MAIRS v HAUGHEY[1]

Julian Ghosh & Stephen Woodhouse[2]

The recent decision in *Mairs v Haughey* is significant in altering the perceived wisdom on a number of issues relevant to the charge to tax under Schedule E. The purpose of this article is to examine and comment on the various questions raised and the approach of the House of Lords in each context.

The Facts

The taxpayer was an employee of Harland & Wolff who had contingent rights under a non-statutory enhanced redundancy scheme. As part of the process of the privatisation of Harland & Wolff, the employee was offered the choice between being made redundant and accepting employment with a new company established to effect the privatisation. He accepted the offer and, under its terms, received a lump sum consisting of two elements. The first element ("element A") consisted of a payment of 30 per cent of the amount which the taxpayer would have received upon being made redundant, together with a promise to pay the balance should he be made redundant within the first two years of the operation of the company as a private company, in return for agreeing to forego rights under the non-statutory redundancy scheme. In the particular taxpayer's case, this amounted to £4,506. He also received a second element ("element B") of £1,300 representing £100 for each complete year of service with Harland & Wolff.

Before the Special Commissioners, it was decided that the total payment of £5,806 should be apportioned between element A, which should be regarded

---

1 [1993] STC 569.

2 Julian Ghosh LLB, LLM, Barrister, 3 Temple Gardens, London EC4Y 9AU
Tel: (071) 353 7884 Fax: (071) 583 2044

Stephen Woodhouse LLB, Solicitor, Norton Rose, Bank of America House, PO Box 570, 25 Cannon Street, London EC4M 5SL
Tel: (071) 283 2434 Fax: (071) 329 6808

as being a payment to compensate the individual for loss of his rights under the enhanced redundancy scheme and therefore not taxable to Schedule E under general principles and element B which should be so taxable as being attributable to the acceptance by the employee of his new terms and conditions of employment.

This view was upheld in the Court of Appeal and the Inland Revenue appealed to the House of Lords, arguing that it was inappropriate to apportion the payment into two elements and that, in any event, a payment to compensate an employee for loss of redundancy rights should be taxable.

Decision

In considering these facts and the related arguments, the House of Lords decided:

1. The Special Commissioners and the Court of Appeal were correct to conclude that the consideration should be apportioned between the non-taxable element A and the taxable element B.

2. The Special Commissioners and the Court of Appeal were also correct to hold that a payment to compensate the employee for loss of his rights under the non-statutory redundancy scheme should not be taxable. There should be no difference in principle between a payment made for redundancy and a payment made to compensate an individual for loss of redundancy rights. Where there is a genuine redundancy, redundancy payments (even in excess of the statutory redundancy payments) should not be taxable to Schedule E under general principles as emoluments.

Implications of the Decision

The decision in *Mairs v Haughey* raises several issues of continuing interest concerning the application of rules for taxing remuneration under Schedule E, which are examined in the rest of this article.

The Capital-Income Distinction

The decision of the House of Lords was delivered by Lord Woolf, with all the other judges concurring. The most interesting conceptual issue raised by *Mairs v Haughey* derives from an almost "throw-away" remark by Lord Woolf in the penultimate sentence of his judgment, to the effect that a lump sum payment must be established as being in the nature of an income payment before it could begin to qualify as being chargeable to tax under Schedule E (at 581).

This remark raises a fundamental question as to whether the distinction between income and capital, crucial in other contexts in the income tax legislation, has any relevance to the determination of whether or not a payment should be taxable under Schedule E.

This requires a consideration of both the statutory framework relating to taxation under Schedule E and the relevant authorities.

a. *The Statutory Framework*

ICTA 1988 s.1(1) reads: "Income tax shall be charged in accordance with the provisions of the Income Tax Acts in respect of all property, profits or gains respectively described or comprised in the Schedules A, C, D, E and F, set out in sections 15 to 20 or which in accordance with the Income Tax Acts are to be brought into charge to tax under any of those Schedules or otherwise."

Schedule E is governed by s.19 which provides that "Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom", while emoluments are defined in s.131(1) to include "all salaries, fees, wages, perquisites and profits whatsoever".

