of employees, JMT indicated that the group needed greater mathematical expertise. The Appellant suggested Mr Platts as a suitable candidate, and he joined the group about six months after the Appellant.

28. Mr Platts left Infolink specifically because they had reneged on their promise to allow him to acquire an equity stake in the business. On joining the Scorex group Mr Platts mentioned this to JMT who said that he would allow Mr Platts to participate in the ownership of the Scorex group, recognising him as a co-founder of the business. There was no reference to the grant of an opportunity to acquire share ownership in Mr Platts's employment letter of July 1988. Mr Platts explained that this was because any share participation was not a benefit - it was assumed he would have to pay market value for any shares.

29. When Mr Platts joined the Scorex group JMT owned 51% and Grattan owned 49%. Mr Platts believed that this was the reason why he was unable to acquire an equity interest at the outset -- if he had received shares JMT would have lost control. Nonetheless, Mr Platts had clear discussions with JMT about the principle of share ownership and JMT promised to allow Mr Platts the opportunity to acquire shares at some future date at then current market value.

30. About 18 months later, the Appellant recruited Mr O'Connor and the Team was reunited under the Scorex banner. Mr O'Connor said that he was led to believe by JMT that he would be offered the opportunity to share in the ownership of the group at some stage. He always believed that it was JMT's intention that he, the Appellant and Graham Platts, who were the key

individuals, were to become shareholders in the company when JMT eventually decided to take a back seat.

31. In his witness statement the Appellant made the following comments about the Team's move from Infolink to Scorex:

> "We all had a shot with Infolink and had some success. GP [Mr Platts], MOC [Mr O'Connor] and I knew, however, that without the drag of the corporate style we could have even more success. We were driven by the chance to build a bigger business and particularly driven by trying to create something out of nothing. It was a once in a lifetime opportunity to create a consultancy out of nothing.
>
> Indeed, GP, MOC and I were the individuals who built the whole infrastructure of the Scorex Group."

32. The Appellant was paid a salary which reflected market rates plus an annual bonus. This remuneration increased as he progressed from his position as marketing director to managing director and finally to chairman of the UK business. The Appellant considered that it might have been possible to have made more (but not much more) money by joining a larger organisation but with Scorex he also had a more attractive choice of company car which pleased him. After his experiences with Infolink, the Appellant particularly enjoyed the freedom and flexibility that came with his job and this was one of the key attractions of the Scorex group.

33. JMT was an entrepreneur, described variously as a "visionary", "an extraordinarily gifted thinker", "an ideas man". He was also described as someone who was not "hands-on" as regards the day-to-day running of the business. He would not normally deal directly with clients and travelled on business frequently. He was not a natural salesman and would usually leave marketing and customer relationships in the hands of the Appellant, who had considerable success in this area.

34. Mr Platts had a further discussion with JMT about share ownership in either 1989 or 1990 and, in particular, about the market value of the shares. JMT valued the company in millions of pounds based on its potential whereas Mr Platts valued at in thousands of pounds based on its sales and level of profitability at the time. Mr Platts considered that JMT was not refusing to contemplate giving Mr Platts an equity stake but that there was a difference in view as to price. Mr Platts trusted JMT to make good his promise to allow him to invest and considered him a man of his word. Nonetheless, Mr Platts found it difficult to raise the subject with JMT because he would become defensive when the topic was discussed. He could only raise the subject at opportune moments. It was, in his words, "a once a year thing".

35. The Appellant's original request to acquire an equity stake in the Scorex group, made when he joined the group in 1988, had been rebuffed. The Appellant said that JMT had made remarks about share ownership but there was nothing tangible. The Appellant tended to disregard such suggestions.

36. The business was very successful and grew steadily during the 1990s. As already noted, at the beginning the Scorex group had only one customer: Grattan (which was later acquired by Next). The Appellant's marketing skills produced a considerable expansion of the client base.

37. As mentioned above, JMT owned 51% of the Scorex group and Grattan/Next owned the remaining 49%, before selling their stake to a company called Equifax. Eventually, Equifax terminated its joint-venture and a new joint-venture party, Experian (at that time known as CCN) took over from Equifax. The joint-venture agreement gave Experian the option to acquire 100% of Scorex BV, the holding company of Scorex UK.

The Theoule meeting

38. Towards the end of 1995 the Appellant, together with Mr Platts and Mr O'Connor, attended a business meeting at JMT's house in Theoule sur Mer ("Theoule") in the south of France. The discussions were conducted informally by the poolside. The acquisition of shares in the Scorex group was raised with JMT at that meeting.

39. Mr Platts said that when the subject of share ownership was mentioned he, the Appellant and Mr O'Connor had repeated their request to invest in the business by buying shares at the original market value. Mr Platts remembered JMT diving into the swimming pool in order, as he put it, "to cool off and buy himself some time to think". JMT had acknowledged that he had promised to allow them the opportunity to invest. JMT reassured them that he was going to "step back" at some point in the future, allowing Mr Platts and the other key players to run the business He said that they would be offered the opportunity to acquire shares at that time. The number of shares and the exact acquisition price do not appear to have been mentioned, although it should be noted that the understanding was that they would be allowed to acquire shares at the "original" market value ie by reference to the value when they joined the group. It seems to have been recognised that as the Scorex group grew in value it became increasingly difficult for the Team to afford to buy shares at the (increasing) current market value. As time went by it was assumed by all that the acquisition price of the shares would be at the (much lower) original market value.

40. The meeting by the pool in Theoule took place at an important time for the Scorex group because Equifax had served a notice terminating its joint-venture and the group would have to survive alone or find a new joint-venture partner. Mr Platts mentioned that he and the Appellant also discussed with JMT whether the business should be sold to Equifax who had tabled an offer of around £2 million.

After the Theoule meeting

41. The period after the Theoule meeting was a very busy one, according to Mr Platts. It was also a difficult time because, for a six-month period, both Equifax and Experian had a share in the business. In order to separate from Equifax a

significant part of the Scorex business (generating over a £1 million per annum) was transferred to Equifax in return for buying back their shareholding. Because the business became smaller and therefore less profitable it was clear that the Team would have to work hard to develop the business and its profitability in the post-Equifax period.

42. At some stage in 1997 Mr Platts had dinner with JMT. JMT outlined a proposal in which Mr Platts could acquire a 12% interest in the Scorex group; the Appellant could acquire up to a 9% interest and Mr O'Connor a 6% interest. It is clear that Mr Platts tended to be the spokesman for the Team in discussions about share participation. It is also clear that the other members of the Team were content for Mr Platts to assume that role.

43. JMT asked Mr Platts what he thought about the differential treatment. He replied that he felt uncomfortable about the Appellant and Mr O'Connor getting only 9% and 6% respectively. Mr Platts had always assumed that the three members of the Team would all get the same number of shares or at least that he and the Appellant would get the same, perhaps with Mr O'Connor receiving a slightly smaller percentage. Mr Platts thought that JMT might have been slightly "scared" by what Mr Platts had said. He thought that that was why JMT did not put his proposal into action at that time. Mr Platts did not mention the proposed percentages to the Appellant and Mr O'Connor because he considered that was something that JMT should do. It was plain, however, that that it was always contemplated by JMT and the Team that all members of the Team would receive shares.

44. Mr Platts moved to Monaco in 1998, continuing in the employment of the Scorex group. He drew up a letter dated 15 May 1998. He inserted his salary, converting it from sterling into Euros. He also referred to JMT's earlier promise to allow him to acquire an interest in the Scorex group. He said he saw the letter as something of an insurance policy. The relevant extract from the letter, taken from Mr Platts's witness statement of 2 June 2009 in relation to earlier proceedings, reads as follows:

> "Share Participation: You will be eligible to purchase shares in Scorex BV after an initial probation period of nine months i.e. April 1999."

45. In his witness statement of 2 June 2009 Mr Platts noted that the wording used in the 15 May 1998 letter did not refer to the percentage participation proposed by JMT in 1997 and did not mention whether the participation would take the form of a share option or the proposed price. Mr Platts noted that it also named the wrong company, as the ultimate holding company of the Scorex group was Scorex NV. In his witness statement dated 1 April 2010 Mr Platts said:

> "I used the word 'option' since I still expected to have to pay something for the shares. However, I did not now expect to pay market value as we had come through the difficult period and the shares are now worth significantly more than they were in 1988 when I joined or at the end

> of 1995/early 1996 when we parted company with Equifax and I, along with KR [the Appellant] and MOC [Mr O'Connor], had helped to build that value."

46. Mr Platts said that he had never used the letter. Although the letter was read by JMT and was signed by him Mr Platts never showed it again to JMT (or to JMT's father after JMT's death). Mr Platts regarded the letter simply as an insurance policy, because his job with the Scorex group required him to move abroad for the first time and his partner was unlikely to be able to get a job. He therefore saw the letter as providing some security but thought that using it to exert leverage against JMT would have been counter-productive.

Succession planning and wedding of Jean Michel Trousse

47. In late February or early March 2001 JMT was married (it was his second marriage). The wedding took place in Theoule. There was a private wedding ceremony on the Wednesday. On Friday (or perhaps Saturday) there was a business strategy meeting which was attended by JMT, Mr Platts, the Appellant and Mr O'Connor. At this meeting JMT indicated that the three members of the Team could acquire a shareholding in the Scorex group at a nominal cost. As already noted, in Mr Platts's view this was because the current value of the shares was such that any original valuation (i.e. a valuation at the time the Team joined the Scorex group) would have been insignificant by comparison.

48. On the Saturday of that week there was a party to celebrate JMT's wedding to which Mr Platts was invited. The Appellant and Mr O'Connor were not invited and did not attend. There was, in Mr Platts's view, some significance to the fact that only he was invited to the wedding party.

49. During the early 1990s the Appellant had definitely been JMT's "number two". According to the Appellant, the UK business of Scorex was the "flagship out of which everything else grew" and the Appellant was the managing director of that flagship. However, Mr Platts had become more of a confidant to JMT as the 1990s progressed. Echoing the Appellant's evidence, Mr Platts considered that he and JMT were closer technically and that JMT increasingly placed a greater value on Mr Platts's organisational skills. Mr O'Connor was seen as a younger protégé. He was similar to the Appellant in having a sales background and had done a good job opening new markets, including the US, which JMT appreciated.

50. From the Appellant's viewpoint, although he considered that he had a good relationship with JMT, which involved visiting his house in France, he agreed JMT became closer to Mr Platts. The Appellant attributed this to JMT's love of intellect. He thought that JMT saw Mr Platts as more of a kindred spirit -- Mr Platts was a mathematician whereas the Appellant was a marketeer and was not very analytical.

51. Therefore, Mr Platts saw the fact that he alone was chosen to attend the wedding party on the Saturday after the wedding as symbolic of him being chosen to be JMT's heir.

52. There was also another issue which lay below the surface. Mr Platts confirmed that from the mid-1990s the Appellant had had a drink problem which affected his work. It was clearly a problem, according to Mr Platts, by 1996. This lay behind the decision in approximately 1996 to ask the Appellant to 'step back' from the running of the UK business and become the chairman of the Scorex UK. By 2001 the Appellant's alcoholism was even more manifest and was a recognised problem. The Appellant in his own evidence recognised that he was being "sidelined" although he explained this as being because the business was a young person's business and that he was being asked to make way for younger people. He noted candidly that it was not really necessary for a subsidiary (Scorex UK), which only had two shareholders, to have a chairman. We were provided with medical guidance in relation to the conditions under which the Appellant could give evidence which made it clear that his problems with alcohol continue to this day.

