[2016] UKFTT 776 (TC)

TC05503

Appeal number: TC/2016/00184

NATIONAL INSURANCE CONTRIBUTIONS – Class 1A – decisions in respect of car benefits – whether cars pooled cars – whether deduction for payments for private use allowable – chargeable person – more than one user: relationship between s 148 ITEPA and regulation 36 SS(C) Regulations – excluded employment.

FIRST-TIER TRIBUNAL
TAX CHAMBER

COULDWELL CONCRETE FLOORING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
MRS GAY WEBB

Sitting in public at City Exchange, Leeds on 26 October 2016

Dr R A Milton of Milton & Co for the Appellant

Mr A Burke, Presenting Officer, for the Respondents

DECISION

1. This was the hearing of an appeal notified by Couldwell Concrete Floorings Ltd ("the appellant") to the Tribunal. The appeal was made against decisions made under s 8 Social Security Contributions (Transfer of Functions etc.) Act 1999 ("SSCTFA") that the appellant was liable to pay Class 1A National Insurance Contributions ("NICs") in respect of benefits it had given to three employees. Each of the three decisions was made on the appellant and named one of the employees, Mr Sean Couldwell ("Sean"), Mrs Phillippa Couldwell ("Phillippa") and Ms Abigail Couldwell ("Abigail") (who we refer to together as "the Couldwells").

2. We mean no disrespect by using their forenames as it seems to us more helpful to clearly distinguish them as the circumstances of each are different. We should also add that the appeals made to HMRC against the decisions were made by the appellant and each of the Couldwells, as is permitted by s 11 SSCTFA and regulation 3(3) Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) ("SSCDAR") and as was stated in the Notes accompanying the decisions. HMRC overlooked this when notifying the conclusions of their review of the matter as did Dr Milton when notifying the Tribunal of the appeal.

3. Because Sean and Phillippa own and manage the appellant and all the Couldwells engage Dr Milton there is no disadvantage to them in not being treated as appellants, and Sean and Phillippa produced witness statements. We are satisfied that there was no need to take any formal steps such as joining the Couldwells as appellants in order for justice to be done in accordance with the overriding objectives of the Tribunal.

Evidence

The bundles

4. We had two bundles of documents, prepared by HMRC as is usual in cases of this kind. However one bundle (the "Sch 36 bundle") had been created and used in a previous case, *Couldwell Concrete Flooring Ltd v HMRC* [2015] UKFTT 136 (TC) (Judge Jonathan Cannan and Mr Derek Robertson) ("the 2015 appeal"). That case concerned notices issued by HMRC under Schedule 36 Finance Act ("FA") 2008 which had been issued by HMRC in the course of their investigation into among other things the matters which were the subject of the decisions in this case.

5. The Sch 36 bundle had therefore included the early correspondence and other documents relating to the appeal and it seems on the face of it a sensible decision to produce that bundle for this hearing, though at the cost of giving everyone a large amount of unnecessary material relevant only to the 2015 appeal. But Dr Milton's skeleton had raised what seemed to us an important issue. In that skeleton he had pointed out that the Sch 36 bundle included two authorities, for the inclusion of which he said Judge Cannan had "strongly rebuked" HMRC (in the person of Mr Burke).

6. It turned out however that it was Dr Milton who has asked for the Sch 36 bundle to be included. When we asked him why he had done that if he did not wish these authorities to be brought to our attention, he said that he assumed that Mr Burke would leave them out.

7. Mr Burke said that it would have been a time–consuming task to fillet the Sch 36 bundle and to just include the relevant papers in the bundle for this hearing, and that Dr Milton's request to include the bundle seemed to be a time-saving opportunity. He had not thought to exclude the authorities which he agreed he had been criticised by Judge Cannan for including in the Sch 36 bundle, as they were in Judge Cannan's view simply prejudicial against Dr Milton.

8. In our view Mr Burke should not have included these authorities in the bundles for this hearing. It would have been the work of moments to remove them from the bundle and to redact or recreate the index to remove all mention of them. We did not on this occasion consider whether to apply any sanctions for this conduct, but Mr Burke is nonetheless rebuked again. We make it clear that we have not read the two authorities.

The relevant documents

9. What the relevant documents consist of is:

(1) A letter from HMRC giving notice of their enquiry into employer issues.

(2) Notes of a meeting between HMRC and Sean and Phillippa.

(3) Mileage logs produced to HMRC for Phillippa in relation to HMRC's enquiry into "mileage payments|" claimed by her from the appellant.

(4) Registration details of three vehicles made available by the appellant to the Couldwells.

(5) Documents supplied by the appellant relating to reimbursement.

(6) The correspondence between the parties following the meeting.

The witness statements

10. In addition there were included in the bundle the two witness statements from Sean and Phillippa respectively. These had been supplied to the Tribunal by Dr Milton in accordance with the directions for management of the case. When supplying them Dr Milton asked the Tribunal if they could be taken as read without the witnesses attending. HMRC objected to that course and said that they expected the witnesses to be available for cross-examination.