Thus, Schedule E is concerned simply with the taxability of the profits or gains from an employment.

b. *The Authorities*

Lord Woolf made the statement referred to above after considering the submission from the Inland Revenue that, if a payment made under the enhanced redundancy scheme is taxable as an emolument from employment, a payment to terminate the right to receive the benefits from the scheme should also be taxable as an emolument from employment. His comments were not necessary for the decision, as it had already been decided that the basic premise for this submission (namely, that redundancy payments would be taxable, in the absence of the Statement of Practice, 1/81, see infra) was not correct so that his remarks are obiter only. Nevertheless, it is important to examine his reasoning.

Lord Woolf (at 581) cited the decision of the House of Lords in *Hunter v Dewhurst* 16 TC 605, and referred to the approval of the ratio of that decision by the Lord Chancellor in *Tilley v Wales* [1943] AC 368 at 392:

> "There an article of association of the company which had employed [the taxpayer] provided that when a director died or resigned or ceased to hold office for a cause not reflecting upon his conduct or competence, the company should pay to him "... by way of compensation for the loss of office" a sum equal to the total amount of his remuneration in the preceding five years. [The taxpayer] subsequently agreed with the company, at a time when he was ceasing to be chairman but was remaining a director, that in lieu of his rights under this article he should be paid £10,000. ... [Their Lordships in *Hunter v Dewhurst*] held that the £10,000 was not a profit from his employment as director and did not represent salary, but was a sum of money paid down by the company to obtain a release from a contingent liability as distinguished from remuneration under the contract of employment."

Lord Woolf went on to say that he "[was] not persuaded that this aspect of the Court of Appeal of Northern Ireland's decision was incorrect in that *Hunter v Dewhurst* was wrongly decided ... because for the Revenue to succeed the Revenue would have to establish, contrary to [Lord Woolf's] provisional view, that the lump sum payment was in the nature of an income payment before it could begin to qualify as being chargeable to tax under Schedule E".

Although *Hunter v Dewhurst* did categorise the payment made in that case as a lump sum (at 645), the decision is explicable as a decision simply categorising that payment as not having been made in return for services and accordingly outside the charge to Schedule E entirely, as is borne out in the passage referred to by Lord Woolf. Consequently, the case is not authority for Lord Woolf's conclusion that a lump sum capital payment cannot be taxable under Schedule E due to it not being in the nature of income. One should, however, consider other authorities which may support Lord Woolf's statement.

Other Schedule E Authorities

It is true that certain payments which have escaped a charge to tax under Schedule E have been described as "capital" (see *Jarrold v Boustead* [1964] 3 All ER 76 at 81 per Lord Denning MR; *Tilley v Wales* supra at 393 per Lord Simon).

However both of these decisions are explicitly based on the finding that the payments in question were not made in return for services. Accordingly, "capital" in this context is properly seen as simply a synonym for a payment which is not an emolument (also see Finley J, *Prendergast v Cameron* (1939) 23 TC 122 at 138).

This approach was confirmed in *Brumby v Milner* [1976] STC 534. Pursuant to powers under a trust deed, directors terminated a profit sharing scheme set up by a company for the benefit of its employees. Dividends on shares purchased by the trust in the employer company had been used to (1) pay off a loan granted by the company to the trust and (2) make payments to employees (from which income tax was deducted at source on the basis that they constituted emoluments).

On the termination of the scheme, the trustees realised the trust assets, paid off the balance of the loan owed to the company and distributed the balance to employees and pensioners of the company.

The House of Lords held that the payments constituted Schedule E emoluments and the approach of Walton J at [1975] STC 215 "that, under Schedule E there is no such thing as an emolument in the form of a capital receipt", (at 227) in the High Court was approved by Lord Wilberforce (at 536) expressly rejecting the income-capital distinction.

A similar case is *Bray v Best* [1989] STC 159 in which a lump sum payment was also made to an individual following the winding up of a trust fund established by his employer. In these circumstances, the distribution was held to be non-taxable, but only because the employee was not employed in the year in which the payment was made and to which it related. Although ICTA 1988 s.19(4A) reverses the effect of the decision in *Bray v Best*, this only has the effect of relating a payment which is made in a year in which the employment in question was not held to a year in which the employment was held. There is no provision dealing with the fact that the payment was of a capital nature, presumably on the basis that this is not necessary to bring such payments into charge.

The approach of the Higher Courts in *Brumby v Milner* and *Bray v Best* reflected the decision in *Weight v Salmon* (1935) 19 TC 174 when a director's right to apply for certain unissued shares at less than market value was assessed to income tax under Schedule E, with the "capital" nature of the benefit being ignored.

