TC03345

Appeal number: TC/2012/00085, TC/2012/03692 & TC/2010/04293

National Insurance Contributions – Class 1A - benefit of the use of a car and fuel – whether a pool car within section 167 ITEPA 2003 – held - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) VINYL DESIGN LIMITED
(2) MR M HANMER
(3) MR G TEMPLEMAN **Appellants**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
MRS GILL HUNTER

Sitting in Bedford Square, London, on 17 July 2013.

Mr P Hill, Accountant, Dominic Hill Chartered Accountants represented the Appellants.

Darren Bradley, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision issued by HMRC on 5 October 2010 to charge Class 1A NIC for car and fuel benefits for the periods 1 August 2007 to 5 April 2010 inclusive as a result of vehicles being provided for two directors of Vinyl Design Ltd ("the Company").

2. The decision was issued under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 ("SSC 1999")

3. The first point at issue is whether the two cars used by the two directors of the Company during the relevant period satisfy all the conditions of section 167 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") to categorise them as pool cars.

4. The second point is whether the provision of the vehicles to the directors constitutes a taxable benefit.

5. Mr Hanmer and Mr Templeman are the only two directors of the Company.

Background facts

6. The Tribunal was able to establish the following facts.

(1) The Company carries on a business of computer generated vinyl graphics and was set up over 10 years ago. They operate from a workshop in Eastbourne, Sussex.

(2) The directors started working in the business in 2007.

(3) The Company undertakes the work of sign writing for shop windows, cars, vans as well as hoardings at football grounds and trade mainly with the local community.

(4) The Company has two employees, who are the directors and uses two self-employed workers.

(5) There are three company cars, an Audi, Mercedes and an out of use Renault Laguna. The Audi is used by Mr Hanmer and the Mercedes by Mr Templeman.

(6) The cars are not left at the Company's premises due to issues of security and vandalism.

(7) All fuel for the cars is purchased by the Company.

(8) The directors have not operated a mileage or journey log for the journeys undertaken.

(9) The Tribunal was provided with the minutes of a meeting of directors on 18 July 2007 which confirmed that the cars should be used by all employees of the Company for business purposes and not for private use.

(10) The cars were parked at night by the directors at their home. The directors have confirmed that they had other vehicles which were for their private use.

Legislation

(1) Class 1A NICs are payable by the employer in respect of those earnings of the employee as are left out of account for the purposes of Class 1 NICs. The benefits of a car provided by the employer and of fuel are left out of account for Class 1 NICs and the benefits are therefore subject to Class 1A contributions.

(2) Chapter 6 of Part 3 ITEPA provides for the treatment of benefits related to cars and earnings of the employee.

(3) Sections 114–148 of Chapter 6 provides for the determination of an amount of earnings based on the original price of a car for a car which is made available to an employee by reason of his employment.

(4) Section 149-153 provides an amount to be treated as earnings if fuel is provided for a car by reason of employment: the amount is a percentage which is determined by reference to the CO2 emissions and engine capacity, of a fixed a monetary sum (£14,400 in 2007/08; £16,900 in 2008/09 and £16,900 in 2009/10) irrespective of the actual amount or value of fuel provided.

(5) Section 167 ITEPA provides an exemption for pool cars if the provision of the car satisfies the particular conditions in section 167(3) ITEPA. In such a case, the car is treated as not having been available for private use with the result that the provision is not taxable and the provision of fuel for it is not taxable.

7. In this appeal, the Appellants appeal against HMRC's decision mainly on the basis that the car provided to the directors was a pool car.

8. For completeness, there are five conditions, all of which must be satisfied in order for a car to be considered a pool car. These conditions are:

(1) The car was made available to, and actually used by, more than one of the employees;

(2) The car was made available, in the case of each of those employees by reason of the employees' employment;

(3) The car was not ordinarily used by one of those employees to the exclusion of the other;

(4) In the case of each of those employees, any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year; and

(5) The car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees were residing, except while being kept overnight on premises occupied by the person making the car available to them.

9. The five conditions are essentially questions of fact. Each condition must be considered in turn and each condition must be satisfied. It is not enough that a car satisfies four of the five conditions. All five conditions must be satisfied.

10. The onus is on the Appellants to provide the necessary evidence on a balance of probabilities.

Appellants' submissions

(1) The Appellants say that HMRC have adhered to the criteria indicating whether a car is used 100% for business or not in a very strict manner. The facts of the particular case should be considered.