53. When the Appellant was made chairman of Scorex UK, JMT once again mentioned the possibility of acquiring a shareholding in the group when he (ie JMT) stepped down. The Appellant said that he assumed that he would have to pay for the shares. However, at that stage, because he had been rebuffed about share ownership when he joined the group he did not set much store by JMT's suggestions.

The death of Jean Michel Trousse in March 2001 and the transfer of the shares

54. After the wedding, JMT and his new wife went on honeymoon and approximately two or three weeks later were killed in an air crash in the Caribbean on 24 March 2001.

55. Shortly after JMT's death, Lucien Trousse (JMT's father) visited Mr Platts at his office in Monaco and did so every week for the following month. Mr Platts recalled him saying early on that "we need to transfer the shares". Mr Platts said that Lucien Trousse had acknowledged that he knew about JMT's promise regarding the shares. There had been no need for Mr Platts to show JMT's father the letter of 15 May 1998. Lucien Trousse asked Mr Platts to effect the share transfers in April 2001, but the transfers were not in fact carried out until 20 June 2001. The shares were bought for a nominal consideration of $1 per share and were transferred by JMT's nominee, Ms Marie-Rose Pisarello. The Appellant was transferred 9% of the shares of Scorex NV, comprising 540 A shares and 9 B shares ("the shares") in the Scorex NV ("the Transfer"). At the same time, Mr Platts received a 12% shareholding and Mr O'Connor received a 6% shareholding. In other words, the percentages transferred to each member of the Team were those discussed by JMT during his dinner with Mr Platts in 1997.

56. In addition to the 27% of the shares transferred to the Team, 10% of the share capital of Scorex NV was put aside for other employees to share, a further 10% was given to others and the Trousse family were left with a 53% majority interest.

57. There were no conditions attached to the transfer of the shares to the three members of the Team.

58. Following JMT's death Mr Platts became the chief executive of the Scorex group. Mr Platt said that this was not discussed and it just happened in the natural course of events. This smooth transition led him to believe that JMT had also discussed the evolution of the company with his father when preparing to take "a back seat" after his second marriage.

Events following the Transfer

59. Mr Platts, now the chief executive of the Scorex group, found that his role had changed relatively little. He had always acted as an owner of the business and indicated that the other members of the Team behaved in a similar manner. He had only consulted JMT on major business decisions and JMT had not run the business on a day-to-day basis.

60. At some stage between 2001 and 2003 the Appellant started working part-time and this was related to his drink problem.

61. The Appellant's shares were transferred on 20 June 2001 to Mr Platts as the Appellant's nominee. Mr Platts considered that, while the transfer into his name may have been connected with the desire of the Appellant to take time to consider how precisely he should apply the shares for the benefit of this family, it was rather more to do with the need rapidly to put the shares out of the reach of JMT's first wife in case she objected to the transfer of the shares. JMT had died intestate.

62. On 4 April 2002 the Appellant's shareholding in Scorex NV was transferred to a company called Reizone Limited ("Reizone") incorporated in the British Virgin Islands. Reizone settled the shares by a Trust Deed executed on 10 May 2002, the trustee being Shire Trust Limited, a trust for the benefit of the Appellant's family, including his wife (from whom he is now divorced) and their disabled daughter and their son. A distribution of £3,738,000 was paid on the shares.

63. The Appellant had asked a Mr Graeme Lupton, an investment adviser based in New Zealand and recommended by colleagues, to manage his investments. In the event, through a series of rash investments, Mr Lupton lost all the funds entrusted to him, which represented the value derived from the Appellant's allocation of Scorex NV shares. The Appellant lodged a complaint with the New Zealand Serious Fraud Office ("SFO") and had two interviews with the SFO concerning Mr Lupton's conduct. Transcripts were included in the bundle of documents produced before us.

64. In 2003, Experian exercised its call option to acquire the shares of Scorex BV for a total consideration of £66,330,500. There had been a disagreement and a protracted argument over the valuation formula in the call option agreement.

65. As part of the acquisition by Experian of Scorex BV it was agreed that the Appellant would leave the employment of the Scorex group in 2003. Mr Platts and Mr O'Connor continued to work for the Scorex group.

66. Lucien Trousse died in 2009.

Reasons for the Transfer

67. The reasons for the Transfer are in dispute between the parties. Our findings of fact in relation to this issue are dealt with under the heading "Discussion of the emoluments issue" below.

68. Apart from the letter of 15 May 1998 drafted by Mr Platts before moving to Monaco, there was nothing in writing about JMT's intention to allow the Appellant, Mr Platts and Mr O'Connor to share in the ownership of the Scorex group.

69. The Appellant in his witness statement said:

> "41. ... JMT knew that I had been down the "battle road" to build the company into what it had become and he was grateful.
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> 43. I believe that the shares given to me were in recognition and gratitude of what I had achieved for the Group. JMT felt that the other two individuals and I had contributed to the growth of his empire and wanted to give us shares as a token of their contribution.
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> 44. I believe that fundamentally, and with GP's pressure also playing a part, JMT took the opportunity of his stepping back to fulfil his obligations and to recognise GP, MOC and me as, in a strong sense, founders. There was much more generosity here than I could have expected given that no payment was required for the shares."

70. In his witness statement Mr Platts said:

> "21. JMT was extremely grateful for our contribution. He recognised the loyalty and commitment that we had shown. As the company grew JMT not only felt gratitude but he was also proud of what we had all achieved.
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> 22. JMT felt a huge sense of gratitude to [the Appellant] since in 1988 when the company had only a single customer, Next/Gratton (its shareholder), and no track record, he was the guy who went out and won us new customers in 1988, 1989 and 1990. I do not think that either JMT or I could have gone out and done this at the time as we did not have the same skills. JMT never forgot this.
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> 23. JMT and I grew close as the 90s drew on and we developed a very close business friendship. The first tangible signs of this were JMT treating me as his "confidant". If he wanted advice he would ring me first. He would say how should I tackle this or that?
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> 24. I think it was about the time that the joint venture started with Experian in 1996 which marked the handing over of the baton from [the Appellant] to me. I ran the joint venture which meant that I was

travelling all around the world. At this point, most people reported to me. [The Appellant] remained in the UK which was difficult as he continued to compete with Experian (which they did not like) whilst I was partnered with them outside the UK. The future was clearly with Experian so we asked [the Appellant] to step back and become Chairman of the UK as the next generation of guys came through the company.

25. JMT felt a moral obligation to give us shares. We had all expressed the desire to buy into the ownership of the group of which we were in a very real sense co-founders but he had always said later, later. He had promised us all the opportunity to become shareholders and kept on stalling as the company grew. Never at any stage did he say that he would not allow us to become co-owners, it was always later. Then it became almost impossible for us to pay for the shares at market value given the level of monies that we would have needed to raise. He would not have felt guilty but rather proud of our achievements. I think JMT would have reconciled in his own mind that he wanted to share the company with us and for us to look after his interests (which were aligned) as he stepped back and became less involved.

26. It was only after having met his second wife that JMT had decided to step back from the business. He had reached a crossroads and at the wedding party on the Saturday in Theoule, he made it clear to me that he wanted me to take over the running of the business day-to-day. His son was a creative person who had no interest in the business; he went on to be a photographer. His daughter was still at school. His sister, Brigitte, although a mathematician, was an academic. JMT wanted to involve her in the business. In fact he invited her but she refused. They were not terribly close and she saw the business world as unfulfilling.

27. JMT recognised our contribution and he wanted to raise our status. He wanted us to be the co-owners but was quite clear that the time for this would be when he decided to take a back seat and I believe that this point arrived when he re-married. I also think his father Lucien had suggested he reassessed his personal priorities now that he was 50+. JMT also had an incident in the late 90s when he broke his sternum when the aeroplane on which he was travelling suddenly dropped 500 feet in the sky. JMT had not been wearing his seatbelt as he was attending to his kids and had hit the ceiling and fallen to the floor; two people were very seriously injured in the same incident.

28.....

29. JMT died intestate and Lucien was worried about JMT's ex-wife. She had already prevented him from seeing his grandchildren. He thought that she would go for everything if we did not act fast and he suspected her motivation. It was therefore the ex-wife rather than anything else which gave the impetus to the share transfers. Lucien was interested in securing a smooth transition but this was subordinate to preventing the ex-wife from getting her hands on JMT's assets to the detriment of his grandchildren. He also knew that if he did not honour the JMT's promises he was putting everything at risk. He inherited a

> fait accompli and simply wanted to ensure that it happened in the way that JMT had agreed.
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> 30....
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> 31. [The Appellant] was not involved in any of these discussions as he was in the UK and the conversations were all in French."

71. In his witness statement of 2 June 2009 Mr Platts said:

> "10)... We were therefore all founders of the Group in a sense, as the others were junior analysts, secretaries etc. JMT recognised our contribution to the Group and wanted to elevate our status, particularly in view of his wish to step back from the business following his second marriage. I believe that [the Appellant] and Mike O'Connor were similarly given their shares in recognition of their contributions.
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> 13)....
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> 12) After JMT's death his father, Lucien Trousse, said that he wanted us to continue to run the business and said that he knew about the promises that had been made and indicated that he wanted us to action the share transfer and ensure a smooth transition so that the value of the company would be retained.
>
> 13)... The transfer of the shares into the names of the three key players was not really about giving effect to any contractual right. It was more about empowering the three key players and giving them a share of the business to ensure the continuing success of the business."

72. In his oral evidence Mr Platts was clear that the shares had not been transferred to the Appellant in respect of his future contribution to the Scorex group. The Appellant's importance to the Scorex group had diminished throughout the second half of the 1990s and his drink problem was one of the reasons the Appellant was asked in approximately 1996 to become chairman of the UK operations. By 2001, in Mr Platts's view, the Appellant's role was "tiny".

73. Mr Sykes asked Mr Platts how he would have allocated the shares in Scorex NV on the basis of the importance of the individuals in 2001 looking to the future. Mr Platts replied that on that basis he would have allocated the shares 14% to himself, 12% to Mr O'Connor and 1% to the Appellant. Mr Platts noted that in 2003 Experian had insisted that the Appellant should leave the employment of the Scorex group.

74. When asked why JMT had promised shares to the Appellant, Mr Platts replied that it was because he was grateful to the Appellant. When the Appellant had joined the Scorex group Grattan was the only customer. The Appellant had brought in major clients e.g. Nationwide. JMT realised he could not have done that himself. JMT never forgot that. Over time it became obvious that the Appellant had a drinking problem and JMT had agreed that the Appellant should be sidelined. JMT, however, never forgot the early years and was grateful and loyal to the Appellant.

75. Mr Platts considered that, during the 1980s and early 1990s, his own contribution and that of the Appellant had been similar. Commenting on the Appellant who gave evidence the day before, Mr Platts observed, with obvious regret, that the person we saw was nothing like the person of the early 1990s and late 1980s.

76. Mr O'Connor said that the shares were not intended to supplement his income since he was paid a fair market rate of remuneration. He said:

> "It was about becoming a shareholder. I never had anything in writing. (I believe that Graham Platts was different in that he had insisted on having something in writing when he moved to Monaco, although I was not aware of this at the time.)"