Another recent decision which has considered the income/capital distinction in the Schedule E context is *IRC v Herd* [1993] STC 436, where the House of Lords had to consider the application of the PAYE regime contained in the Income Tax (Employments) Regulations 1973 (now the Income Tax (Employments) Regulations 1993) to a payment made to a director of a company for the sale of certain shares which he had acquired in the company by reason of his employment, which was taxable in part under s.79 Finance Act 1972 (now s.138 Taxes Act 1988) and in part under s.67 Finance Act 1976 (now s.160 Taxes Act 1988).

The PAYE Regulations were introduced under the authority of what is now s.203(1) Taxes Act 1988 which provides that "on the making of any payment of, or on account of, any *income* assessable to income tax under Schedule E, income tax shall, subject to and in accordance with Regulations made by the Board under this section, be deducted or repaid by the person making the payment ..." (emphasis added). This raised the question of whether the PAYE Regulations were only capable of applying to payments of income and thus did not apply to payments which were capital in nature.

This approach was accepted by Lord Sutherland in a dissenting judgment in the Inner House of the Court of Session [1992] STC 264 when he said (at 288) that "the fact that after the capital transaction had been completed a proportion of the amount received by the taxpayer has to be regarded as being received as income cannot affect the nature of the completed capital transaction". Thus the receipts were outside the provisions of the 1973 Regulations. However, the majority of the Inner House of the Court of Session, rejected the income-capital distinction espoused by the Revenue and approved the dicta referred to above in *Brumby v Milner* and the approach of the Court in *Weight v Salmon* (see Lord McCluskey at 277 and Lord Coulsfield at 286). Further, although the majority decision of the Inner House was reversed by the House of Lords, the Lord Chancellor, giving the only judgment, expressly said that his reasons differed considerably from the reasons given by Lord Sutherland and stated (at 443) that he "would not be prepared to confirm [Lord Sutherland's] analysis of the transaction into a capital transaction completed at the time of payment followed by a statutory treatment of certain parts of the payment as income for tax purposes".

d. *Other Authorities*

There appears to be little authority in the cases dealing with the taxation of emoluments under Schedule E which supports Lord Woolf's contention that the income-capital distinction is relevant for Schedule E purposes. However, there are numerous other areas where the distinction is of great significance. It may therefore be questioned whether some of the authorities in these areas may be relevant for Schedule E purposes.

It is not proposed in this article to provide a general analysis of the income-capital divide throughout the tax legislation. However, even in areas where it is clear that the distinction does have significance, there are decisions which illustrate the flexibility of the concept of "income" for tax purposes. For instance, the elasticity of the term is illustrated by the decision in *IRC v Reids Trustees* [1949] AC 362, where the House of Lords held a capital profits dividend paid by a foreign (South African) company to a UK resident was chargeable to tax under Schedule D Case V despite the fact that, at the time that the case was decided, the dividend would not have been chargeable to tax under any Schedule if the paying company had been UK resident.

Furthermore, reference to the income-capital divide in the context of Schedule D reveals that the considerations relevant in this area often have no significance for Schedule E. For instance, there is the question of the relevance of local law in deciding whether a payment is Schedule D Case V income or capital by reference to whether or not the corpus of an asset was left intact after a distribution (*Rae v Lazard Investment Co. Ltd* (1963) 41 TC 1; *Courtaulds Investments v Fleming* (1969) 46 TC 117 at 122), or whether a payment is taxable under Case

III of Schedule D as an annual payment or is a capital part-payment of a purchase price (*Brodies WT v IRC* (1933) 17 TC 432, 440). These issues which distinguish between the return from an investment (i.e., income generated by it) and the realisation of the investment itself are simply not relevant to payments received in return for personal services where the appropriate test is simply that of a causal connection to the provision of services, (see s.19 of ICTA 1988 supra), since there is no concept of "human capital" which can be given any sensible meaning in the fiscal context.

Policy Considerations

Finally, are there any policy considerations which might support Lord Woolf's approach? The opposite seems to be the case.

