



TC 04958

Appeal number: TC/2015/03118

Income tax – whether tax compensation payment paid as part of foreign pension exempt from UK tax – application of inter-governmental agreement – whether statutory exemption applied – held – tax compensation payment subject to tax – no exemption available under UK law.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr John Sinnamon

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
William Haarer (Member)**

Sitting in public at the Magistrates' Court, Marlborough Street, Bristol on 11 January 2016.

Mr John Sinnamon in person as the Appellant

Mr Brian Skelley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal brought by Mr Sinnamon against a closure notice issued by
5 HMRC on 25 November 2014 charging him to tax in an amount of £5,546.40 in
respect of a payment made for the 2012-13 tax year described as a “Partial
Compensation Payment”. Mr Sinnamon argues that this amount is exempt from tax in
the UK. HMRC argue that it is taxable as a pension payment under s 566 Income Tax
(Earnings and Pensions) Act 2003.

10 *Preliminary issues*

2. Mr Sinnamon’s appeal to this Tribunal of 8 May 2015 referred to the fact that
there was some doubt about whether his appeal had been made in time because it was
unclear when HMRC had issued the “decision” against which he was appealing. It
was agreed before the Tribunal that Mr Sinnamon’s appeal should be treated as made
15 in time.

3. Mr Sinnamon’s appeal referred to two grounds of appeal (i) the tax treatment of
the Partial Compensation Payment and (ii) HMRC’s application of its practice and
procedures in dealing with Mr Sinnamon’s claim. At the Tribunal Mr Sinnamon told
us that he accepted that HMRC had acted in accordance with their practice and
20 procedures and that he no longer wished to pursue this aspect of his appeal.

Background facts

4. The parties agreed that the facts set out by HMRC in their skeleton argument of
7 January 2016 were not disputed:

(1) The European Patent Office (“EPO”) is the executive body for the
25 European Patent Organisation. (“the Organisation”). EPO officers study
European patent applications to decide whether to grant a patent. The
Administrative Council acts as the supervisory body of the Organisation.

(2) Mr Sinnamon worked for the EPO until 2002 when he retired from his
role. Mr Sinnamon receives a pension from the EPO.

30 (3) Until 2009, in addition to his pension payments Mr Sinnamon received an
additional payment reflecting the fact that his pension payments were subject to
tax in the UK, a tax adjustment payment.

(4) There is no dispute between Mr Sinnamon and HMRC that the tax
adjustment payments received prior to January 2009 are subject to UK tax.

35 (5) The EPO introduced a new pension scheme which was implemented on 1
January 2009. As part of those changes, the Administrative Council abolished
the tax adjustment payments for staff joining the EPO after 1 January 2009 and
implemented a Partial Compensation Payment scheme to replace the tax
adjustment payments from 1 January 2009.

(6) The pension scheme regulations of the EPO were modelled on those of the OECD, NATO and the European Space Agency amongst other similar inter-governmental bodies. Partial compensation payments made by these bodies to pensioners in the UK are subject to tax.

5 (7) Mr Sinnamon received Partial Compensation Payments from the EPO from January 2009 until January 2013. Payments for the 2010-11 and 2011-12 tax years are not in dispute because HMRC's assessments were made under the discovery provisions at s 29 Taxes Management Act 1970 and HMRC accepted on review that the requirements of s 29 had not been met.

10 5. It was agreed that the onus of proof was on Mr Sinnamon to demonstrate that HMRC's amendment to his self-assessment return reflected in their closure notice of 25 November 2014 was incorrect.

The law

15 6. UK Legislation dealing with pension payments is set out in the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"):

7. S 566 ITEPA sets out the types of pension income which are taxable in the UK:

S 566(1) *"The charge to tax on pension income under this Part is a charge to tax on that income excluding any exempt income."*

20 S 556(2) **"Pension income"** means the pensions, annuities and income of other types to which the provisions listed in subsection (4) apply.

.....

S 556(4) *These are the provisions referred to in subsection (2)*

.....