77. Mr O'Connor said that JMT had told him at the Theoule meeting in the mid-90s and again just two weeks before his fatal accident that he would be given a 6% share in the group. Mr O'Connor was also involved in some of the discussions that Graham Platts had with Lucien Trousse following JMT's death. He did not recall the Appellant being involved in those discussions.

78. In cross-examination of the Appellant, Mr Way pointed out that, in a letter dated 2 August 2006 from the Appellant's original solicitors (Dawsons), paragraph 3 contained a reference to the shares in Scorex NV being "allocated" to the Appellant. Mr Way noted that there was no reference to a gift. In cross-examination Mr Way also referred the Appellant to the fact that in paragraph 11 Dawsons had said:

> "It would seem that the allocation [of shares in Scorex NV] constituted a benefit in kind to Mr Rogers under s154 Taxes Act 1988 on the value of the shareholding at that date."

79. The Appellant said that he was unaware of the admission made by Dawsons in correspondence and that he had ceased to retain them because of errors that they had made.

80. As mentioned above, the Appellant attended two meetings with the SFO in pursuance of his complaint against Mr Graeme Lupton. Prior to those meetings the Appellant swore an affidavit in support of his complaint on 19 May 2006. Mr Way pointed out that, in paragraph 2 of the affidavit, the Appellant said:

> "I became entitled to a shareholding of the Netherlands company from around 1998 to 2000."

81. In cross-examination Mr Way drew attention to the use of the word "entitled" and asked the Appellant why he did not simply say that the shares had been given to him. The Appellant replied that he was just using plain English and that he had a tendency to use three words rather than one.

82. In his first interview with the SFO on 12 October 2006 the Appellant is recorded as saying:

> "I eventually was compensated by way of rights, our interests in the entirety of the group and not just Scorex UK Limited."

83. Mr Way asked the Appellant why he had not said that the shares were "given" to him. The Appellant's response was that he had just used ordinary English words. However, we note that in context it appears that the Appellant was explaining why he received shares in Scorex NV because a couple of sentences before the comments quoted above he is recorded as saying:

> "... but because I was a founder member of Scorex UK Limited."

84. Later in the interview the dialogue is recorded as follows:

> "Interviewer: .... you've put it on the basis that it was a bit like a bonus for all the good work with UK.
>
> Rogers: because I've been there for so many years and we've seen it grow from, for example in the UK and that was not unusual, from five people verging towards 100 people."

85. Mr Way challenged the Appellant on these words in which the Appellant, according to Mr Way, seem to accept the interviewer's suggestion that the shares were a bonus. The Appellant replied that he was talking to a policeman not a solicitor. He had not known that these words were going to be "dragged up". He had flown 26 hours to Auckland and was very jet-lagged. The interview took place at what for the appellant was 4.00am. He felt that he was not in a fit state to select words.

86. Mr Way drew attention to a comment later in the interview when the fact that Mr Platts had received a higher percentage of shares than the Appellant was being discussed. The Appellant is recorded as having said:

> "Correct he was more valuable to the organisation than I was."

87. The Appellant explained that software, which formed a large part of Scorex's business, was a young person's business and that Mr Platts had more years ahead of him than the Appellant -- therefore Mr Platts's share was greater.

88. Mr Way again referred to a point later in the interview in which the Appellant used the word "entitlement" to refer to his shareholding:

> "... when first awarded the shareholding or the entitlement to the shareholding more correctly...."

89. In his witness statement of 29 May 2009 Mr Hutchinson, speaking of the transfer of the shares in Scorex NV after the death of JMT, said:

> "I think that the Trousse family were in a difficult position as Messrs Platts, O'Connor and Rogers were key individuals and there was therefore a commercial desire to allow them the share in the ownership of the group which was in accordance with JMT's wishes."

90. Mr Way asked the Appellant whether he agreed with the statement and in particular the reference to "a commercial desire". The Appellant thought that Mr

Hutchinson had perceived things incorrectly. The Appellant's view at the time was that he would not be with the Scorex group for very long because it was a young person's business. He believed that there was an intention to shunt him into a siding so that younger and more skilled people could run the organisation.

91. In his first witness statement of 2 June 2009 Mr Platts stated:

> "12) After JMT's death his father, Lucien Trousse, said that he wanted us to continue to run the business and said that he knew about the promises that had been made and indicated that he wanted us to action the share transfer and ensure a smooth transition so that the value of the company would be retained.
>
> 13) Even when JMT died and I discussed the promise with JMT's father, I did not bring up the letter which I had been given by JMT in 1998. The transfer of the shares into the names of the three key players was not really about giving effect to any contractual right. It was more about empowering the three key players and giving them a share in the business to ensure the continuing success of the business."

92. Mr Way cross-examined the Appellant on these words. The Appellant replied that he had never met Lucien Trousse and did not know what his thinking was. However, the credit scoring business was a consultancy which worked best with continuity. If the Team had all left the group there would have been a hiatus. It was less important, in the Appellant's view, that he stayed on because, in his view, he was being put in a "siding."

93. In his cross-examination of Mr Hutchison, Mr Way drew Mr Hutchinson's attention to his statement in paragraph 4 of his witness statement of 29 May 2009:

> "I understand the JMT promised shares to the above individuals [the Team] as he wanted to involve them in the ownership of the group, although I was not a party to the individual discussions."

94. Mr Hutchinson confirmed that he was not involved in those discussions.

95. Mr Way asked Mr Hutchison whether in his opinion the Appellant was worth a 9% shareholding in Scorex NV both in 2001 and thereafter. Mr Hutchison replied in the negative. Speaking bluntly, as he put it, the Appellant had a drinking problem. He was not contributing to the business and was not very productive -- indeed, others were contributing more. By that time there were 10 senior people in the organisation and the Appellant's star was waning because of alcohol problems.

96. Mr Way questioned Mr Hutchison in relation to the statement in paragraph 12 (quoted in paragraph 89 above) in his witness statement of 29 May 2009. The statement suggested that there were commercial reasons for retaining Mr Platts, Mr O'Connor and the Appellant. In his oral evidence, as Mr Way pointed out, Mr Hutchison now seemed to be suggesting that the Appellant was a spent force in 2001. Mr Hutchison replied that he had not really changed his position.

In 2001 the stars of Mr O'Connor and Mr Platts were in the ascendant, but because of his drink problems the Appellant's star was on the wane. However, the three members of the Team were very close and loyal to each other.

Whether the shares in Scorex NV were readily convertible into cash -- the evidence.

97. We find the following facts.

98. As noted above, shares in Scorex NV were transferred to the Appellant on 20 June 2001 for a nominal consideration.

99. In his supplementary witness statement of 26 October 2010 Mr Platts stated that he had been asked to comment on whether it would have been likely when the shares in Scorex NV were transferred to the Appellant in June 2001, (or the earlier time of JMT's confirmation of his promise at the time of his wedding), that the shares would be convertible into money within a relatively short time frame. Mr Platts confirmed his belief that the shares were always likely to be sold for cash by the end of March 2003.

100. Mr Platts noted in his witness statement that Scorex BV was part of a joint venture with Experian, a subsidiary of GUS plc. Experian (or an associated company) had a call option agreement, which expired on 31 March 2003, to acquire a 50% interest of Scorex BV owned by Scorex NV. There was a lengthy difference of opinion over the interpretation of the price formula in the agreement. After 31 March 2003, GUS plc had no right to acquire the outstanding 50% of Scorex BV and Scorex NV would have been free to sell its stake to a third party. Eventually, a deal was reached and the call option was exercised on 25 March 2003. In his supplementary witness statement Mr Platts said:

> "11. I believe the deal -- and with it the immediate realisation of the shares for cash -- was very likely from the time we received our shares, and became even more likely following the death of JMT in March 2001. The subsequent delay was merely the result of the disagreement on price and interpretation of the formula within the joint-venture agreement as well as the upward performance curve of the business which kept increasing the price.
>
> 12. GUS was therefore under commercial pressure to acquire Scorex's 50% interest in the joint-venture. I knew that GUS was planning to float Experian on the stock market and they would not want to explain the arrangement with Scorex which was somewhat embarrassing since in some markets they were actually competing with their own joint-venture partner.
>
> 13. It was always the intention to sell Scorex BV for cash and to distribute the proceeds to the shareholders of Scorex NV. Scorex NV was simply a holding company with no activity of its own and hence no need for cash."

101. In his supplemental witness statement of 27 October 2010 Mr Hutchison stated as follows:

> "3. I have been asked to comment on whether it would have been likely, when the shares in Scorex NV were transferred to Mr Rogers in June 2001, that they would be convertible into money within a relatively short time frame. For the reasons explained in the paragraphs below, I believe this was certainly the case. There was a natural buyer (Experian) who was under commercial pressure to buy out Scorex BV, its joint-venture partner, within a short fixed times and against the background of a rising share price which meant that every year that passed there was an increase in the amount that it would have to pay.
>
> 4....
>
> 5.... I explained to Mr Wheeler [an HMRC officer] that there was a real commercial imperative for "Experian", a subsidiary of Great Universal Stores (GUS) to buy out Scorex BV's 50% interest in the joint-venture with Experian by 31 March 2003. Failing that they would have had to match the amount that any third party may have been prepared to offer, and they could have found themselves in a partnership with a competitor organisation. Furthermore, the price that they would have had to pay would have been 'open market' rather than driven by the formula in the joint-venture agreement.
>
> 6. Unfortunately, when I was asked by Mr Wakeman [the Appellant's accountant] to try and locate a copy of this joint-venture agreement because of the passage of time I was unable to find one. As I recall, Mr Wakeman asked HMRC to use their formal powers to get a copy but Mr Wheeler was disinclined to do so.
>
> 7. The shares in Scorex NV were owned by Mme Pisarello, a Mongasque citizen, who was a friend of JMT. I do not know why this was done.
>
> 8. When Scorex BV was sold, the sales proceeds were distributed from Scorex NV to Mme Pisarrello. I know that the proceeds of the sale went to her, since I instructed the bank to pay the proceeds to her in accordance with her shareholding, but I have absolutely no knowledge what happened to the monies after that.
>
> 9. Scorex BV was part of a "50-50" joint venture with "Experian", a subsidiary of [GUS]. Experian had, since 1995, when the joint-venture agreement was signed, a call option, which ran to 31 March 2003, to acquire the 50% interest of Scorex BV according to a formula included in the joint-venture agreement. However, Experian had one interpretation of this formula and Scorex had a different one.
>
> 10. The call option would have expired after 31 March 2003 so that they would have had no automatic right to buy after that date. The joint venture agreement itself ran until 31 March 2009, and after the call option deadline had passed, "Scorex" could have sold its interest in the joint-venture to any third party.
>
> 11. There was therefore a ready-made a purchaser of the shares waiting in the wings. The members of the senior management team to whom

> shares were transferred had no need to look any further than to GUS to cash in their shares even though Graham Platts may have subsequently suggested to Experian that he was talking to merchant banks etc; this was merely "one-upmanship" to secure a fair price from Experian/GUS.
>
> 12.....
>
> 13.....
>
> 14. I know for certain from my position as Group Finance Director that there was never any intention to hold the sale proceeds from the sale of Scorex BV in Scorex NV; the intention was always to distribute these funds in full immediately to the shareholders in NV."

102. In cross-examination by Mr Way, Mr Platts and Mr Hutchison accepted that GUS's call option over the shares of Scorex BV did not entitle Scorex NV to require GUS to buy the Scorex BV shares.