The main reason for taxing capital gains is that realised gains are as much relevant to the ability to pay tax as income liable to income tax and any capital returns therefore should be taxed on the grounds of both horizontal equity (i.e., that those in equal circumstances should pay an equal amount of tax) and vertical equity (i.e., that those in unequal circumstances should pay different amounts of tax). The justification for taxing income and capital receipts under different regimes is the recognition of the economic reality of commercial transactions. Transactions generating income (i.e., a return on investment) differ in nature (and frequency) to transactions generating capital (i.e., realising an investment). This approach has, in the absence of any notion of "human capital", no relevance in the context of the taxation of the rewards for personal services where the form of a reward for service is irrelevant to the status of payment as a reward for those services (see e.g., Seltzer "The National Tax Treatment of Capital Gains and Losses" (1951); Simon "Personal Income Taxation", Chapter 7).

It is also instructive that economists treat realised capital gains in the same manner as "income" from the profits from a trade or a salary (Simons op cit at 26; Miller (1950) 59 Yale Law Journal 837, 1057; Sandford "Taxing Personal Wealth" (1971) Ch 7).

One may add that any classification of the tax base as a whole which avoids the income-capital distinction has been welcomed by many on this basis (e.g., Break, 7 Journal of Finance (1952) 214) and may also be seen to prevent a possible erosion of the tax base by converting income benefits into capital form.

f. *Conclusion*

The statement by Lord Woolf that the Revenue had to establish that "the lump sum payment was in the nature of an income payment before it could begin to qualify as being chargeable to tax under Schedule E" does not appear to be supported either by the authorities relating to the taxability of payments which have been characterised as capital under Schedule E nor by those encountered in the Schedule D context which are concerned with the income-capital distinction. The observations of Lord Woolf are obiter and in this context are best viewed as being of curiosity value only, especially as there would seem to be no policy reason to support Lord Woolf's approach.

Other Issues

As well as the question of the relevance of the distinction between income and capital for Schedule E purposes, the decision in *Mairs v Haughey* raises other issues which may be of more immediate significance to taxpayers and their advisers.

Taxation of Redundancy Payments Under Schedule E

Lord Woolf stated that he regarded the important issue raised by the appeal as being whether "a cash payment made for giving up non-statutory contingent redundancy rights is received by an employee as an emolument from his employment and chargeable to income tax" as such. The Revenue argued that, as a matter of strict law, a payment made to an employee under the enhanced redundancy scheme would be taxable, notwithstanding Statement of Practice 1/81 (which the Revenue apparently argued contained an element of concession) which provides for "genuine redundancy payments" to escape a charge to tax even where the scheme forms part of the conditions of service of the employees or where the employees otherwise have an expectation of payment. The Revenue further argued that the Statement of Practice applied only to redundancy payments and *not* to payments for the *loss* of redundancy rights, the latter being taxable as emoluments under a general Schedule E charge. The proposition that a Statement of Practice can operate to disapply the general law is puzzling. However, Lord Woolf rejected any distinction between a payment under the redundancy scheme and a payment in lieu of rights under the scheme (at 577, 580). In his view SP1/81 merely reflects the correct legal position (whereby redundancy payments and payments for the loss of redundancy rights are outside a charge to tax) and therefore offers no element of concession. It followed that all redundancy payments can only be taxable under the provisions in s.148 Taxes Act 1988 and therefore subject to the exemption for the first £30,000 of payments in s.188(3) Taxes Act 1988.

In arriving at his conclusion, Lord Woolf also made the unexceptionable observation that a redundancy payment was payable "after the employment has come to an end" which did not represent deferred wages in consideration of services rendered (at 579, 580).

This approach would appear to be a welcome clarification which would avoid the need to seek confirmation of the correct tax treatment of a redundancy payment from a company's Inspector of Taxes as provided for in SP1/81. The decision is also most welcome in principle. Redundancy payments to compensate an employee for the loss of his job through no fault of his own are not properly categorised as emoluments "from" an employment (see the discussion infra) and should, in the opinion of the writers, not be subject to a Schedule E charge under general principles. Unfortunately, Lord Woolf proceeded to obfuscate the position by attempting to identify (at 578) "the qualities of a genuine non-statutory redundancy payment" for these purposes. In doing so, he referred to the definition of statutory redundancy in s.81(2) of the Employment Protection (Consolidation) Act 1978 and went on to say (at 578) that "redundancy, whether statutory or non-statutory, involves an employee finding himself without a job through circumstances over which he has no control. It is also a quality of redundancy that it does not give rise to a right to compensation unless the employee has been employed for a minimum period and the right when it accrues increases, initially, with the period of employment and then subsequently reduces until eventually the employee loses any right of payment upon his reaching normal retirement age."