Section 573 Foreign pensions."

25 S 573 (1) applies to *"any pension paid by or on behalf of a person who is outside the United Kingdom to a person who is inside the United Kingdom"*

8. The term *"pension"* is defined by s 574 and includes at s 574(1)(a) *"an annuity under, or purchased with sums or assets held for the purpose of, or representing acquired rights under, a relevant non-UK scheme or an overseas pension scheme"*

30 9. An *"overseas pension scheme"* is defined by reference to s 150 of the Finance Act 2004 as

"s 150(1) In this Part "pension scheme" means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons—

35 *(a) on retirement,*

- (b) on death,
- (c) on having reached a particular age,
- (d) on the onset of serious ill-health or incapacity, or
- (e) in similar circumstances.”

5

S 150(7) applies this definition to overseas pension schemes:

“In this Part “overseas pension scheme” means a pension scheme (other than a registered pension scheme) which—

- (a) is established in a country or territory outside the United Kingdom, and
- 10 (b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue.”

10. S 575 ITEPA defines “taxable pension income” for these purposes and includes at s 575(1)

- 15 *“If s 573 applies, the taxable pension income for a tax year is the full amount of the pension income arising in the tax year.....”*

The EPO Convention and Protocol

11. The Convention on the Grant of European Patents (European Patent Convention) 5 October 1973. (“the Convention”). This is the instrument under which the Organisation is created and includes at Article 8 the introduction of a Protocol on Privileges and Immunities

12. The Protocol on Privileges and Immunities of the European Patent Office (“the Protocol”). This provides the details of the privileges and immunities referred to in the Convention, including at Article 16 the treatment of salaries and emoluments of employees of the EPO:

Article 16:

“(1)The persons referred to in Articles 13 and 14 [the president and employees of the EPO] shall be subject to a tax for the benefit of the Organisation on salaries and emoluments paid by the Organisation, subject to the conditions and rules laid down by the Administrative Council within a year from the date of entry into force of the Convention. From the date on which this tax is applied, such salaries and emoluments shall be exempt from national income tax. The Contracting States may, however, take into account the salaries and emoluments thus exempt when assessing the amount of tax to be applied to income from other sources.

(2) Paragraph 1 shall not apply to pensions and annuities paid by the Organisation to the former employees of the European Patent Office”.

13. SI 1978 No 179 - European Patent Organisation (Immunities and Privileges Order) (“SI 1978”). This is the UK legislation which brings the Protocol into effect in UK law. Article 15 grants certain immunities and privileges to “all officers” and an exemption from tax for emoluments:

“15 All Officers

Except in so far as in any particular case any privilege or immunity is waived by the President of the European Patent Office or (in the case of the President) by the Administrative Council of the Organisation, all officers of the European Patent Office shall enjoy;-

(a) immunity from suit and legal process.....

(b) as from the date on which the emoluments received by them as officers of the European Patent Office become subject to taxation by the Organisation for its benefit, exemption from income tax in respect of such emoluments, provided that nothing in this sub-paragraph shall be interpreted as precluding such emoluments from being taken into account for the purpose of assessing the amount of taxation to be applied to income from other sources;

(c).....”

Background to the European Patent Organisation

14. The EPO was set up in the 1970s as an inter-governmental organisation and now has 38 members in Europe. It is a statutory body with its own regulations. It is not regulated by the EU or the European Court of Justice. It is made up of two separate organisations the European Patent Organisation, the Organisation, which makes strategic decisions and the European Patent Office, the EPO, which carries out the day to day work of the organisation.

15. It operates in three European languages, French, German and English, which are given parity of status in interpreting any documents produced.

Background to the partial compensation payment made to Mr Sinnamon

16. Before the new EPO pension scheme was introduced in 2009, EPO pensioners who were subject to tax on their pension payments in their home jurisdiction were paid an additional amount, a “tax adjustment” amounting to approximately 50% of any tax they had to pay. It was accepted that the tax adjustment payment itself would be subject to tax. The local tax authority was obliged to make payments back to the EPO in respect of the tax adjustment.