Statutory provisions -- emoluments

103. Section 19 ICTA 1988 charges to income tax:

> "Any emoluments for any year of assessment in which the person holding the office or employment is resident and ordinarily resident in the United Kingdom...."

104. "Emoluments" are defined in section 131 (1) ICTA 1988 as including "all salaries, fees, wages, perquisites and profits whatsoever." Both parties now accept that no charge arose under section 154 ICTA 1988.

Submissions for the Appellant -- emoluments

105. Mr Sykes submitted that the main issue was whether the Transfer was an emolument under section 19 ICTA 1988.

106. The question was whether the shares represented a perquisite or profit from the Appellant's employment.

107. Mr Sykes submitted that the evidence showed that the Transfer was a gift by JMT to the Appellant reflecting his gratitude towards the Appellant for the role that he had played in founding and developing the business of the Scorex group. The Appellant's employment was not the active cause of the Transfer. Mr Sykes referred to the Appellant's evidence (that he and JMT had been down the "battle road" to build the Scorex group) and the evidence of Mr Platts to the effect that the Transfer was a result of JMT's gratitude for the Appellant's role in building the business. The facts in this case were close to those in *Bridges v Bearsley* 37 TC 289.

108. Mr Sykes submitted that the evidence also demonstrated that the Transfer was not predominantly (or at all) made in order to secure or reward the Appellant's future services. He referred, inter alia, to the Appellant's statements to the SFO to the effect that he had received shares because he was a founder member of Scorex UK Limited. He also referred to the evidence given by Mr

Platts that by the mid-1990s the Appellant no longer played a central role in the Scorex group. In particular, the Appellant's problems with alcoholism meant that by 2001 his role and value to the Scorex group had greatly diminished and his contribution at that time was not worth the value of the shares in Scorex NV transferred to him.

109. Mr Sykes also noted that there were no conditions attached to the transfer of the Scorex NV shares, reflecting the fact that there was no written agreement pursuant to which the Transfer was made.

110. Although promises were made by JMT in later years that shares in Scorex NV would be transferred to members of the Team when he stepped down, the evidence showed there was no intention that the Appellant would step in to JMT's shoes or that any additional work would be required from the Appellant.

111. Mr Sykes submitted that the evidence showed that the Transfer was made out of a desire to recognise the contribution of the Appellant as a founder member of the Scorex group.

112. There were, Mr Sykes argued, a number of factors which were relevant in considering whether a payment was an emolument and all these factors had to be taken into account.

113. Mr Sykes contended that the evidence showed that there was no contractual entitlement of the Appellant to the shares in Scorex NV. A contractual entitlement to receive a payment or an asset pointed strongly towards a payment of remuneration and he referred to the comments of Jenkins LJ in *Moorhouse v Dooland* 36 TC 1 at 22.

114. Furthermore, Mr Sykes submitted that there was no expectation on the part of the Appellant that he would eventually receive shares in Scorex NV and that the Appellant's evidence on this point had not been challenged in cross-examination. In any event, Mr Sykes submitted that an expectation that a payment will be made is not a substantial argument in favour of taxing the payment noting that in *Seymour v Reed* 11 TC 625 (at 636 and 648) the court recognised that there may have been an expectation but since it was not a contractual entitlement did not attach much weight to it. Also, in *Bridges v Bearsley* (at 308) non-contractual promises given to Mr Hornby carried little weight.

115. There was no customary element to the Transfer. Mr Sykes referred to the customary nature of Easter offerings in *Cooper v Blackiston* [1909] AC 104 and submitted that the Transfer could not be described as customary.

116. The Transfer was a one-off receipt and was not recurrent. Mr Sykes referred to the judgment of Brightman J in *Moore v Griffiths* 48 TC 338 at 350 and the judgment of Lord Phillimore in *Seymour v Reed* 11 TC 625 at 654.

117. The fact that the value of the Transfer was large in comparison to the Appellant's salary was, in Mr Sykes's view, relevant and he referred to the comments of Sellers LJ in *Bridges v Bearsley* 37 TC 289 at 325.

118. Mr Sykes also argued that it was relevant that the Appellant was in receipt of a normal salary, referring to the comments of Viscount Simonds (at 706) and Lord Radcliffe (at 707) in *Hochstrasser v Mayes* 38 TC 673 and the comments of Morris LJ in *Bridges v Bearsley* at 230.

119. Mr Sykes also submitted because neither JMT nor Lucien Trousse were the Appellant's employer (his employer was Scorex UK Limited) this was also a factor which suggested that the Transfer was not an emolument from the Appellant's employment. He referred to the comments of Morris LJ in *Bridges v Bearsley* at 323 and of Brightman J in *Moore v Griffiths* at 350.

120. In weighing up the various factors, Mr Sykes submitted that it was necessary to discern the dominant factor or factors resulting in the payment or transfer in question. He referred to the comments of Lord Sterndale MR (at 31) in *Cowan v Seymour* 7 TC 372 at 381. Mr Sykes also referred to *Blackiston v Cooper*, which he argued involved a mixture of motives, and in the speech of Lord Ashbourne (at 108) where his Lordship acknowledged that an Easter offering may reflect personal esteem and respect but considered that the real cause of the offerings was that they accrued by virtue of the recipient's office as vicar. Mr Sykes also referred to the judgment of Lord Diplock in *Tyrer v Smart* 52 TC 533 where his Lordship said at 556:

> "The employer's motives in conferring the benefits may be mixed and the determination of what constitutes his dominant purpose is a question of fact for the commissioners to determine. Their finding on this matter is therefore one with which a court whose jurisdiction on appeal is limited to correcting errors of law by the commissioners should be slow to interfere."

121. Mr Sykes referred to a summary of the law in a decision of the Special Commissioners in *McBride v Blackburn* [2003] STC (SCD) 139 which, he said, usefully summarised the law in relation to whether voluntary payments were taxable remuneration (at paragraph 53):

> "From these authorities, therefore, we derive the following principles. A voluntary payment is taxable if it is received in respect of the discharge of the duties of an office; or if it accrues by virtue of the office; or if it is in return for acting in the office. However, a gift is not taxable if it retains its characteristic as a gift (which we would describe as an exercise of bounty intended to benefit the donee for reasons personal to him or her), even though it is given in recognition of services rendered, or if it is 'is peculiarly due' to personal qualities, or if it is to mark participation in an exceptional event. Relevant factors are: whether the payment is made by the employer; whether the office is at an end; whether other remuneration is paid; whether the payment is

> exceptional; whether there is an element of recurrence; and whether the recipient is entitled to the payment."

122. The decision of the Special Commissioners in *McBride v Blackburn* illustrated an important principle, in Mr Sykes's submission, viz that a gift can be in recognition of services provided under the employment, without it being an emolument from that employment for the purposes of section 19 ICTA 1988. Mr Sykes submitted that a payment in recognition of service would not be an emolument if, in substance, it is less akin to a payment for services than it is personal and motivated by gratitude, bounty or moral indebtedness.

123. Mr Sykes referred to the decision of the House of Lords in *Blackiston v Cooper* [1909] AC 104 where Lord Loreburn said at 107:

> "In my opinion, where a sum of money is given to an incumbent in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of the money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but merely a present."

124. On the facts in that case it was found that there was nothing personal about the gift -- every incumbent received the Easter collection -- and it was held that the money was given to the vicar as an emolument of his employment.

125. In *Cowan v Seymour* 7 TC 372 a voluntary payment was made to the liquidator and chairman of a company following its voluntary winding up. The liquidator had not been paid for his services. The Court of Appeal, reversing Rowlatt J, upheld the decision of the Special Commissioners. Mr Sykes referred to the judgment of Lord Sterndale MR (at page 380):

> "... the inference ... is that this was money paid to the appellant as a testimonial or tribute for what he had done after his services were over and not a payment for those services."

126. Younger LJ observed at page 384:

> "... the circumstance lends further weight to the view that this was not a profit by reason of the office at all, but was really a gift by persons in the position of beneficiaries who had appreciated and it maybe had benefited by the personal exertions of the holder of the office while he held it."

127. Mr Sykes referred to the subsequent decision of Rowlatt J in *Mudd v Collins* 9 TC 297 (at page 300 -- 301) where the learned judge explained the distinction:

> "I ventured to throw out during the argument that there was a distinction between a testimonial and remuneration for services of this kind. When a man is given a testimonial because of his work in the

> past, not directly remuneration to him for that work, but recognising how high a regard has been held for him in the association of people with him arising out of the performance of those services, and people recognise the good qualities he has and how zealous and kind he has been and how eager to advance the interests of his employers or his parishioners or his constituents, or whatever they may be, and they say "We would like to give you something as a mark of our esteem and regard," that is a testimonial. But where a man does a business operation of this kind which he could not be called upon to do, but it is a business operation and would have been paid handsomely if done by someone else, and it is said "One of our directors did it for us and he ought to have something besides his fees as director because of this," that seems to me to be paying him for his services, as the Commissioners have found."

128. Mr Sykes also referred to the decision of the House of Lords in *Reed v Seymour* 11 TC 625 which concerned the payments made to a cricketer (which were contemplated from the outset). Viscount Cave LC (at page 646), with whom Viscount Dunedin and Lord Carson agreed, expressed the distinction as follows:

> "The question, therefore, is whether the sum of £939 16s. fell within the description... of 'salaries, viz, perquisites, or profits whatsoever therefrom' (i.e. from an office or employment of profit) 'for the year of assessment,' so as to be liable to Income Tax under that Schedule [E]. These words and corresponding expressions contained in the earlier Statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such -- that is to say, by way of remuneration for his services, even though such payments may be voluntary -- but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as Rowlatt J put it, 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not."

129. In that case it was held that the gift was personal and did not constitute remuneration because its purpose was to "express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities" (at page 646).

130. Lord Atkinson delivered a dissenting opinion. His Lordship said (at page 651):

> "It is difficult to imagine what special merit he could have had other than skill and efficiency in the game he was employed by his employer to play, and to teach."

131. Lord Phillimore expressly rejected this approach in the light of the authorities. His Lordship said (at page 655):

> "My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Schedule E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful and valuable service."

132. Mr Sykes also referred to *Calvert v Wainwright* 27 TC 475, which in his view illustrated that a payment can be a personal gift even where it was in respect of service. Atkinson J said, after referring to the passage in Lord Loreburn's speech in *Blackiston v Cooper* quoted above, (at page 478):

> "To my mind that puts the principle very clearly. The distinction would apply to a taxi driver in this way, if I may give an illustration. Some people have the same taxi every morning to take them to their work. I have in mind somebody who has the same taxi every day. It comes in the morning as a matter of course and then takes him home at night. The ordinary tip given in those circumstances would be something which would be assessable, but supposing at Christmas, or when the man is going for a holiday, the hirer says: 'You have been very attentive to me, here is a £10 note', he would be making a present, and I should say it would not be assessable because it has been given to the man because of his qualities, his faithfulness, and the way he has stuck to the passenger, and has always been available in that sort of way. In those circumstances it would be a payment, in my opinion, of an exceptional kind. But a tip given in the ordinary way as remuneration for services rendered is well within the principles there defined."

133. As was to be expected, Mr Sykes placed reliance on the decision of the Court of Appeal in *Bridges v Bearsley* 37 TC 289, the facts of which bear a resemblance to those in the present appeal and are worth setting out in some detail.