Lord Woolf's description of the qualities of payments which amount to "genuine redundancy payments" merit further examination, since it is only payments with such qualities which in Lord Woolf's mind escaped a charge to tax under Schedule E based on the wording of s.131(1) alone (i.e., without reference to authority) (see 578). The qualities of redundancy relevant to Lord Woolf are, respectively, a minimum service requirement before an employee can be said to have been made "redundant", and a requirement that redundancy rights be "tapered" as an employee approaches retirement age, both of which "were fully reflected in [the redundancy scheme] of *Harland & Wolff* (at 578).

So far as the requirement for there to be a minimum period of service is concerned, this might be read to import a requirement for a minimum period of two years in accordance with the requirements for receiving a redundancy payment pursuant to s.81 EP(C)A 1978. Alternatively, his judgment might be interpreted as requiring some minimum period of service (but not necessarily the statutory minimum) as a qualification for a redundancy payment in the terms of a particular redundancy scheme for a payment under that scheme to qualify as a "redundancy payment".

Although SP1/81 includes a minimum period of two years' service as one of the conditions for establishing that there has been a genuine redundancy, the Revenue acknowledge that a scheme may also be devised to meet a specific case of redundancy or couched in general terms to embrace redundancies as and when they arise. This may give rise to circumstances where the Revenue have previously agreed that the statement should apply in respect of a scheme which includes employees with less than two years service (see para 3). In this respect, if Lord Woolf's description of the features of "genuine redundancy" were to be interpreted to require the minimum two year qualifying period specified in s.81 EP(C)A 1978, his description of redundancy would be narrower than the circumstances contemplated by the Statement of Practice. It is to be hoped that this aspect of Lord Woolf's judgment will not lead to the Revenue concluding that the Statement of Practice is presently too widely couched and changing their approach to allow only payments to employees with the minimum period of service under the employment legislation to escape a charge to Schedule E.

There appears to be no reason why the provisions in s.81 EP(C)A 1978 should preclude compensation payments for loss of office being "redundancy payments" merely because the recipient has not completed the two years, qualifying service relating to statutory payment rights. The two year period is a moveable feast; the relevant period was raised from six months to one year by the EA 1980 and thereafter to two years in 1985 (Unfair Dismissal (Variation of Qualifying Period) Order 1985, SI 1985/782 amending EP(C)A 1978 s.64(1). It would be nonsensical for the tax treatment of a payment to be determined by legislative activity in a completely unrelated context which would be the case if the principles established in *Mairs v Haughey* are predicated on the EP(C)A 1978 legislation on redundancies.

Even if Lord Woolf's comments may be taken to impose a requirement that an employee must have some minimum length of service (although not necessarily the statutory period) before he can be said to receive a "redundancy payment", this leads to the question of whether it is appropriate for there to be any such requirement at all. A justification for this approach can be found in the employment law context, where there is authority indicating the existence of proprietary rights in the holding of a job. So in *Lloyd v Brassey* [1969] 2 QB 98, Lord Denning said (at 102) "... as I read the [1965 Redundancy Payments Act], a worker of long standing is now recognised as having an accrued right in his job, and his right gains in value with the years. So much so that, if the job is shut down, he is entitled to compensation for loss of a job. ... it is not unemployment pay. I repeat "Not"; even if he gets another job straight away, he nevertheless is entitled to full redundancy payment. It is in a real sense, compensation for long service."

There are other rationales for the statutory redundancy scheme (such as increasing labour mobility, providing greater job security and reducing the number of strikes over redundancy) but these are not aspects discussed in Lord Woolf's judgment. Rather, Lord Woolf went on to state (at 578) that a "redundancy payment has therefore a real element of compensating or relieving an employee for the consequences of his not being able to continue to earn a living in his former employment", that is the loss of *future rights*. In his view, it followed that a genuine redundancy payment is not an emolument from employment but is a "payment to compensate the employee for not being able to receive emoluments from his employment" and should therefore not be regarded as being taxable as an emolument within s.131(1) Taxes Act 1988 (at 578). This view directly contradicts that of Lord Denning in *Lloyd v Brassey* supra and is, in the writers' view, preferable. It is not apt to describe payments to employees to compensate for their loss of jobs resulting from the absence of work for them to do as being any sort of reward or compensation given by reference to personal services actually rendered.