17. A new pension scheme was introduced for current employees and former employees in 2009. Tax adjustment payments were abolished and Partial

5 Compensation Payments were introduced instead. Partial Compensation Payments were subject to an internal EPO tax and local tax authorities had no pay back obligations to the EPO. Partial Compensation Payments would only be paid if the pension payments themselves were actually subject to tax in the pensioner's home state.

18. The position changed again in 2014 when the Administrative Council reintroduced the former tax adjustment payment system in lieu of Partial Compensation Payments.

Evidence

10 *Oral Evidence*

19. We saw a written witness statement from Mr Geoffrey Barnard dated 16 December 2015. Mr Barnard gave oral evidence to the Tribunal and was cross-examined by Mr Sinnamon. Mr Barnard described himself as a senior policy adviser to HMRC's Tax Treaty Team with particular responsibility for direct tax privileges granted to international organisations and their staff.

20. Mr Barnard explained the background to HMRC's discussions with the EPO about the treatment of payments made to pensioners in the UK, which arose as a result of queries from UK pensioners.

21. Mr Barnard said that it was HMRC's view that it was clear in the UK legislation that there was no tax exemption for the Partial Compensation Payments and that it was not HMRC, but the Foreign and Commonwealth Office ("FCO") who dealt with the question of exemptions arising from international agreements. They had confirmed that they agreed with HMRC's interpretation of SI 1978.

22. Mr Barnard confirmed in response to Mr Sinnamon's questions, that the UK delegation to the EPO in 2008 had not reported back to HMRC about the changes made to the pension scheme but resisted the suggestion that HMRC had reacted without properly considering advice provided by the EPO in December 2011.

Other Evidence

23. We saw email correspondence between HMRC and the EPO dated 21 December 2011 including the opinion of Professor Kay Hailbronner "*International law aspects of the new partial compensation arrangements for national income tax on EPO Pensions*" dated 1 September 2010 and his conclusion that the Partial Compensation Payments should not be subject to national income tax.

24. That email correspondence from M. Castellanos, EPO head of department compensation and benefits policy/studies stated that:

"As of 01.01.2009, a "partial compensation" has been introduced. This is an emolument and as such subject to EPO internal tax and fully defrayed by the EPO. So there is no more reimbursement through member states and therefore

the obligation to provide the member states with details of pensions and tax adjustments for pensioners resident in the respective country no longer exists in this framework”.

5 25. The enclosed opinion of Mr Hailbronner extended to 28 pages but relied on the rationale and purposes of Article 16 of the Protocol and the international legal doctrine prohibiting the abuse of rights and the principles of ‘venire contra factum proprium’ to conclude that the Partial Compensation Payments were not subject to national taxation.

10 26. We also saw the minutes of two meetings of the Administrative Council of 21 - 23 October 2008 and 9-11 December 2008.

27. The 23 October 2008 minutes included an amended document dated 10 October 2008 giving details of the new pension plan which said in respect of the Partial Compensation Payments:

“This partial compensation has the following features:

15 *It is subject to internal tax [and no longer to national tax], as an emolument within the meaning of Article 16(1) PPI. Therefore in the Office’s opinion it should be exempted from national taxation”*

20 It was made clear that amendments had been made from an earlier version of the document to delete the statement in square brackets about national tax and add the final sentence.

28. At this meeting the Administrative Council recorded that

25 *“Implementation of the new pension scheme had to be accompanied by measures concerning the tax treatment of benefits paid under the scheme. The EPO was fully aware that taxation was a matter for member states’ exclusive sovereignty, so did not expect the delegations to bind their respective countries by taking a decision on the issue”*

30 29. The meeting of 9-11 December 2008 considered a document called “Technical amendments to the Regulation on internal tax for the benefit of the EPO”, which was introduced as *“The aim of the present document is to introduce several technical amendments into the Regulation on internal tax linked to the requirement of making the internal tax on salaries visible in the budget”.*

Mr Sinnamon’s arguments

30. Mr Sinnamon explained why he believed that the Partial Compensation Payment paid to him by the EPO should be treated as exempt from tax in the UK.