(2) The cars are kept at the directors' home because of the location of the workshop in an industrial estate which is deserted at night and a prime spot for vandalism. There are security issues at the industrial estate. They have provided testimonies from local businesses which support this position.

(3) They say that the directors frequently have to go to a customer's home direct from their own home early in the morning and therefore have the cars available at their home. They arrange their diary visits to make direct journeys as it is the most efficient use of time rather than going to the workshop first and then on to the customer. They also offer a 24 hour emergency service, for example, where a sign has fallen down or a safety hazard, and an emergency response is required. The directors have an obligation to safeguard the assets of the Company and to leave the vehicles at the workshop would inevitably mean that they would be damaged.

(4) The vehicles have been solely used for business purposes. The two directors have their own private vehicles which they use for social and family purposes. The vehicles are not used privately. There is an agreement between the two directors that private use is prohibited. This agreement appears in the minutes of a meeting in 2007.

(5) The vehicles are used in exactly the same way as a van. They contain tools and other equipment which makes it difficult for the vehicles to be used for family or social purposes. The vehicles carry materials and workers during working hours and are specially equipped with roof racks and other fittings which make the vehicle suitable to be used for the purposes of work and the business.

(6) It is accepted that the Appellants have not kept mileage or journey logs which shows the business use of the vehicles.

(7) The Appellants say that given the company has essentially two employees, they both share the use of the vehicles and the structure for sharing is less formal and not documented in any particular agreement.

(8) The Appellants indicated that they do a substantial amount of work from home and in that sense the car being parked outside the home would be tantamount to being near an office. The home location is used as a base for going to clients. The directors have charged some of their home costs onto the accounts of the Company.

The Respondents' submissions

(1) The Appellants have not satisfied the five conditions in section 167 ITEPA 2003 and therefore the cars cannot be considered pool cars.

(2) The use of the cars primarily for business journeys would include a limited amount of private use. However in this case the vehicles are taken home each and every night which suggests substantial private use.

(3) The calculation of the fuel benefits is not disputed.

(4) While it is accepted that there is a security issue at the office location, it is possible to secure the office with CCTV or to park the cars inside the office premises since there are parking facilities. These are options available to the directors rather than taking the cars home. They say that the cars have been taken to the directors' homes for financial reasons and not for work related reasons.

Assessment

Vinyl Design Ltd

Period	Date of Assessment	Date of Appeal	Class 1A NIC Due	Legislation
2007/08	05/10/2010	18/02/2011	£2,260.00	Section 8 SSC Act 1999
2008/09	05/10/2010	18/02/2011	£3,545.00	Section 8 SSC Act 1999
2009/10	05/10/2010	18/02/2011	£1,738	Section 8 SSC Act 1999

Mr M Hanmer

Year Ended	Date of Assessment	Date of Appeal	Tax Due	Legislation
05/04/2008	28/09/2010	28/09/2011	£1,183.16	Section 29 TMA 1970
05/04/2009	22/05/2012	14/06/2012	£1,768.50	Section 28A TMA 1970
05/04/2010	22/05/2012	14/06/2012	£ 867.00	Section 29 TMA 1970

Mr G Templeman

Year Ended	Date of Assessment	Date of Appeal	Tax Due	Legislation
05/04/2008	28/08/2010	28/09/2011	£2,729.68	Section 29 TMA 1970
05/04/2009	22/05/2012	14/06/2012	£4,814.85	Section 28A TMA 1970
05/04/2010	22/05/2012	14/06/2012	£1,850.00	Section 29 TMA 1970

11. The Taxpayer's Self-Assessment Tax Return had not been submitted at the time of HMRC's review and the figures for 2009/2010, it transpired, were not declared on the completed return. For 2009/10, Mr Templeman's car benefit is £4,954.00 and his fuel benefit is £3,887.00 and for Mr Hanmer his car benefit is £13,456.00 and his fuel benefit £5,405.00.The Tribunal had a discussion on figures and understood that there was some adjustment. Such adjustment would be allowed in arriving at all final figures.

12. HMRC indicated that they would expect appeals on the 2010 assessment. The Appellants pointed out that the vehicles were removed from the business on 1 October 2009. It was therefore agreed by HMRC that any payments due would be postponed pending the appeal. If those postponed amounts become payable interest would be charged. The Tribunal understands that the 2009/10 appeal was included with this appeal and will be decided accordingly. If it is found that the Appellants had in fact removed the vehicles from the business on 1 October 2009 then the appropriate adjustments to the assessment should therefore be made.

