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## NICs on contributions to FURBS: *Forde & McHugh Ltd v HMRC* Michael Collins, Barrister, Temple Tax Chambers

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On an appeal direct to the Upper Tribunal in *Forde & McHugh* [2011] UKUT 78 (TCC) the Tribunal was invited to consider the correctness of *Telent plc* [2008] STC (SCD) 202. The Special Commissioner in *Telent* held that contributions by an employer to a FURBS in which an employee had a contingent entitlement were 'earnings paid to or for the benefit of an earner' for the purposes of the Social Security Contributions and Benefits Act 1992 s 6 and therefore

attracted Class 1 NICs.

It is surprising that *Telent* had not previously been challenged because the basis of the decision has always been obscure. The Special Commissioner held that the employee derived 'the benefit of being a scheme member, with the cost being borne by the [employer]. Thus [the employee] was in receipt of 'earnings' within section 6 (see para 71). The Special Commissioner relied on the fact that 'earnings' for NIC is defined to include any 'remuneration' derived from an employment and held that 'remuneration' had a wider meaning than 'emoluments'. The Special Commissioner referred to *R v Postmaster General* [1877] 3 QBD 428, a case on the compensation payable to telegraph operators on the nationalisation of the telegraph service, as authority on the meaning of 'remuneration' and 'emolument'. It has always been puzzling that reference was made to the Postmaster case in this context because:

- a case on compensation payable to redundant employees has no obvious application to a situation where an employer makes a contribution to a FURBS; and
- the case was decided on the meaning of 'annual emolument.'

At the hearing in *Forde & McHugh* HMRC did not attempt to maintain reliance on the Postmaster case.

In *Telent* the Special Commissioner distinguished the decision of the High Court in *Tullet & Tokyo Forex International Ltd v Secretary of State* [2000] EWHC Admin 350. In *Tullet* the Court considered the meaning of 'earnings paid to or for the benefit of an earner' in the context of a NIC avoidance scheme. Under the scheme the employer took out an insurance policy on the life of an employee. The employer declared that the policy was held for the benefit of the employee and bought a short-dated gilt which it transferred to the insurer as an additional premium, thereby enhancing the value of the policy. The employer then assigned the policy to the employee who surrendered the policy to the insurer, thereby becoming entitled to be paid the (enhanced) value of the policy. It was contended on behalf of the Secretary of State that the transfer of the gilt was 'earnings paid to or for the benefit of an earner' for the purposes of section 6. This contention was rejected by Collins J who held that what the employee received was the enhancement of the policy which was exempt from NIC as a 'payment in kind'. He went on the say at para [22]:

*The limitation [on section 6] is that a payment for the benefit of an employee must provide something for that*

*employee and it is the value of what the payment provides that constitutes his earnings.'*

The Special Commissioner in *Telent* distinguished *Tullet* on the basis that the transfer of the gilt by the employer to the insurer was discretionary, whereas in *Telent* the employer was contractually committed to make contributions to the FURBS. A peculiarity of this part of the decision is that counsel for HMRC in *Telent*, who also appeared for HMRC in *Forde & McHugh*, told the Upper Tribunal that he had made no such argument before the Special Commissioner.

### **Forde & McHugh v HMRC**

In *Forde & McHugh* HMRC submitted that *Tullet* was wrongly decided. The taxpayer, however, submitted that:

- *Telent* was wrongly decided; and
- contributions by an employer to a FURBS in which an employee had a contingent entitlement are not 'earnings paid to or for the benefit of an earner' for the purposes of section 6. Earnings arise only if the FURBS makes a payment to the earner or for his benefit.

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## Employers who have paid Class 1 NICs on contributions to a FURBS will be able to recover the NICs

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HMRC contended that 'remuneration' was wider than 'emolument' and submitted that '[t]he common sense view was to regard [the contributions] as the earnings or remuneration of the employee even though subject to a contingency'.

The Upper Tribunal rejected both of HMRC's arguments in emphatic fashion, although curiously said that the point was a 'finely balanced one'. (HMRC made a further submission which was not in their skeleton argument and which the Tribunal described as 'somewhat of an afterthought'. There is not sufficient space to consider the submission here but it too was rejected by the Tribunal.) The Tribunal said that it was unable to find any difference between the meaning of 'remuneration' and 'emoluments', and dismissed HMRC's appeal to common sense as contrary to the income tax cases such as *Edwards v Roberts* 19 TC 618, CA, which held that contributions to a fund in which an employee had a contingent entitlement were not emoluments, as well as contrary to *Tullet*.

### **Recovery of Class 1 NICs**

Assuming there is no appeal in *Forde & McHugh* can employers who have paid NIC on contributions to a FURBS on the basis that *Telent* was correctly decided recover the NICs? For income tax and CGT purposes a taxpayer cannot recover tax paid on the basis of a case which is subsequently overturned because of the 'prevailing practice' restriction (TMA 1970 Sch 1AB para 2(8)(b)). However, a peculiarity of the NICs recovery provisions (the Social Security (Contributions) Regulations, SI 2001/1004, reg 52) is that there is no prevailing practice restriction. Therefore employers who have paid Class 1 NICs on contributions to a FURBS will be able to recover the NICs.