35 31. The EPO is a legal entity which can make decisions about how it functions including about how it pays pensions to its employees and how those payments should be treated. This is made clear in the Convention.

EPO's treatment of the Partial Compensation Payment should be respected in UK

32. The Convention is implemented in the UK through the UK Statutory Instrument 1978 no 179 which also reflects the EPO's legal status. That refers to the privileges and immunities granted to the EPO, its members, officers and experts, of which Mr Sinnamon is one.

33. The Administrative Council of the EPO has the right, under its rules, to make changes to benefits paid to employees (Article 33 of the Convention). The changes which were made to the pension scheme in 2009 were made in accordance with these rules with representatives from all EPO Members states including the UK voting on the changes. The UK delegation voted in favour of the changes.

34. Having agreed to the changes in principle, the Administrative Council went on to agree the details of the new scheme in December 2008, including that the Partial Compensation Payments would be paid as an emolument, would be subject to an internal EPO tax and would be accorded national tax free status.

35. The purpose of those changes and the intended tax treatment of the Partial Compensation Payments made to EPO pensioners is clear by reference to the rules of international treaty interpretation laid down by the Vienna Convention on the law of treaties 1969. The term "emolument" used by the EPO should not be construed restrictively and should include payments made to former employees such as Mr Sinnamon.

36. The UK delegation did not object to the details of the Partial Compensation Payments when they were discussed at the EPO meetings in October and December 2008 or to the intention to treat those receiving pensions and Partial Compensation Payments as employees in receipt of emoluments.

37. The UK's own legislation, the SI 1978 uses the term "*officer*" rather than employee and this term should be taken to include former employees, as for example retired police and military personnel are still described as "officers".

38. The UK delegation agreed to the new EPO pension plan and the Partial Compensation Payments in 2008. The UK has never enacted legislation rescinding that agreement and therefore the UK is bound by the terms of those agreements to treat the Partial Compensation Payments as exempt from tax in the UK. Nor have they made use of the opportunity to take the issue to an international arbitration tribunal (available under Article 23 of the Convention).

39. Since the changes made in 2009 a number of other EPO member states have concluded that the Partial Compensation Payments should be treated as tax exempt; including Luxembourg, Belgium, Netherlands and Germany. Mr Sinnamon accepted that the decisions in these countries were not necessarily binding in the UK, but said that it was indicative that the "overwhelming majority" of member states had accepted that the Partial Compensation Payments should not be subject to national tax.

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Impact on tax collected

40. If HMRC are correct to charge tax on the Partial Compensation Payments they, and other member state tax authorities who do the same, will be collecting more tax under the new than the old rules, because they no longer have to pay back any element of the tax adjustment payments to the EPO. Mr Sinnamon said that this had arisen because when the OECD were consulted to draft the Partial Compensation Payment rules, they had not taken account of the fact that payment would no longer be required to be made from the national authorities back to the EPO.

Estoppel and Equality Act

41. Under the UK common law concept of estoppel HMRC are prevented from altering their position on the tax treatment of the Partial Compensation Payment. Mr Sinnamon referred to the principle that “A party that has acquiesced in a particular situation cannot then proceed to challenge it”. (*Malcolm Shaw International Law, 6th Edition 2008*) and the similar point made in the opinion of Professor Hailbronner provided by the EPO.

42. HMRC were not notified by the UK delegation to the EPO in 2008 that changes were being made to the EPO pension plan and their reason for taxing the Partial Compensation Payments was because they believed them to be tax adjustment payments made under the old rules. It was only in 2011 that HMRC first raised questions about the new Partial Compensation Payments. HMRC failed to give proper consideration to the detailed arguments set out by the EPO in their response of 21 December 2011 to HMRC’s questions about the correct characterisation of the Partial Compensation Payments. They responded on 29 December 2011, meaning that they took only a very few business days to consider the EPO’s very detailed points.