134. In that case, the two taxpayers were respectively managing director and a director of a limited company. The company carried on the business of manufacturing constructional and mechanical toys better known as Meccano. They had worked as employees for the company for many years in a number of capacities and were eventually appointed as directors. They, together with the founding shareholder Mr Frank Hornby (and a third employee who subsequently died), had played a significant role in building up the company's business and running it when it had become successfully established. Mr Hornby, during his life, had expressed the wish that the taxpayers should each have a fairly substantial holding of shares in the company. They wanted these shares for reasons of security, and also as giving them a standing with employees of the company commensurate with their respective important positions. They were the backbone of the company and had helped Mr Hornby build up the company's business.

135. Although Mr Hornby transferred a few shares to each of the taxpayers he did not transfer the number of shares to which they thought they were in justice entitled. The matter of the share transfers had been mentioned to him

several times and he said that he would look after the taxpayers. After Mr Hornby's death in 1936 most of the shares in the company were held in trust according to his will for his widow during her life and thereafter for his two sons in equal shares absolutely. The taxpayers had been under the impression that Mr Hornby would leave them shares in his will but he had failed to do so. They approached Mr Hornby's sons about the matter in 1945 and they agreed that Mr Hornby had been remiss in not leaving the shares to the taxpayers. The sons entered into covenants under which the taxpayers, in consideration of their continuing their engagements with the company for four years, were each to receive a substantial shareholding within three months of the death of Mr Hornby's widow. In the event, in 1953 Mr Hornby's sons transferred the shares to the taxpayers (before the death of Mr Hornby's widow) at a time when both taxpayers were still employees or officers of the company.

136. The Court of Appeal by a majority (Jenkins LJ dissenting) held that the transfer of the shares to the taxpayers did not constitute profits from their employment.

137. Morris LJ said (at 320):

> "In may be difficult to describe in precisely accurate language the features of payments or benefits received which must attract tax and the features of those which will not. The general distinction as outlined by Lord Cave [in *Reed v Seymour* 11 TC 625 at 646] is between payments made by way of remuneration for services and payments made by way of personal gifts. Yet some payments seem to have a blend of both of these elements. The tip given to the taxi driver is in one sense to gift: a particular tip may be somewhat above what would normally be expected by the taxi driver and may reflect a bountiful impulse. Yet all the tips received, including the especially generous one, must be regarded as being by way of remuneration for services. But on the other hand it seems to me that a payment which has the attributes of being a personal gift does not necessarily lose those attributes merely because the gift is in recognition of services or because the donor agrees to bind himself so as to be compellable at law to make the payment. So it seems to me that the fact that the position in the year 1945 was that Mr Bearsley would only gain his benefit if to his past services he added those of staying the course for four more years does not cause is benefit when received to be remuneration for services rather than a gift."

138. Sellers LJ said (at 326):

> "In my opinion the effect of each deed as drawn is that the service of four years as stipulated was a condition to be fulfilled before the Hornby Brothers could be called on as a matter of law or legal obligation to transfer the shares within the specified date, that is, within three months after the death of Mrs Clara Hornby, their mother. The fact that the transfer date was expedited has, as I see it, no effect on the questions involved in this appeal. In this way the transfer of the Shares is "linked up" with the respective offices, but the question is

> whether that necessarily or on a reasonable view involves that the transfer was a payment of remuneration for services rendered to the company or a profit of the employment. I would not regard the transfer is having those attributes or is such a character."

139. It is clear that if it had not been for the covenant Jenkins LJ would have held that the transfer of shares to the taxpayers in that case would not have been a profit of their employment:

> "If Mr Frank Hornby had given the Appellant's substantial holdings of shares in the company by his will, as in effect he had promised to do, it seems clear that such shares would have come to the Appellant's purely by an active testamentary bounty on the part of Mr Frank Hornby wholly removed from the sphere of remuneration." (at 314)

140. In Jenkins LJ's view the covenant explaining that the consideration from the taxpayers for the shares comprised of their continuing in their "present engagements" was fatal to their case and he held that the shares constituted remuneration. Mr Sykes emphasised that in the present case the Appellant had no contractual entitlement to shares in Scorex NV.

141. Mr Sykes also referred to the judgment of Megarry J in *Pritchard v Arundale* 47 TC 680 at 686:

> "... I think the question to be tested in this way is only one question. Either the emoluments are within the statutory word 'therefrom', as explained by the cases, or they are not. At one stage in the argument, in commenting on *Bridges v Bearsley*..., Mr Heyworth Talbot said that the question there was whether the employees in the case got the shares as remuneration for services or as personal gifts. In the *Hochstrasser* case, in the Court of Appeal, Parker LJ had expressed himself in terms of any benefit in money or money's worth received by an employee during the course of his employment from his employer as being a taxable profit of his employment, with two exceptions, one of which was a gift to him in his personal capacity: see [1959] Ch 22, at page 54. In the House of Lords Lord Simonds, [1960] AC, at page 389, deprecated this approach, saying it was not for the subject to prove that his case fell within exceptions arbitrarily inferred from the Statute, but for the Crown to prove that the tax is exigible. After a little discussion, I think that Mr Heyworth Talbot accepted that the true issue was not the twofold question whether the benefit fell within the taxable category of remuneration for services (as it may briefly be described) or within the non-taxable category of personal gift, but a single question, namely, whether or not it fell within the taxable category of remuneration for services. 'Personal gift' is thus not a category which has to be defined or explained, but merely an example of a transaction which will not fall within the taxable category of remuneration for services. In other words, the question is not one of which two strait-jackets the transaction best fits, but whether it comes within the statutory language, or else, failing to do so, falls into the undefined residuary class of cases not caught by the Statute."

142. In Mr Sykes's submission the Transfer was motivated by JMT's gratitude for the Appellant's role in building up the business of the Scorex group. JMT's intentions were carried out by his father Lucien Trousse. The evidence demonstrated that the Transfer was not effected in respect of the Appellant's current or future services. Moreover, when weighing all the various factors, it was plain that it was the gratuitous intent of JMT that was the active cause of the Transfer and that the Transfer was not a reward for services. Mr Sykes referred to the similarities between this case and the facts in *Bridges v Bearsley* and submitted that our approach should be similar in the determination of this appeal.

Submissions for HMRC -- emoluments

143. Mr Way submitted that the normal position as regards the burden of proof (ie that the burden of proof lies with the Appellant) applied in this case by virtue of section 50(6) Taxes Management Act 1970

144. Mr Way referred to the comments of Chadwick LJ in *Wood v Holden* 78 TC 1 at 87H:

> "It is a feature of tax litigation... that, in the first instance, the facts are likely to be known only to the taxpayer and his advisers. The Revenue will not have been a party to the transaction; will know only those facts which have been disclosed by the taxpayer or others; following, perhaps, the exercise of the Revenue's investigatory powers. I have no doubt that there are cases in which the evidence before the Special Commissioners is so unsatisfactory that the only just course for them to take is to hold the taxpayer has not discharged the burden of proof which s 50(6) TMA 1970 has placed on him."

145. Mr Way submitted that in this case the Appellant had not discharged the burden of proof which lay upon him. It was for the Appellant to satisfy the Tribunal that the Transfer was a gift as distinct from a reward for services past, present or future. In Mr Way's submission there was a great deal of conjecture over what JMT would have done but insufficient evidence for the Appellant to discharge the onus of proof. Mr Way invited the Tribunal to ignore conjecture. During his lifetime JMT had not made a gift. There was no one present when JMT said he would transfer shares in Scorex NV to the Appellant. It was therefore not possible to find as a fact that there was an agreement between JMT and the Appellant that the Transfer was a gift. JMT and Lucien Trousse were both dead.

146. There was no evidence to displace HMRC's assertion that the Transfer was an emolument and indeed there was sufficient evidence, particularly the words used by the Appellant to the SFO, where he never described his allocation of shares as a gift, that the transfer of the shares represented an emolument.

147. Mr Way noted that the Appellant had given different explanations at various times as to the reason for the Transfer.

148. He noted that the Appellant's solicitors, Dawsons, in a letter dated 2 August 2006 had accepted that the Transfer constituted a benefit in kind under section 154 ICTA 1988, although Mr Way accepted that HMRC themselves did not now consider section 154 to be applicable.

149. In addition, Mr Way pointed out that the Appellant, in statements made to the SFO, had referred to his "entitlement" to the shares in Scorex NV and had not referred to them as a gift. Mr Way also referred to statements of the Appellant to the SFO where he referred to the fact that Mr Platts would receive a higher percentage of shares than the Appellant and confirmed that it was because Mr Platt was "more valuable to the organisation than I was." This indicated that the shares were a reward for effort ie for services. It did not matter whether the services were passed present or future -- the only relevant question was whether the shares constituted a reward for services.

150. Mr Way noted that the Appellant, when challenged on the phraseology in the statements made to the SFO, has said that he had not known that those statements would be "dragged up". In Mr Way's view this indicated that when the Appellant was off his guard, by using words such as "entitlement" and "value to the organisation" he indicated the true nature of the transfer of shares in Scorex NV and never referred to them as a gift.

151. Mr Way also noted that in his cross-examination of Mr Hutchinson, Mr Hutchinson had confirmed that he had not been party to discussions between JMT and the Appellant and did not know whether a promise had been made by JMT to the Appellant to transfer shares as a gift. Mr Way noted that Mr O'Connor in cross-examination had given a similar confirmation.

152. Therefore, in Mr Way's submission the Appellant had failed to produce sustainable evidence sufficient to discharge the burden of proof. Instead, the evidence indicated that the Transfer was a reward for past services.

153. Mr Way drew attention to the decision of the House of Lords in *Shilton v Wilmshurst* 64 TC 78. The House of Lords held that an emolument can be paid not just by the employer but also by third parties. In addition, it was held that an emolument which is paid as a reward for past services and as an inducement to continue to perform services in future was taxable. Whether a payment was an emolument was not determined by whether the payment was provided by a person who had an interest in the performance by the employee of the services which he is contractually bound to perform. In this case, Mr Way submitted that it was irrelevant whether the Trousse family had an interest in the performance of the Appellant's services. In fact, they did have an interest but this was irrelevant as a factor. Mr Way referred particularly to the judgment of Lord Templeman at 105 F – I:

> "Section 181 is not confined to 'emoluments from the employer' but embraces all 'emoluments from employment;' the section must therefore comprehend an emolument provided by a third party, a person who is not the employer. Section 181 is not limited to

> emoluments provided in the course of employment; the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and, secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future... The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived 'from being or becoming an employee' on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a homebuyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received 'from the employment.' The task of determining whether an emolument was paid for being or becoming an employee or was paid for another reason, is frequently difficult and gives rise to fine distinctions."

154. Mr Way referred to the decision of Finlay J in *Weight v Salmon* 19 TC 174 at 183:

> "I cannot bring myself to doubt that this privilege was granted -- I use those words purposely because they bring me to the point which was really made on behalf for the Respondent -- that the privilege was granted to a person exercising an office of profit and in respect of his successful exercise of the office of profit. It was a payment made to Mr Harry Salmon because he was a Managing Director and because in that capacity he had managed the business so successfully and so skilfully.
>
> ...When the terms of the earlier resolutions are looked at, it becomes perfectly clear that this was paid to him as the holder of an office and in respect of his successful energy in that office, and it cannot for a moment be suggested that any difference arises by reason of the circumstances that in the later resolutions the reference to the valuable service is omitted."