Evidence

13. The Tribunal was provided with two ring binders of all of the correspondence, forms, assessments and revenue materials which passed between the parties. There was also a file containing legislation and authorities.

14. The authorities included *Yum Yum Limited v The Commissioners for HMRC* [2010] UKFTT 331 (TC), *Impact Foiling Limited, Michael Roy Flay & Gary James*

Plumb v The Commissioners for HMRC SPC 00562 Spc (3 October 2006) and *Inland Revenue v Quigley* [1995] BTC 356.

15. The Appellants provided insurance documentation, a set of accounts for 2010 and 2011 and various testimonials from other businesses in the industrial estate where the office is located attesting to the security issues which were highlighted by the Appellants.

16. The insurance for the Mercedes car allowed both Mr Templeman and Mr Hanmer to drive. There is a limitation on the use of the car for "social, domestic and pleasure purposes and travel between home and permanent place of business". The insurance for the Audi car was only in the name of Mr Hanmer and had the same limitation as to use as stated for the Mercedes.

17. The Appellants also provided minutes of a meeting in 2007 which allowed the car to be pooled for employees and restricted private use.

18. The accountants for the two Appellants indicated that the value of the cars and the car fuel benefits outweigh the actual values of the cars as they are second hand. The Audi was registered in 2003 and was purchased on a second hand value of £6,000 in 2006. It is said to be currently worth £2,000. Its price when new was £21,540.

19. The Mercedes was first registered in 1996 and purchased in November 2004 for £3,000. It is said to be currently worth only scrap value. The list price when new was £42,050.

20. The Company claims that the directors were on 24 hour call but provided no evidence to support that position.

21. The parties do not dispute that the cars were taken home by the directors nightly and were not left at their place of work.

Discussion and conclusion

22. This case can be decided on the basis of the five conditions in section 167 ITEPA 2003. We shall look at these in turn.

23. The first condition is that a car was made available to and actually used by more than one of the employees. The Appellants provided minutes of a meeting stating that the cars were pool cars and were shared 50/50 between the parties. HMRC said that the minutes of the meeting were presented to show that the directors had agreed to pool the cars and not to use them for private purposes but these were not presented until the day of the hearing. The more important question, and based on the legislation, is whether the cars were "made available to" more than one employee. There were two cars in working order and only two directors and no other employees on the payroll and it would appear from the insurance documentation that Mr Hanmer drove the Audi car but both parties were insured to drive the Mercedes car. On a balance of probabilities, the Tribunal thinks it more likely that the cars were used by the directors individually. There were two cars and two directors and no other

employees. The Tribunal therefore is not convinced by the argument of the Appellants that both cars were used 50/50 by each party.

24. This moves us to the second condition as to whether the cars were made available in the case of each of those employees by reason of the employees' employment. There is no dispute that the cars were made available to both Mr Hanmer and Mr Templeman by reason of their employment with the Company.

25. The third condition is that the cars were not ordinarily used by one of those employees to the exclusion of the other. The Appellants have not provided any evidence to demonstrate that the vehicles were not ordinarily used by one employee or director to the exclusion of the other. It has been established in the notes of meetings with the Appellants and HMRC that Mr Hanmer used the Audi and Mr Templeman generally used the Mercedes. It would have been helpful to the Tribunal to have evidence as to the journey log and other details which showed how the vehicles were used. The Tribunal is aware that one car had a roof rack and was used ordinarily as a van. This may be because the car was more spacious and able to accommodate tools, signs, hoarding and other fittings used in the trade. The cars do have different characteristics and one would presume that they would be used differently and by different parties doing different jobs. The more reasonable inference from the facts seems to be that the cars were used by the individual director which is to say that Mr Hanmer used the Audi and Mr Templeman the Mercedes.

26. The fourth condition is that in the case of each of the employees any private use of the car made by the employee was merely incidental to the employee's other use of the vehicle. Private use means use other than business use. The absence of proper paperwork relating to the use of the car and a detailed journey log makes it difficult to establish the split between private and business use. The Company also claims that home to work travel "is considered necessary business mileage to safeguarding the Company assets". The legislation states that a journey between a person's home and their place of business is not a business journey it is ordinary commuting and private travel. The private use of the cars was not therefore incidental to the business use.