11. When the hearing started the witnesses were not present. Dr Milton explained that they had hosted a reception for trade contacts at the weekend and had done the catering themselves. Unfortunately the Couldwells and some of the guests had come down with food poisoning, and were therefore unable to attend. Dr Milton produced no medical evidence of their inability to attend.

12. Dr Milton was not withdrawing the statements, and asked for them to be taken as read. We considered that the statements were relevant to the case and that we would admit them, but that we would give such weight as we thought appropriate, which might not be very much, to any untested assertions of fact.

13. Mr Burke told us and Dr Milton of the areas he would have wished to cross-examined the Couldwells on. In replying to Mr Burke Dr Milton was in effect giving hearsay evidence, but much of it was of the "I think what would have normally happened was …" type. Both Mr Burke and the Tribunal asked Dr Milton about the basis for his assertions and for such further information as he could give, such as the distance between the office and their home. We have given no weight to Dr Milton's hearsay evidence on the Couldwells' behalf unless it is corroborated elsewhere.

14. Finally we notice that the witness statements are not signed in manuscript. They both have a printed signature in a font which looks somewhat like handwriting, and is also a font used by Dr Milton in his correspondence. Dr Milton accepted that he had drafted the witness statements which were, as Mr Burke had pointed out, to all intents and purposes identical.

15. We consider the witness statements and Dr Milton's evidence further below when making our findings of fact.

The appellant's documents at the hearing

16. Before the hearing started Dr Milton handed up a small bundle of documents to which course Mr Burke had no objection, and we accepted them in evidence.

The facts

17. It is something of an oddity in this case that both parties are relying for the facts relevant to their case on a single document, the notes of a meeting ("the Notes") that took place between Mr A Lawrence, an officer of HMRC who has conducted the enquiry in this case throughout, and a colleague on the one hand and Sean and Phillippa on the other. This meeting took place on 4 April 2013 at the offices of the appellant. It was held in response to Mr Lawrence's opening letter of 18 December 2012 in which he informed the appellant that he was conducting a review of their employer liabilities including the Construction Industry Scheme, PAYE and NIC.

The notes of the meeting

18. The Notes were sent to the appellant on 9 April 2016 and in that letter Mr Lawrence made it clear that they were not intended to be a verbatim account of what was said in a meeting lasting about 3½ hours. The appellant had been given an opportunity to comment on the Notes and to make any amendments it wished. It did not do so. Dr Milton did not object to the Notes being put in evidence.

19. Because of their importance we will quote substantial chunks of the notes. Items in [ ] are the Tribunal's additions etc:

> "BRIEF BACKGROUND

…

SC [Sean] also has another company running alongside [the appellant] called SCPS Plant Hire Ltd ["SCPS"]…. SC explained that this company had been set up in March 2012 in case of financial difficulties. [The appellant's] assets were in the process of being transferred to SCPS which included … the company vehicles.

[In fact the company is called SCP*C* Plant Hire Ltd, SC being Sean's initials and PC Phillippa's. Other than in these Notes we refer to it as SCPC]

…

EXPENSES

PC [Phillippa] received a mileage allowance which she claims back from the company for business miles travelled in her company car. There are no company credit cards in existence so PC initially pays for all the fuel herself by her own credit card in either the Land Rover Discovery or Ford Fiesta. The allowances are paid through petty cash.

The rate being claimed at 40p per mile exceeds the HMRC advisory limits for company cars of between 15p and 20p per mile depending on engine size. [HMRC] took details from the mileage records kept for the period April 2012 through to March 2013 and noted that a total of 5780 miles was claimed by PC and £2,311.20 received in allowances during this period."

…

COMPANY CARS

SC and PC advised that there are four which are pool cars (detailed below) but no records have been kept of either their usage or mileage. SC and PC said that these vehicles are either kept at the business premises or at home.

Land Rover Discovery …. S1 CCF - date of registration 1/9/10, bought by SCPS but leased back to [the appellant].

Ford Fiesta Zetec EJ61 SNX – date of registration 23/12/11, bought by SCPS but leased back to [the appellant]…..

The above two vehicles are kept at SC/PC's home address and usage tends to be split between them. The Fiesta was first used in December 2012 as it was bought second hand.

Fiat 500 BN59 SZV – date of registration 30/9/09 The Fiat is used by Abigail … bought by [the appellant] but transferred to [SCPS] from March 2012. Abigail uses her own money to purchase fuel in this car and does not claim any allowances back from the company."

The computations

20. In his letter of 9 April 2013 Mr Lawrence enclosed a computation of the PAYE and Class 1 NIC which in his view arose from the excess mileage payments made to Phillippa. The "additional remuneration" was £1,444.00. We mention that this amount was not part of the appeal, but it does figure in Dr Milton's arguments.