43. Mr Sinnamon also referred to the UK Equality Act 2010 and s 149 which applied to discrimination by public bodies, suggesting that HMRC’s actions in taxing this Partial Compensation Payment amounted to discrimination.

HMRC’s arguments

44. Mr Skelley explained why it was HMRC’s view that the Partial Compensation Payment received by Mr Sinnamon in 2012-3 was subject to tax in the UK under s 566 ITEPA as a pension payment.

45. HMRC do not believe that Mr Sinnamon is one of the class of persons to whom privileges and immunities are given by the Protocol, which applies only to current employees and officers of the organisation, not former employees or officers. Mr Skelley pointed to Article 16 of the Protocol conferring an exemption from national taxation on salaries and emoluments, Article 14 concerning other immunities of EPO employees after the termination of their service and Article 19 stating that the privileges and immunities are not designed to give employees personal advantages of the Protocol, to support this argument, which he said was reflected in Article 15 of the UK’s implementing legislation the SI 1978.

Purpose of grant of privileges in the Protocol

46. Mr Skelley explained that HMRC did not view the purpose of the Convention or the SI 1978 as to confer privileges on individuals, but rather to give equality between states by not allowing any country to benefit from an international organisation being based there. The privileges conferred, including the tax privileges, were to ensure the independence and “unimpeded operation of the organisation” (Article 19 of the Protocol). It would not be within this purpose to extend benefits to former employees. There is nothing explicit in the Protocol to suggest that former employees should be included within its remit. For example Article 14(a) protects an employee after termination of their contract, but only for actions taken while they were still an employee. Emoluments paid to an ex-employee are outside the scope of the Convention.

Meaning of “emolument”

47. The use of the term “emolument” itself also suggests that it was intended to apply only to those who are currently working for the EPO. An emolument being something that is earned, or a reward for work, not a compensation payment paid to a former employee like Mr Sinnamon. This is made clear by Article 16(1) and 16(2) of the Protocol. The SI 1978 at Article 15 refers to “officers”, a term which is not defined, but its normal meaning is of someone holding a position of authority, which Mr Sinnamon no longer did at the time of the Partial Compensation Payment.

Decisions of the Administrative Council

48. As for as the intention of the Administrative Council of the EPO, demonstrated by the minutes of their meetings in October and December 2008 to consider the pension rule changes, it is clear that there was a recognition that it was not possible to force the member states to treat the Partial Compensation Payments as non-taxable, reflected in the minutes of the 23 October 2008 meeting.

49. HMRC had considered the arguments put forward by the EPO when they responded to HMRC’s request for clarification in December 2011, but did not agree that just because the EPO treated the payment as an emolument, it was tax exempt in the UK. In addition, even if the Partial Compensation Payment can be treated as an emolument, it was still not paid to Mr Sinnamon while he was an employee so the SI 1978 does not apply.

50. HMRC had chosen not to take the opportunity of going to arbitration on this issue, but they were not obliged to take advantage of Article 23 of the Convention, which arguably only applied to issues concerning current employees in any event.

Estoppel and the Equality Act

51. Mr Skelley said that the principle of estoppel was not relevant to Mr Sinnamon’s case. It applied when a public authority had changed its view on which an individual had relied giving rise to a detrimental effect. HMRC had not changed its

view, it had always asserted that the Partial Compensation Payment was taxable. Mr Sinnamon had not changed his position in reliance on HMRC's views.

52. The Equality Act was not in point here either; none of the specific types of discrimination set out in s 149 of that Act were relevant to Mr Sinnamon. If Mr Sinnamon had been discriminated against, it was in comparison with other EPO pensioners who had not been charged to tax. In HMRC's view Mr Sinnamon had been dealt with in accordance with UK law and there had been no discrimination against him.