However, this explanation of why a redundancy payment should not be taxable as a matter of law contradicts any argument in favour of a requirement for there to be any minimum period of employment. There may often be circumstances where it would be appropriate to make a payment to compensate an individual even where he has a short period of service because, for instance, he has recently moved from another job. In practice, many non-statutory redundancy schemes, particularly those designed to meet a particular set of circumstances, such as the closure of a business, do not contain a requirement for a minimum period of service, which explains paragraph 3 of SP1/81 (see supra). In any case, to impose a requirement of a minimum period of service in categorising a redundancy payment is to nullify paragraph 3 of the Statement of Practice to that extent. Lord Woolf's comment that SP1/81 "accords with the position in law of payments made to an employee on redundancy under a non-statutory redundancy scheme" (at 577, 578) does not sit easily with this aspect of his judgment.

So far as the legitimacy of the requirement of a minimum service period in defining redundancy, both in the employment law and tax contexts, is concerned, the test is perhaps explicable as imposing an easily ascertainable requirement which obviates the need for any sort of motive test and has appeal as a test of administrative convenience. The unfortunate consequence of this, test, however, is the fact that it now remains to be seen whether employers operating schemes without a minimum service requirement are able to continue to rely on SP1/81 and paragraph 3 in particular.

The second aspect of Lord Woolf's description of what amounts to redundancy which invites attention is the assertion that it is a quality of redundancy that "the right when it accrues increases, initially, with the period of employment and subsequently reduces until eventually the employee loses any right of repayment upon his reaching normal retirement age" (see supra).

Unfortunately, Lord Woolf does not explain the basis of his assertion. The most obvious source is the statutory redundancy scheme itself. Thus, EP(C)A 1978 Schedule 4 provides for employees to receive one and a half weeks' pay for each year of employment in which the employee was 41 or older, one week's pay for each year of employment for which the employee was between 22 and 40 and one-half week's pay for each year of employment in which the employee was below the age of 22, subject to a maximum in all cases of 20 years of employment. However, where the employee is made redundant between his 64th and 65th birthdays, his redundancy payment will be reduced by the proportion of the year he has worked from his 64th birthday to his 65th birthday, with him having no entitlement if he continues to work after his 65th birthday.

The statutory scheme is difficult to reconcile with Lord Denning's view of the nature of redundancy referred to supra as having a nexus to a proprietary interest but can be reconciled with Lord Woolf's view of redundancy payments being made to compensate an individual for the hardship of losing his job. An individual who is made redundant at, for instance, the age of 50 is likely, as reflected by the statutory scheme, to suffer greater hardship than an individual of 21, as it is likely that he will be approaching the peak of his earning power, have greater economic responsibilities and have less prospect of finding alternative employment. Conversely, an individual who has reached the age of 64, will be likely to suffer less from the impact of redundancy as he will be likely to be moving towards retirement at the age of 65 and would therefore only lose a maximum of one year's employment and will be likely to have built up sufficient pension rights (whether through an occupational pension scheme or otherwise) to ensure that he will be adequately provided for in his retirement. However, this does once again result in Lord Woolf's view of redundancy being narrower than that contemplated by SP1/81 which makes no reference whatsoever to any requirement of the tapering of redundancy rights as retirement age approaches in relation to a payment escaping taxation. As with the minimum service requirement, the test is perhaps explicable as one of administrative convenience in identifying a true redundancy payment. It is a pity that Lord Woolf failed to justify either test.

Once again one must ask what the fate will be of payments made under an extra-statutory scheme involving otherwise genuine redundancy payments are not tapered by reference to retirement age. It is likely that **most** extra-statutory redundancy schemes will **not** have any tapering of redundancy rights in the manner described by Lord Woolf. May employees paid under such schemes rely on SP1/81 or is this Statement of Practice now, to the extent that it does not refer to a tapering requirement, otiose?