155. In *Tyrer v Smart* 52 TC 533 Lord Diplock said at 556:

> "The test to be applied is well established. It is whether the benefit represents a reward or return for the employee's services, whether past, current or future, or whether it was bestowed upon him for some other reason."

156. Mr Way also referred to *Bridges v Bearsley* and in particular to the judgment of Dankwerts J in the High Court at 302:

> "... it is no longer possible to assume that a large sum received in one year is not to be treated for Income Tax purposes as income of that year. Nor again can it be assumed that the fact that the money or property is acquired from other persons than the recipient's employers prevents the acquisition being treated as a profit of the recipient's office."

157. Dankwerts J continued at page 304:

> "These cases seem to me to establish (1) that a sum may be assessable as a profit even though it appears to be an unusually large one in comparison with the recipient's normal income; (2) it may be assessable though it is received in the form not of cash but of money's worth, such as shares; (3) that it may be assessable though it is received from persons who are not the employers of the recipient or even persons having any actual financial interest in the services of the recipient; but (4) it depends on the circumstances, and not every sum received from another person during the period of the recipient's service is assessable as income and a profit of his office, even though it comes from the recipient's employer, and this must be more obviously so if the amount received is from a person who is not the employer."

158. Mr Way contended that these comments indicated that although: (a) the shares in Scorex NV transferred to the Appellant were large in relation to his normal annual salary and (b) the shares were not transferred by his employer, the Transfer could still be an emolument. Moreover, it was clear that the Trousse family did have a financial interest in the services of the Appellant.

159. As regards the decision of the Court of Appeal in the *Bridges* case, Mr Way criticised it as being inconsistent with *Shilton v Wilmshurst* to the extent that it held that shares transferred in appreciation of past services or in consideration of continuing in employment were not emoluments. In any event, Mr Way considered that the case was unusual and decided by reference to its own special facts and did not have great value as a precedent. Mr Way had been unable to find other cases in which the decision had been followed.

160. Furthermore, Mr Way drew attention to the fact that one of the taxpayers had been employed by the company for over 40 years whereas Mr Rogers had been employed by the Scorex group for only 15 years at the relevant time. In addition, the Special Commissioners had found that the taxpayers in that case had wanted the shares for reasons of security and also to give them standing in the company commensurate with the positions they held. Mr Way argued that in the *Bridges* case there was nothing more for the taxpayers to do for the company whereas in the case of the Scorex group the possibility of the sale of Scorex BV was on the horizon and the involvement of Mr Rogers was critical -- in other words his retention as an employee was crucial.

161. In summary, therefore, Mr Way argued that the burden of proof has not been discharged by the Appellant. There was no evidence that there was a gift of the shares to the Appellant, leaving aside conjecture which, he submitted, was inadmissible. On the contrary, the evidence pointed to the Transfer as being the fulfilment of an entitlement. Accordingly, the assessment should be upheld but reduced to tax on £2.75 million.

Discussion of the emoluments issue

Legal principles

162. In cases of this kind, where the question is whether a receipt is an emolument, the starting point is the leading case of *Hochstrasser v Mayes* 38 TC 673. The House of Lords held that it was necessary that the employment or office had to be the *causa causans* (ie the active cause) of the payment or the provision of the asset in question and not simply the *causa sine qua non* (i.e. that only employees or officeholders received a payment or asset). Viscount Simonds (at 705 - 706) said:

> "My Lords, if in such cases as these the issue turns, as I think it does, upon whether the fact of employment is the *causa causans* or only the *sine qua non* of the benefit, which perhaps is only to give the natural meaning to the word 'therefrom' in the Statute, it must often be difficult to draw the line and say on which side of it a particular case falls... It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the Statute but arbitrarily inferred from it."

163. Moreover, the services in respect of which the receipt is derived may be past, current or future services and the receipt must be in the nature of a reward for those services. The most succinct enunciation of this principle is to be found in the speech of Lord Diplock in *Tyrer v Smart* 52 TC 533 at 556:

> "The test to be applied is well established. It is whether the benefit represents a reward or return for the employee's services, whether past, current or future, or whether it was bestowed upon him for some other reason."

164. At first sight it may seem that there are two tests: first, a causation test (*causa causans*) and a consideration test (reward or return for the employee's services). It is clear, however, that consideration, in the contractual sense, is not a necessary condition for a receipt to constitute an emolument. A voluntary payment can be an emolument (e.g. a tip paid to a taxi driver) and, indeed, an emolument can come from a third party other than the employer (see Lord Templeman in *Shilton v Wilmshurst* 64 TC 78 at 105). However, in our view there is only one real test. The real test is whether the receipt derives from ("therefrom") the employment and the two apparent tests are simply different formulations of that statutory requirement found in section 19 ICTA 1988. The receipt must be from the employment and not from something else and, in that sense, they are both different expressions of the same causation test (see Viscounts Simonds in *Hochstrasser v Mayes* 38 TC 673 at 705, particularly the passage considering the judgments of the Court of Appeal).

165. We accept Mr Way's contention that if the Appellant received the Transfer in order to induce him to remain in the employment of Scorex UK, to remain as a director of Scorex UK or as a reward for his future services, the Transfer would constitute a taxable emolument. In such circumstances the

receipt plainly derives from the employment. The decision of the House of Lords in *Shilton v Wilmshust* is, in our view, clear authority for this proposition. In *Laidler v Perry* 42 TC 351 at 363 Lord Reid, whilst expressing doubts in respect of the use of the word "reward", said:

> "It is not apt to include all the cases that can fall within the statutory words. To give only one instance, it is clear that a sum given to an employee in the hope that he will produce good service in the future is taxable."

166. Moreover, Lord Diplock in the passage (at 556) from *Tyrer v Smart* quoted above clearly contemplates that a payment in respect of current or future services is an emolument.

167. As regards past services, the authorities are less clear. In the High Court in *Hochstrasser v Mayes* 38 TC 681 at 685 Upjohn J reviewed the authorities and summarised the law in the following passage:

> "In my judgment 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."

168. In the House of Lords Viscount Simonds approved (at 705) this passage from the judgment of Upjohn J with one reservation:

> "In this passage the single word 'past' may be open to question, but apart from that it appears to me to be entirely accurate."

169. In *Shilton v Wilmshurst* 64 TC 78 Lord Templeman said that payments in respect of past services will be taxable as emoluments if they were also intended as an inducement to continue to perform future services.

170. Lord Diplock in the passage (at 556) from *Tyrer v Smart* quoted above clearly contemplates that receipts in respect of past services would be taxable as emoluments.

171. In our view, a payment to reward past services performed by an employee or officeholder is taxable as an emolument. The question is simply whether the payment has been derived from the office or employment or whether it has been paid for some other reason. It is simply a question of causation and not one of consideration. It may be, in the case of past services, that the cause of the payment is less distinct or more difficult to discern than, say, in the case of present or future services, ie was the payment or benefit

derived from the employment or made for other reasons (e.g. a testimonial), but the test is the same in all cases.

172. In determining whether the Appellant's office or employment was the active cause (*causa causans*) of the Transfer we have borne in mind the authorities cited by Mr Sykes regarding the need to weigh up the different possible motivations to find the dominant motivation or cause for the Transfer and, in particular, Lord Diplock's observations in *Tyrer v Smart* 52 TC 533 at 556:

> "The employer's motives in conferring the benefits may be mixed and the determination of what constitutes his dominant purpose is a question of fact for the commissioners to determine. Their finding on this matter is therefore one with which a court whose jurisdiction on appeal is limited to correcting errors of law by the commissioners should be slow to interfere."

173. We would also draw attention to the decision of the Upper Tribunal (Roth J and Judge Charles Hellier) in *HMRC v PA Holdings* [2010] UKUT 251 (TCC) (at paragraph 53) where the position was set out as follows:

> "The authorities require attention to the statutory words. The only statutory question is, as Megarry J said [in *Pritchard v Arundale*], whether the emolument comes from employment. Answering that question is not to be constrained by the mechanistic application of statements found in the case-law. In some situations, the formulation of an antithesis between one source and another may clarify the process of reaching a decision: for example, finding that a payment is made out of love and affection to a person who happens to be an employee makes it clear that it does not come from employment but from something else; *in other situations, the facts may indicate that there is more than one operative cause for the payment and a judgement falls to be made as to whether the employment cause predominates*; and in yet other cases, there may be precursor causes for payment, in which event the use of the contrast is not helpful since the conclusion that a payment comes from a particular source will not preclude its coming also from employment." [Emphasis added]

174. The Upper Tribunal's reference to "the mechanistic application of statements found in the case-law" is particularly apt considering the various factors found in the authorities which help to determine whether a receipt is derived from the employment. In the course of argument, counsel cited to us the number of authorities which, in the context of a gift or voluntary payment made to an employee, indicated a number of factors which could take into account in determining whether the receipt was derived from the employment. It is important to bear in mind that none of these factors is determinative and the importance of these factors varies according to the facts of each case. The factors are set out below.

175. First, it should be considered whether there was a customary aspect to the receipt e.g. the Easter offering in *Cooper v Blackiston*.

176. Secondly, was the receipt recurrent in nature or was it a one-off payment. In *Moore v Griffiths* 48 TC 338 Brightman J held that the payment from the Football Association to the England football captain in recognition of the 1966 World Cup victory had the quality of a testimonial rather than remuneration for services in the course of employment and (with remarkable foresight, as it happens) was influenced by the fact that there was little foreseeable likelihood of recurrence. Brightman J at 350 said:

> "The payment had no foreseeable element of recurrence. Recurrence, or the possibility of recurrence, is not of course is central to tax liability in this type of case, it is a relevant factor and a not uncommon factor in the reported cases where the decision has favoured the Crown."

177. Thirdly, another factor which has been taken into account is whether the value of the receipt is large in relation to the employee's ordinary salary. This was a factor in *Moorhouse v Dooland* 36 TC 1 (see the comments of Lord Evershed MR at 18-19). Equally, it has to be borne in mind that discretionary bonuses can often be very much larger than an individual's base salary and bonus in these circumstances is undoubtedly remuneration. The question is not so much the size of the payment but whether the size of the payment sheds light on the issue of causation.

178. Fourthly, it can be relevant to determine whether the taxpayer was paid a market rate salary; if so, there may be an inference that significant additional payments are less likely to be remuneration (see the comments *Hochstrasser v Mayes* Viscount Simonds (at 706) and Lord Radcliffe (at 707) and also the comments of Morris LJ in *Bridges v Bearsley* (at 230)).

179. Fifthly, it is highly relevant whether the employee has a contractual entitlement to receive the payment or benefit. Often, in such circumstances, a contractual entitlement will indicate strongly that the receipt is an emolument (see Jenkins LJ in *Moorhouse v Dooland* 36 TC 1 at 22). Nonetheless, a contractual entitlement will not in all cases be fatal to the taxpayer's case. For example, in *Bridges v Bearsley* even though the taxpayer had a contractual entitlement to receive the shares in question the receipt was held not to be an emolument.

180. Finally, there may be an inference that the payment is less likely to be an emolument if it is paid by a person other than the employer (see Morris LJ in *Bridges v Bearsley* at 321).