53. The Partial Compensation Payment was paid as part of Mr Sinnamon's pension and should be taxed as a pension payment. It was not a payment made in reward for any services given by Mr Sinnamon but as compensation for the tax suffered on his pension. It was in essence the same type of payment as the tax adjustment payment which it had replaced and fell outside the exemptions provided by the SI 1978.

Decision

15 *Findings of fact*

54. Mr Sinnamon retired from the EPO in 2002.

55. In 2012-13 Mr Sinnamon had no authority to carry out any acts on behalf of the EPO.

56. The Administrative Council discussions about changes to the EPO pension plan in October 2008 referred to the fact that it was not possible to impose a mandatory tax treatment on the taxing authorities of the member states.

Legal status of the Convention and Protocol

57. The legal status of the Convention and Protocol for UK tax purposes is that they have no direct effect, they are implemented and made effective for UK law purposes through the SI 1978. Therefore, the only basis on which an exemption can be applied in the UK is if that is possible under the SI 1978. This is reflected in the discussions of the Administrative Council at the time when the new pension rules were being considered at the end of 2008. Mr Sinnamon proceeded on the basis that the Convention had direct effect, but that is not the case.

58. The only binding legislation in the UK is the SI 1978 implementing the Convention and Protocol which states "*as from the date on which emoluments received by them, as officers of the European Patent Office become subject to taxation by the Organisation for its benefit, exemption from income tax in respect of such emoluments...*". The question is whether the payments made to Mr Sinnamon fall to be treated as "emoluments" as that term is used by the SI.

Interpretation of the term "emolument" in this context

59. The parties accepted that for these purposes the term emolument could not be defined by its UK law meaning, but reference had to be made to the source from which the payment was made and its meaning for the purpose of the Convention and the Protocol. The parties did not refer specifically to the UK approach to interpreting non-UK legal terms for UK tax purposes, but their proposed approach is in line with UK authorities in this area (*Rae v Lazard* [1963] 41 TC 1 and *HMRC v First Nationwide* [2012] EWCA civ 278); in order to determine the UK tax treatment of a payment from a non- UK source reference must be made to the legal characterisation of the payment by the paying entity in its own jurisdiction and the mechanics by which the payment is made. Those principles are usually applied to the legislation of a particular jurisdiction; for these purposes we have assumed that it is the rules of the EPO which are relevant since it operates as an extra-jurisdictional body governed by its own rules.

The intention of the EPO

60. Two things are clear from the meetings of the EPO Administrative Council in October and December 2008: (i) they intended that the Partial Compensation Payments should be treated as tax free emoluments by fulfilling the conditions at Article 16(1) of the Protocol – being subject to an EPO internal tax and therefore outside the scope of national taxation. (ii) They recognised that they had no power to impose this, or any other specific tax treatment, on the member states’ home tax jurisdictions.

61. Mr Sinnamon’s position is based on the premise that this stated intention of the EPO, as understood by the UK delegation who attended the relevant discussions, must be respected by HMRC in the UK. However, it is clear as a matter of statute that the Protocol, and any related documents, only take effect in the UK through the mechanism of the SI 1978. There is no basis on which the decisions of the Administrative Council could be said to override the wording of that SI.

62. It is also clear, despite what Mr Sinnamon attempted to argue, that the Administrative Council itself recognised that it had no power to bind the member states in this regard, all that could be done was for it to state its intention in making the changes to the pension rules and the Partial Compensation Payment; that by making it subject to the EPO internal tax it should, for the purposes of the Protocol, fall within Article 16(1) as an emolument.

63. Mr Sinnamon relied on the Vienna Convention on treaty interpretation in this context without making it clear how that applied to the EPO or the terms of the Protocol. Without making any assumptions whether the Vienna Convention does apply in this particular case, we do accept the general principle that international legislation should be interpreted in good faith, in accordance with its ordinary meaning and by reference to context, object and purpose.