27. The last condition is the cars were not formally kept overnight on or in the vicinity of any residential premises where any of the employees was residing. The cars were taken home every night. There is no dispute. The parties have accepted that position. If the cars were kept overnight at the home of the directors when they should have been kept at the premises where the employees worked, it is clear that the condition in the legislation is not satisfied. The legislation is very clear and does not look at the practicality of keeping the vehicles at home at night before going to the job. The test is simply one of where the cars were kept. In this case they were kept at the homes of the directors and not at the place of work. It is clear that though some work was carried out at home, the core business was carried out at the offices on the industrial estate and that is where the cars should have been kept not "in the vicinity of any residential premises where any of the employees was residing". The condition was not met.

28. It is clear that the five conditions in section 167 ITEPA 2003 have not been met and the vehicles cannot be regarded as pool cars.

29. The directors have provided the Tribunal with evidence that there was an agreement that private use is prohibited and the cars should be shared amongst the employees. The argument is noted but the absence of other detailed paperwork makes this less convincing.

30. The legislation which looks at prohibition and private use is contained section 118 ITEPA 2003. It states:

> "(1) For the purposes of this chapter a car or van made available in a tax year to an employee or member of the employee family or household is to be treated as available for the employee or member's private use unless in that year –
>
> (a) the terms on which it is made available prohibits such use; and
>
> (b) it is not so used."

31. This means that even where it is clear that the employer has imposed what is intended to be a meaningful ban on private use, there will still be a car benefit charge if there was any private use actually made of the car during the year in question. Section 118 ITEPA 2003 therefore has a twin test and it is a question of fact.

32. HMRC draw reference to the case of *Gilbert v Helmsley* 55 TC 419. In this case the taxpayer was an employee for a plant hire company. He was required to be on call at all times and was provided with a company car. He used this to travel between his home and the company's nearby business premises and for genuine business trips. He successfully argued before the Tribunal that he was prohibited from using the car privately and he never used the car for private motoring. The critical point in this case is that his workplace was his home and not the employer's premises. All journeys made by the taxpayer, including those made between his home and the company's premises, were therefore business travel. The case clearly turned on the particular facts. The case highlights the fact that a ban on private use must be enforceable and it should carry the possibility of any disciplinary action if the prohibition were to be disobeyed or disregarded.

33. In our case, the taxpayer's place of work was not at his home. It is understandable if the taxpayer works in the emergency services and had to keep his car at home then he may be said to be working from home. Further, the use of the car for business purposes may include a limited private use. The Tribunal is willing to accept that the taxpayers took the cars home to make journeys to clients which required them to leave home in the early morning to get to the clients' addresses. In this case the evidence provided shows that the directors admitted that the vehicles were taken home so the condition in section 118 has not been satisfied.

34. It should be added that the insurance certificate for the vehicle registrations allowed the vehicles to be used for social and family purposes and did not specifically allow business purposes. It seems clear to the Tribunal that the cars were available for

use for private purposes. The fact that the taxpayers had their own private vehicles does not mean that the company cars had not been available for private purposes.

35. The taxpayers have provided no real documentation to show the use of the pool cars by the members of staff, moreover the cars were kept at their home premises. There were no mileage logs available to show the amount and use of the pool cars by the individuals and there were no written procedures or logs of any kind in place to deal with the use of the cars, the recording of the miles and the prohibition on private use. Whilst it is understandable that if there are two employees, this form of documentation may not be available, on advice from their accountants the taxpayers should at the very least have been able to provide some detailed information to the Tribunal to support their point of view. It would make it difficult for the Tribunal to accept the taxpayer's argument that the policy of sharing the cars and observing non-private use was adhered to, as there was no real evidence to support that position. The burden of proof is on the taxpayer and it is on a balance of probabilities and this burden has not been discharged.

36. The Tribunal's view therefore is that the Company vehicles do not fulfil the criteria as set out in section 167 and 168 ITEPA 2003 and therefore the cars were not pool cars. This means that they should have been reported on Forms P11D and subject to Class 1A NIC for the period 1 August 2007 to 5 April 2010 inclusive. The car benefit and car fuel benefit charges on the directors, Mr Martin Hanmer and Mr Guy Templeman are also upheld and the appeal is accordingly dismissed. The assessments against the directors are revenue assessments and involve the making of revenue amendments to their Self Assessment Tax Returns.

37. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 10 February 2014