So far as the effect of the decision in *Mairs v Haughey* on the status of SP1/81 is concerned, both in relation to the minimum service and the tapering requirements, one must examine Lord Woolf's exposition of the ratio of his decision (at 579) with care. It will be recalled that only payments made under schemes which satisfied these requirements escaped a Schedule E charge under s.19, according to Lord Woolf, based on the wording of that section and s.131(1) alone. However, (at 579) Lord Woolf, having referred to *Hochstrasser v Mayes* [1960] AC 376, *Comptroller of Inland Revenue v Knight* [1973] AC 428 and *Shilton v Wilmhurst* [1991] STC 88, concluded that these authorities treated "payments either from a distress fund or to relieve distress" as falling outside a charge to tax under Schedule E under general principles (i.e., s.19). Since a redundancy payment was compensation for the "unfortunate consequences of becoming unemployed", such payments fell within those authorities and thus were outside a charge to tax under s.19.

What is **not** clear is whether the "payments" referred to (at 579) were payments made under a scheme which satisfied the minimum service and tapering requirements only, or all otherwise genuine redundancy payments.

It is perhaps (just) arguable that the ratio of *Mairs v Haughey* can be restricted to the proposition that all payments made from a distress fund or to relieve distress are not taxable under s.19 whether or not the scheme under which they were paid satisfied the tests described above. On this basis Lord Woolf's comments as to the minimum tapering requirements are obiter observations or mere indicators (not necessary conditions) of redundancy. However, Lord Woolf's extensive discussion of the minimum service and tapering requirements as "qualities" identifying redundancy payments and his emphasis on redundancy payments being "only payable in limited circumstances" (at 580) suggests that any such analysis is optimistic. It follows that SP1/81 may well not survive the implications of *Mairs v Haughey* in respect of payments made under extra-statutory schemes which do not satisfy the minimum service and tapering requirements to protect payments made under such schemes from a Schedule E charge under s.19. Both requirements may be justifiable (in both the employment law and tax contexts) as imposing tests of administrative convenience, as discussed above. What is unfortunate is the possible stripping of SP1/81 (and paragraph 3 in particular) of any effect when that Statement of Practice was expressly approved as accurately reflecting the state of the law, especially as the legitimacy of those tests in principle is not, at least to these writers, established peradventure.

National Insurance Contributions

A corollary of the conclusion that genuine redundancy payments do not constitute "emoluments" for the purposes of s.131 Taxes Act 1988 is that they should also not constitute "earnings" within the meaning of s.3(1)(a) Social Security and Contributions Benefit Act 1992 and should therefore not attract either primary or secondary national insurance contributions. There should therefore be no question in such cases of the Department of Social Security seeking to argue that where a redundancy payment is made in excess of the statutory requirement, this should be subject to national insurance contributions.

Conclusion

Mairs v Haughey is an important explanation of the law relating to redundancy payments and the circumstances in which they may be taxable. Lord Woolf's conclusion that genuine redundancy payments are not taxable as a matter of general law are, in the writers' view, welcome. However, there are aspects of the judgment of Lord Woolf in the House of Lords which are open to criticism.

The observations concerning the income-capital distinction discussed above were obiter and, in the writers' opinion, unlikely to be followed by other courts, in the light of principle, policy and authority.

The description of the criteria for establishing what are genuine redundancy payments, with its emphasis on a minimum period of employment, gives more grounds for concern, since this may well lead to inequitable discrimination against employees with a short period of service.

The requirement of the tapering of redundancy rights by reference to retirement age may serve to exclude payments made under extra-statutory schemes with no such requirement from the protection of the decision in *Mairs v Haughey* altogether and throw the tax status of such payments onto SP1/81, which does not sit easily with that decision, despite its being expressly approved by Lord Woolf.

The current position seems to be thus: where a payment is made under a redundancy scheme which satisfies all the requirements of the E(P)CA 1978, it will no longer be necessary to refer to SP1/81 even where the amounts exceed the minimum required by the statutory scheme for that payment to escape a change of tax. In other cases, however, an employer may wish to make redundancy payments to individuals without specifying a minimum period of employment or tapering payments to employees approaching retirement, particularly where there is a wide-spread redundancy programme. In these circumstances, employers may, as a result of Lord Woolf's comments in *Mairs v Haughey* as to the definition of a redundancy payment, still need to persuade the Inland Revenue to apply paragraph 3 of SP1/81 dealing with specific instances of redundancy, assuming that it survives the reflections of the Revenue post *Mairs v Haughey* to the extent that it contains a wider definition of redundancy than that adopted by the House of Lords in that case.

Developments are anxiously awaited.