64. Looking at the context, object and purpose of these changes, we do not agree with Mr Sinnamon that there was a clear and binding decision about the tax treatment of the Partial Compensation Payments in the pensioners’ home jurisdiction at either

the October or the December 2008 meetings of the Administrative Council. The October meeting, on the contrary, made it clear that the EPO accepted that it could not force the member states to treat those payments as tax exempt. We think it is particularly telling that amendments had been made on just this point in the document concerning the Partial Compensation Payments before it was produced to the meeting in October. The decisions of the December meeting about the tax characterisation of the payment were internal to the EPO and did not impose a mandatory treatment, only introducing the mechanism for the internal tax to be charged.

The meaning of emolument – SI 1978

65. The only possible relevance of the decisions of the Administrative Council to the way in which the SI 1978 is applied in the UK is as an aid in interpreting the meaning of the term “emolument” for the purposes of the SI. Can the decision of the Administrative Council to charge EPO “internal tax” on the Partial Compensation Payment and treat it as an emolument turn it into something which should be treated as an emolument under the UK legislation, within the class of tax exempt emoluments at Article 15?

66. UK authorities in this area accept that in applying UK tax law to a non-UK legal concept, regard has to be taken in the first instance, to the legal characterisation of that payment by the source from which it is paid, in this case the EPO. HMRC argued that, without taking account of the UK meaning of the term, on any definition an “emolument” must connote some element of earned income. The Partial Compensation Payment was not earned, it was paid as part of a pension payment and was compensation for tax suffered and would only be paid if tax was actually payable on the pension payment. That might be correct as a contractual analysis of the source of the Partial Compensation Payment, but our view is, on the basis of the UK authorities in this area, that the specific description of the payment and the mechanics of its payment have to be taken account of. For the purposes of the paying entity, this payment was treated as an emolument, however that might or might not fit with UK concepts of what an emolument should be.

67. In considering the weight to be given to the EPO’s characterisation of the payment, our view is that it is valid to take account of the reason why the EPO treated the partial compensation payments as emoluments. On the basis of the evidence that we saw and the notes provided of the October 2008 meeting of the Administrative Council, this characterisation was to ensure as far as possible, that they fell within the category of tax free payments at Article 16(1) of the Protocol. This characterisation does not seem to have been based on any legal analysis of what in substance the payments might be, but on a pragmatic view of their preferred categorisation for tax purposes. For that reason we are not taking the EPO’s characterisation of these payments as a definitive statement of their legal character.

68. Turning to the wording of Article 15 of the SI 1978, our view is that, even if, taking account of the approach of the Administrative Council there is an argument that the Partial Compensation Payment can be treated as an “emolument” for the purposes of the SI 1978, that is not enough for Mr Sinnamon’s purposes because

Article 15 refers explicitly to “the date on which *emoluments received by them as officers* of the EPO become subject to taxation by the Organisation for its benefit.....”. However the Partial Compensation Payment is defined, Mr Sinnamon cannot be treated as an officer of the EPO at the time when this Partial
5 Compensation Payment is received. There is nothing in any of the statements made by the Administrative Council to suggest that this was the intention or any basis of interpretation on which Mr Sinnamon can be treated as a current officer of the EPO at this time.

69. On this point we note in particular that in another context the Administrative
10 Council did take its interpretive rules this far; Article 14(a) of the Protocol makes explicit reference to immunity from suit for employees even after their service has terminated, but a similar approach is not taken in respect of Partial Compensation Payments. On this point we agree with HMRC that being an “officer” of the EPO must connote having some current responsibilities and authority, which Mr Sinnamon
15 no longer had at the time when the Partial Compensation Payment was received by him in 2012. At best Mr Sinnamon could be described as a former officer of the EPO, and that is not enough to bring him within Article 15 of SI 1978.

70. Our conclusion on this point is while it might be possible to take account of the EPO’s determination of the characterisation of this payment as an emolument,
20 nevertheless this payment to Mr Sinnamon remains outside the scope of the exemption at Article 15 of SI 1978 because it was not received by him at a time when he was an officer of the EPO.