181. These factors were helpfully summarised by the Special Commissioners in *McBride v Blackburn* [2003] STC (SCD) 139 (paragraph 53) as follows:

> "From these authorities, therefore, we derive the following principles. A voluntary payment is taxable if it is received in respect of the discharge of the duties of an office; or if it accrues by virtue of the office; or if it is in return for acting in the office. However, a gift is not

> taxable if it retains its characteristic as a gift (which we would describe as an exercise of bounty intended to benefit the donee for reasons personal to him or her), even though it is given in recognition of services rendered, or if it is 'is peculiarly due' to personal qualities, or if it is to mark participation in an exceptional event. Relevant factors are: whether the payment is made by the employer; whether the office is at an end; whether other remuneration is paid; whether the payment is exceptional; whether there is an element of recurrence; and whether the recipient is entitled to the payment."

Burden of proof

182. The burden of proof lies upon the Appellant, in accordance with section 50(6) Taxes Management Act 1970, to displace the assessment. The usual civil standard of proof (on the balance of probabilities) applies.

Contractual entitlement

183. As noted above, a contractual entitlement to the Transfer would be very relevant to the question whether the shares in question constituted an emolument in the hands of the Appellant.

184. We have concluded that the Appellant had no contractual entitlement to acquire shares in Scorex NV or to the Transfer. It seems to us that JMT had made various promises at different times about giving the Appellant and the other members of the Team a shareholding in the business. However, the nature of the promise tended to be vague and it was also unclear whether the Appellant was to be given shares in Scorex BV or Scorex NV. Although, at the dinner in 1997 (referred to in paragraph 42 above), JMT raised with Mr Platts the possible percentage interests which members of the Team might receive there was no indication that these percentages had been communicated to the Appellant or Mr O'Connor. In addition, at the Theoule meeting in February or March 2001, shortly before JMT's death, although shares were promised, there is no evidence that specific numbers or percentages of shares were discussed.

185. We were also satisfied that JMT's various promises to the Appellant (made either directly or via Mr Platts) that he would acquire a shareholding in the Scorex group were oral and were never committed to writing.

186. The Appellant's references in his interviews with the SFO to an entitlement to shares in Scorex NV were, in our view, simply a layman's description of the sense of moral entitlement resulting from JMT's non-binding promises. Those and similar references do not, in our view, provide any evidence of a contractual entitlement.

187. Accordingly, we find that the Appellant had no contractual entitlement to shares in Scorex NV and that the Transfer was a voluntary act.

Evidence of intentions and motives

188. As regards the question of intention, Mr Way submitted that the evidence in respect of the intentions of JMT and the Lucien Trousse were simply conjecture and as such inadmissible. We do not accept that submission. Obviously, JMT and Lucien Trousse are now dead and, in the absence of documentary evidence, direct evidence of their intentions cannot now be provided. Mr Platts was, however, close to JMT and was regarded as his confidant in relation to matters concerning the Scorex group. He was better placed than anyone to know the intentions of JMT and, after his death, the intentions of his father, Lucien Trousse. We consider that his evidence, although hearsay, constitutes the best available evidence of the intentions of JMT and Lucien Trousse. We were impressed by Mr Platts's evidence -- he seemed to us to be a straightforward, sincere and honest witness.

189. In this context there is an issue as to whether the relevant intentions and motives are those of the Appellant or those of JMT and Lucien Trousse.

190. We note that, relying on dicta of Sir Richard Henn Collins MR in *Herbert v McQuade* 4 TC 489 at 500, Jenkins LJ in *Moorhouse v Dooland* 36 TC 1 at 22 said:

> "The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words, by way of remuneration for his services."

191. With respect, we consider that these comments should be confined to the circumstances of the case in question. In that case the taxpayer, a professional cricketer, was entitled by his contract of employment to collections made from spectators for meritorious performances. Obviously in the circumstances it would be difficult if not impossible to determine the motives of each and every spectator who contributed to the collection.

192. In the present case, however, only JMT's and Lucien Trousse's intentions and motives need be considered (as well at those of the Appellant). To ignore their intentions and motives would prevent us from establishing the true cause of the Transfer. In this respect, the comments of Jenkins LJ, if given a wider application, are in our view, inconsistent with the task assigned to this Tribunal by the decision of the House of Lords in *Hochstrasser v Mayes* and we respectfully decline to follow them. In addition, we consider that the warning given by the Upper Tribunal in *HMRC v PA Holdings* concerning the mechanistic application of statements found in case-law is particularly apposite. In any event, we did not understand Mr Way to be arguing that the motives and intentions of JMT and Lucien Trousse were not relevant but rather that there was no evidence as to their motives and intentions -- a submission which, for the reasons given above, we have rejected.

Reward for continuing in employment or for current services

193. We find that the Transfer was not intended to induce the Appellant to remain with Scorex UK or to reward him in respect of prospective services. It is clear from the evidence given by Mr Platts that the Appellant's role in the Scorex group had considerably diminished by 2001 as a result of his drink-related problems. Mr Platts described the Appellant's role by 2001 as "tiny". Although the Appellant remained with the Scorex group until the acquisition by Experian in 2003, it is plain that he was "sidelined", as Mr Platts and the Appellant put it. It may be that there was some element of inducement in respect of future services in the case of Mr Platts and Mr O'Connor, but they were in an entirely different position. They had an important role in the future of the Scorex business. It seemed to us highly unlikely that either JMT or Lucien Trousse would decide to give such a substantial shareholding in the Scorex group to the Appellant in 2001, in the light of his diminished importance to the group at that time, as an inducement for him to stay.

194. For similar reasons, we find that the Transfer was not a reward for the Appellant's current services. Once again, by 2001 the Appellant's role in the Scorex group had very significantly diminished to the extent that the Transfer would have constituted a wholly disproportionate reward for his current services.

Reward for past services

195. As the number of authorities cited by counsel show, the question whether money or assets provided to an employee or holder of an office constitute an emolument arising from the employment often gives rise to some very difficult issues and nice distinctions. The authorities lay down general principles but each case involves applying those general principles to the specific facts of the individual case.

196. Therefore, in this case, the Transfer will be a taxable emolument if the Appellant's office or employment was its active cause (*causa causans*), because the Transfer was a reward for the Appellant's services, even where those services were performed in the past. Having concluded, on the evidence, that the Transfer was not a reward for current or future services, we consider that the real issue in this appeal is whether it was a reward for past services or whether it was in respect of "something else", in the words of Lord Reid in *Laidler v Perry* 42 TC 351 or bestowed on him "for some other reason", in the words of Lord Diplock in *Tyrer v Smart* 52 TC 533 at 556.

197. Whether a payment or the provision of an asset is a reward for past services in circumstances where the employment or office is the active cause of the payment or provision or whether it is a gift or testimonial in recognition of past services which does not arise from the office or employment can be a fine distinction.

198. In reaching our conclusion, we have considered all the authorities cited by counsel and which we have set out in some detail above and have considered

the various factors and guidelines discussed in those cases. We make the following findings.

199. First, we find that there was no customary aspect to the Transfer, in contrast to the Easter offering in *Cooper v Blackiston.* There was no suggestion or evidence to the effect that the Transfer was customary.

200. Secondly, the Transfer was a one-off receipt. Again there was no evidence that the Transfer was likely to be recurrent.

201. Thirdly, the value of the Scorex NV shares transferred to the Appellant in 2001 was large in relation to the Appellant's ordinary salary. As we understood it, this was common ground.

202. Fourthly, the Appellant was paid a market rate salary. We accept the Appellant's evidence to this effect.

203. Finally, neither JMT nor Lucien Trousse was the Appellant's employer, although the Trousse family plainly had an interest in the services supplied by the Appellant.

204. Notwithstanding the above findings, we do not find any of these factors determinative or even particularly helpful in this case. As Mr Way pointed out the fact that a payment or an asset is provided by a person other than the employer does not prevent it being an emolument: see Lord Templeman in *Shilton v Wilmshurst* 64 TC 78 at 105. In addition, the fact that it may be a large one-off payment made in one year by a person other than the employer does not prevent the payment being an emolument: see Dankwerts J in *Bridges v Bearsley* (referred to in paragraph 156 above). Moreover, the fact that a market rate salary was paid does not necessarily mean, in our view, that a one-off additional payment could not also be an emolument. Finally, it is clear that a voluntary payment can be an emolument: see the taxi driver example given by Atkinson J in *Calvert v Wainwright* 27 TC 475 at 478.

205. In reaching our conclusion we have, of course, borne in mind the decision of the Court of Appeal in *Bridges v Bearsley.* Whilst the facts in that case do have some similarity to those in the present appeal, each case must be determined upon its own facts applying the relevant principles. Nonetheless, that case and the present appeal do have some similarities and both involve unusual factual situations. In that case, Morris LJ pointed out (at 321):

> "The fact that a payment which can properly be regarded as a gift may involve a measure of recognition of faithful service was pointed out by Lord Phillimore in ... *Reed v Seymour.*"

206. At 324 Morris LJ said:

> "In my judgment the shares were not a profit from the office of managing director because they were not received by way of remuneration for services rendered as managing director. They were

> received while Mr Bearsley was managing director, but they represented an expression of gratitude or a testimonial for what he had done, including what he had done before ever he became a director or managing director.... The kind of gift which Lord Phillimore envisaged as being free from liability to tax even though made by an employer to an employee and even though made in respect of faithful service does not lose its immunity because made while the employee still remains a service."

207. We consider that similar considerations to those taken into account by Morris LJ apply in this case, although we do not believe that there is any distinction between services performed by the Appellant as an employee before he became a director and those performed as a director. However, we should note that we have some sympathy for the dissenting judgment of Jenkins LJ in that case. The condition that the taxpayers in the case continued in employment would, we think, now be fatal to their case applying the principles developed in *Shilton v Wilmshurst*. *Bridges v Bearsley* is perhaps best understood as a case where the underlying reason or cause for the transfer of shares was not the covenant (which specified a continuing employment condition) but the underlying gratuitous intent of the brothers in that case. In that sense the decision represents an unusual instance of a court looking behind the terms of the binding contract. In this appeal, however, there was no such condition or contractual entitlement.

208. In this case, JMT promised to allow the Appellant to acquire shares in the Scorex group at an early stage, shortly after the Appellant joined the Scorex group. However, the promise was always vague and was never implemented in JMT's lifetime. We consider that that whilst initially JMT's promise to allow the Appellant to own an equity stake in the Scorex business may at that time have been motivated by a desire to reward or incentivise the Appellant in respect of the performance of his duties, by 2001 (at the latest) the position had changed. By this time, the Appellant had been sidelined and was no longer as valuable to the Scorex group or to JMT as he once had been. The motive for the transfer of shares was no longer a desire to reward or incentivise. In our view, the crucial piece of evidence was a statement by Mr Platts is paragraph 22 of his witness statement where he said:

> "22. JMT felt a huge sense of gratitude to [the Appellant] since in 1988 when the company had only a single customer, Next/Gratton (its shareholder), and no track record, he was the guy who went out and won us new customers in 1988, 1989 and 1990. I do not think that either JMT or I could have gone out and done this at the time as we did not have the same skills. JMT never forgot this."

209. This was supplemented by Mr Platts's oral evidence recorded at paragraph 72 above.

210. In our view, this was the real reason why in 2001 the Transfer took place. We find that the Transfer was a gratuitous transfer to the Appellant reflecting JMT's gratitude for the role which the Appellant had played in

building up the Scorex business in its early years and that it did not arise from the Appellant's employment. The Transfer was, therefore, more in the nature of a testimonial. In our view, the employment or office was not the active or dominant cause of the Transfer. The evidence of the Appellant, which we accept, was consistent with this view.