71. This is consistent with the general approach of the Protocol as HMRC pointed
25 out; benefits are primarily for the efficient operation of the Organisation and therefore are directed at those who are currently employed by the Organisation and not also those whose services have been terminated. It is also in line with the specific provisions of the Protocol which treat the payment of pensions differently from the payment of emoluments in Article 16(2).

72. Mr Sinnamon referred to decisions of other member states of the Organisation
30 who had concluded that the Partial Compensation Payments should not be subject to national tax. It was accepted that these could not be treated as binding on the UK, however Mr Sinnamon suggested that they had some relevance to his arguments. We agree that the fact that these decisions have been made in favour of taxpayers does suggest that the EPO’s categorisation of the Partial Compensation Payments as
35 emoluments has been respected in those jurisdictions and were it not for the very specific wording of the UK’s SI 1978, that might also have been possible in the UK.

The fairness of the tax collected

73. Mr Sinnamon based some aspects of his argument on whether HMRC (or any
40 other tax authority in a member state) should receive more in tax as a result of the change from tax adjustment payments to Partial Compensation Payments. Our view is that this is not a relevant consideration in determining how Mr Sinnamon should be taxed.

Estoppel and Equality Act

74. The UK common law doctrine of estoppel can be relied on by an individual as against a public authority if they have relied on statements of the public authority which subsequently changes its position to the detriment of the individual. HMRC point out, and we agree, that Mr Sinnamon did not at any point rely on statements made by HMRC in the UK. He placed his reliance on the statements made by the Administrative Council of the EPO, which is not a body which is subject to the UK common law. While HMRC might have taken some time to recognise that the EPO pension payments had changed from taxable tax adjustment payments to something else, we saw no evidence that they or the FCO at any point suggested that the Partial Compensation Payments were exempt from tax. We have concluded that the doctrine of estoppel does not apply to Mr Sinnamon's case.

75. Mr Sinnamon also referred to the UK Equality Act 2010 and s 149 in particular which sets out the grounds on which discrimination is illegal in the UK by public sector bodies, the so called "protected characteristics". Of those referred to "age" is the only one which is potentially relevant to Mr Sinnamon. However we cannot see how he could be said to have been discriminated against on this ground in these circumstances. His complaint, if there is one, is that he has been treated less favourably than other EPO pensioners in the same position as him. That is an argument about HMRC's discretion to raise queries on some but not all of a particular class of taxpayers for which, if there is a remedy, it is one of judicial review in the administrative courts rather than this Tribunal.

Is the payment a pension payment within s 566 ITEPA?

76. HMRC approached this appeal on the basis not only that the Partial Compensation Payment was not exempt from tax, but also that, if it was taxable, it fell to be taxed as a pension payment under s 566 ITEPA. At the hearing HMRC did not provide detailed arguments about why s 566 was the correct head of charge for this payment. Mr Sinnamon did not give any consideration to how the payment should be taxed if it was taxable in the UK.

77. S 566 applies to "pension income" including "foreign pensions" as listed in s 566(4). It is s 574 ITEPA which provides a definition of both a pension and a foreign pension by reference to s 150 Finance Act 2004. That provides a very wide definition of a pension scheme and Section 150(7) applies this definition to overseas pension schemes:

"In this Part "overseas pension scheme" means a pension scheme (other than a registered pension scheme) which—

(a) is established in a country or territory outside the United Kingdom, and

(b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue."

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78. In response to the Tribunal's request after the hearing, HMRC clarified that they had treated the Organisation and the EPO as based in Munich by reference to Article 6 of the Convention, satisfying s 150(7)(a) and that the EPO pension scheme fulfilled the requirements of SI 2006/206 Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes), Regulation 2 (1)(b), so that s 150(7)(b) was also satisfied. On that basis we agree with HMRC that it is correct to treat the Partial Compensation Payment as taxable under s 566 ITEPA as a foreign pension payment.

79. For these reasons this appeal is dismissed and the amount of tax due set out in HMRC's amended self-assessment contained in their closure notice of 25 November 2014 is confirmed.

80. 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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 9 MARCH 2016

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