211. We also find, on the basis of Mr Platts's evidence, that Lucien Trousse was merely implementing his late son's wishes. Mr Platts indicated that Lucien Trousse transferred the shares to the three members of the Team in order to ensure a smooth transition. In our view this is entirely consistent with Lucien Trousse wishing simply to give effect to his son's wishes. To have acted otherwise than in accordance with his son's wishes would no doubt have caused resentment and ill-feeling with three Team members. Therefore, we find that the motive or reason of Lucien Trousse in directing that the Transfer should take place was, in effect, the same as that of JMT.

212. Accordingly, we conclude that the Transfer was not a reward for services and, to use the language of *Hochstrasser v Mayes*, the Appellant's office or employment was not the *causa causans* or active cause of the Transfer. We therefore allow this appeal.

PAYE -- readily convertible asset

213. In the light of our conclusion that the Transfer was not an emolument, it is not strictly necessary for us to decide the additional issue raised on behalf of the Appellant, viz whether Scorex UK was under an obligation to account for PAYE in respect of the Transfer. The significance of the point is that if Scorex UK was obliged to deduct PAYE in respect of the Transfer (had we held that the Transfer was an emolument) the amount of income tax assessable on the Appellant would be reduced by the amount which should have been accounted for by Scorex UK (Regulation 101(4)(a) Income Tax (Employments) Regulations 1993 SI 1993/744, taken together with Section 203J(3) ICTA 1988). Nonetheless, since the point was fully argued before us we think it appropriate to deal briefly with the issue in this decision.

Statutory provisions – PAYE

214. Mr Sykes submitted that, if the Transfer was an emolument, PAYE obligations would have arisen on Scorex UK under one of two statutory provisions: section 203F ICTA 1988 and section 203B ICTA 1988.

215. In the event, Mr Sykes accepted that section 203B, which required a 'payment', did not apply to the transfer of an asset and that the provisions of the Finance Act 1994 took precedence over an earlier decision of the Special Commissioners in *Dunstall v Hedges* [1999] STC (SCD) 26, which held that 'payment' could include a transfer of an asset other than cash.

216. Accordingly, we have confined our consideration of the PAYE issue to the provisions of section 203 F ICTA 1988, which are as follows:

"203F.— PAYE: tradeable assets.

(1) Where any assessable income of an employee is provided in the form of a readily convertible asset, the employer shall be treated, for the purposes of PAYE regulations, as making a payment of that income of an amount equal to the amount specified in subsection (3) below.

(2) In this section 'readily convertible asset' means—

(a) an asset capable of being sold or otherwise realised on a recognised investment exchange (within the meaning of the Financial Services Act 1986) or on the London Bullion Market;

(b) an asset capable of being sold or otherwise realised on a market for the time being specified in PAYE regulations;

(c) an asset consisting in the rights of an assignee, or any other rights, in respect of a money debt that is or may become due to the employer or any other person;

(d) an asset consisting in, or in any right in respect of, any property that is subject to a fiscal warehousing regime;

(e) an asset consisting in anything that is likely (without anything being done by the employee) to give rise to, or to become, a right enabling a person to obtain an amount or total amount of money which is likely to be similar to the expense incurred in the provision of the asset;

(f) an asset for which trading arrangements are in existence; or

(g) an asset for which trading arrangements are likely to come into existence in accordance with any arrangements of another description existing when the asset is provided or with any understanding existing at that time.

(3) The amount referred to is the amount which, on the basis of the best estimate that can reasonably be made, is the amount of income likely to be chargeable to tax under Schedule E in respect of the provision of the asset.

(3A) For the purposes of this section trading arrangements for any asset provided to any person exist whenever there exist any arrangements the effect of which in relation to that asset is to enable that person, or a member of his family or household, to obtain an amount or total amount of money that is, or is likely to be, similar to the expense incurred in the provision of that asset.

(3B) References in this section to enabling a person to obtain an amount of money shall be construed—

(a) as references to enabling an amount to be obtained by that person by any means at all, including, in particular—

(i) by using any asset or other property as security for a loan or advance, or

(ii) by using any rights comprised in or attached to any asset or other property to obtain any asset for which trading arrangements exist;

and

(b) as including references to cases where a person is enabled to obtain an amount as a member of a class or description of persons, as well as where he is so enabled in his own right.

(3C) For the purposes of this section an amount is similar to the expense incurred in the provision of any asset if it is, or is an amount of money equivalent to—

(a) the amount of the expense so incurred; or

(b) a greater amount; or

(c) an amount that is less than that amount but not substantially so.

(4) For the purposes of this section, "asset" does not include—

(a) any payment actually made of, or on account of, assessable income;

(b) any non-cash voucher, credit-token or cash voucher (as defined in sections 141 to 143); or

(c) any description of property for the time being excluded from the scope of this section by PAYE regulations.

(5) Subject to subsection (4) above, for the purposes of this section "asset" includes any property and in particular any right or interest falling within any paragraph in Part I of Schedule 1 to the Financial Services Act 1986.

(6) In this section—

'EEA State' means a State which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993;

`family or household' has the same meaning as it has, by virtue of section 168(4), in Chapter II of this Part;

'fiscal warehousing regime' means—

(a) a warehousing regime or fiscal warehousing regime (within the meaning of sections 18 to 18F of the Value Added Tax Act 1994); or

(b) any corresponding arrangements in an EEA State other than the United Kingdom;

'money' includes money expressed in a currency other than sterling or in the European currency unit (as for the time being defined in Council Regulation No. 3180/78/EEC or any Community instrument replacing it); and

`money debt' means any obligation which falls to be, or may be, settled—

(a) by the payment of money, or

(b) by the transfer of a right to settlement under an obligation which is itself a money debt."

217. Section 203F was introduced by the Finance Act 1994 as one of a number of provisions designed to counteract tax avoidance. In short, there were a number of schemes whereby assets, which could easily be turned into cash, were transferred to employees in order to avoid the application of PAYE (and in most cases national insurance contributions).

218. If the shares in Scorex NV transferred to the Appellant had constituted an emolument, section 203F would apply to impose an obligation to deduct PAYE if the shares represented a "readily convertible asset".

219. It should be noted that section 203F does not require the asset to have been provided by the employer (Scorex UK).

220. The issue is whether the shares in Scorex NV constituted a "readily convertible asset" within the meaning of section 203F(2)(e) and section 203F (2)(g) ICTA 1988.

221. Mr Sykes conveniently reformulated the wording of the relevant statutory provisions in respect of section 203F(2)(e) (and Mr Way did not contest the reformulation) as follows:

> "Were the shares likely (without anything being done by [the Appellant]) to give rise to, or to become, a right enabling him or any other person to obtain an amount or total amount of money which was not substantially less than the expense incurred in providing the shares, whether [the Appellant] was so enabled as a member of a class or description of persons or in his own right?"

222. In respect of section 203F(2)(g), Mr Sykes's reformulation (again not contested by Mr Way) was as follows:

> "Did the shares represent an asset for which there were likely to come into existence arrangements the effect of which in relation to the shares was to enable [the Appellant], or a member of his family and household, to obtain an amount or total amount of money not substantially less than the expense incurred in providing the shares, in accordance with any arrangements of another description existing when the shares were provided with any understanding existing at the time the shares were provided?"

Arguments of counsel

223. Mr Sykes submitted that, if the Transfer was an emolument, it would fall within section 203F.

224. In relation to section 203F(2)(e), using his reformulation of the statutory provisions, Mr Sykes noted that the expense incurred in providing the shares would have been the amount originally subscribed or given for the shares by JMT. Mr Sykes submitted that the likely sale proceeds would not have been substantially less than this amount. We accept this proposition.

225. According to Mr Sykes, if the Appellant had retained the shares (instead of settling them into trust) he would have received the right to receive distributions from Scorex NV. This would not require anything to be done by the Appellant. The shares would have constituted a right to receive such a distribution had one been declared.

226. As regards section 203F(2)(g), Mr Sykes submitted that there would have been little doubt, had the shares in Scorex BV been given to the Appellant, these would have fallen within the statutory provision. Mr Sykes submitted that the insertion of the holding company (Scorex NV), which was a shell, should not alter the position. Mr Sykes argued that the arrangements were such that once a sale of Scorex BV had taken place, a distribution would be paid by Scorex NV.

227. Mr Sykes submitted that the evidence was as follows. First, the shares in Scorex BV were subject to a call option agreement entered into between Experian and Scorex NV. The call option agreement expired in March 2003. Secondly, it was likely or extremely likely that Experian would exercise their call option. Finally, it was a practical certainty that in consequence, the proceeds of sale of the shares of Scorex BV would be distributed to the shareholders of Scorex NV.

228. Mr Way submitted that the Appellant received shares in Scorex NV at a time when the shares in Scorex BV were subject to a call option in favour of Experian. The Appellant never received shares in Scorex BV. It was too remote to say that the shares in Scorex NV were readily convertible assets within the meaning of section 203F(2)(e) -- in other words, there was too much uncertainty to get from the receipt by the Appellant of the shares in Scorex NV in 2001 to the receipt of cash nearly two years later.

229. As regards section 203F(2)(g), Mr Way submitted that the trading arrangements had to relate to "that asset" ie the shares in Scorex NV. There were no trading arrangements in relation to Scorex NV.

230. Mr Way also relied on the purpose of the statutory provisions. The relevant sections were enacted to prevent avoidance in circumstances where an employee is given something which is as good as cash. In the present case, the shares of Scorex NV could not be quickly converted into cash. There was a gap of nearly two years between the receipt of the shares in Scorex NV and the receipt of cash, with no certainty in the meantime that the sale of Scorex BV would take place.

Discussion on PAYE

231. Our conclusion in relation to section 203F(2)(e), is that we do not consider that it was sufficiently likely when the Appellant received the shares in Scorex NV in 2001 that he would receive cash in respect of those shares. The evidence of Mr Platts and Mr Hutchinson to the effect that it was very likely that Experian would exercise its call option and that cash would pass up through

Scorex NV to the Appellant seemed to us to be largely conjecture based on the benefit of hindsight. The fact that there were significant delays caused by the negotiation of the price on the call option indicated to us that there was not the necessary degree of likelihood in 2001.

232. As regards, section 203F(2)(g) we accept Mr Way's submission that trading arrangements did not exist in relation to the shares of Scorex NV within the meaning of section 203 (3A). We do not consider the trading arrangements in relation to the shares of Scorex BV and the possibility that Scorex NV may make a distribution of the proceeds of sale satisfy the statutory requirement that the trading arrangements must relate to the shares of Scorex NV. We would note, in addition, that it was entirely unclear what form the distribution from Scorex NV ultimately took (i.e. whether it was a dividend, some form of capital distribution, a partial reduction of capital or a liquidation distribution).

233. For these reasons, we do not consider that an obligation to account for PAYE fell on Scorex UK.

Summary of conclusions

234. For the reasons given, we have decided that the Transfer to the Appellant was not an emolument from his employment within the meaning of section 19 ICTA 1988. We therefore allow this appeal.

235. Although not necessary for our decision, in the light of our conclusion in relation to the emolument issue, we consider that Scorex UK was not under an obligation to account for PAYE in respect of the Transfer.

236. Finally, we wish to express our thanks to Mr Way and Mr Sykes for their careful and learned arguments and for the assistance which they have given to the Tribunal.

237. 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.

GUY BRANNAN

TRIBUNAL JUDGE
RELEASE DATE: 11 March 2011