21. That letter also enclosed his calculation of the Class 1A liabilities which in Mr Lawrence's view arose (and also of the income tax payable by them on the same benefits). Because of arguments about amounts and the validity of the decisions which were made we set out an extract from the NIC figures here, with some rearrangement.

Sean:

2010/11	Car Benefit £9,391	Class 1A NIC	£1,202.04
2011/12	Car Benefit £15,796	Class 1A NIC	£2,179.84
2012/13	Car Benefit £15,796	Class 1A NIC	£2,179.84

Phillippa

2012/13	Car Benefit £608	Class 1A NIC	£83.90

Abigail

2009/10	Car Benefit £649	Class 1A NIC	£83.07
2010/11	Car Benefit £1261	Class 1A NIC	£161.40
2011/12	Car Benefit £1261	Class 1A NIC	£174.01
2012/13	Car Benefit £1765	Class 1A NIC	£243.57

What these calculations and the subsequent decisions singularly lack is any explanation of how the cash equivalents, the "Car Benefit", were calculated.

The registration details

22. The evidence of fact in the bundles are extracts from the DVLA records for vehicles:

(1) S1 CCF (Land Rover) is shown as acquired on 24 April 2012 by [SCPC], with its date of first registration as 1 September 2010.

(2) EJ61 SNX Ford Fiesta Zetec is shown as acquired on 12 November 2012 by [SCPC], with its date of first registration as 23 December 2011.

(3) BN59 SZV Fiat 500 is shown as acquired on 24 April 2012 by [SCPC], with its date of first registration as 30 September 2009.

It is clear from the mileage records and what was said by Sean and Phillippa to Mr Lawrence that there was a vehicle before S1 CCF which is described in the bundle elsewhere as the predecessor. Mr Burke drew our attention to a reference on one of the mileage records (see §§24 to 27) to the registration YD60TMZ. This he suggested was the "predecessor" vehicle to which Phillippa's mileage records relate. We say from judicial knowledge that a vehicle with a registration with "60" in it cannot have been registered before August 2010.

23. More likely it seems to us is that YD60TMZ was the registration of the vehicle when new and that since S1 CCF is a cherished number (CCF standing for Couldwell Concrete Flooring) that number was assigned to the vehicle when the appellant purchased it.

The mileage records

24. On 2 May Mr Lawrence had asked Dr Milton for details of all mileage allowances paid by the company to Phillippa prior to April 2012 (he had seen and taken copies of those from April 2012 to date at the meeting). It is not clear when they were supplied but Mr Lawrence records in 21 October 2013 that the mileage records requested had been supplied. They are included in our bundle, with some analyses of them made by Mr Burke to the admission of which Dr Milton did not object.

25. Each page in the records is for a month and shows columns for Date, Summary of locations visited, Start of day [mileage], End of day [mileage], Miles, Business [miles] and Private [miles].

26. Locations visited include "office", "home" and what we were told by Dr Milton were sites where the appellant was carrying out business. We cannot tell if all the other locations not shown as home or office were sites. Many days are marked "N/U" which we take to mean "not used". It is not stated where the car was when not in use., but an examination of some of the records show that an "N/U" day frequently followed a day when the last location listed was "home".

27. Many of the private mileage entries in the final column were "8", "5" or "4". We asked Dr Milton how far it was from the office to the Couldwells' home. He did not know.

28. Mr Burke who said he had lived in or near the village outside Wakefield where the Couldwells lived suggested it was 5 miles. We have consulted Google Maps. Using the "directions" function the distance is shown as between 3.5 to 4.1 miles. We therefore find it more likely than not that the entries for 8, 5 and 4 miles were journeys from home to office and/or vice versa. We consider that this use by us of that website is not inconsistent with the decision of the Upper Tribunal (Administrative Appeals Chamber) in *HI v Secretary of State for Work and Pensions* [2014] UKUT 238 (AAC) (Judge Jacobs)

29. The analysis carried out by Mr Burke shows his calculation of the percentage of private miles in the total for each month. For the 17 months of the predecessor vehicle the average private use percentage was 16.80%, and for the 17 months of records for S1 CCF it was 13.51%. The lowest in any month was 4.36% and the highest 46.77%.

30. Another of Mr Burke's analyses purports to show the days when the vehicle was "available at home". The first month considered is April 2009 and Mr Burke shows the vehicle was available at home from 20 to 26 April inclusive. The mileage records

show however that the vehicle was in a garage at "crigg" and on 27 April its location was "garage – office – home".

31. We do not accept that the vehicle was "available at home" on those days. It is more likely that the vehicle was in garage for repair or attention. We have not examined the analysis further in any detail.

The appellants' documents produced at the hearing

32. This small bundle consisted of:

(1) A letter from Phillippa writing as company secretary of the appellant saying that Abigail started work for the appellant on 17 June 2011.

(2) Three letters from the appellant, unsigned and without reference to any signatory, dated 22 July 2013 stating that the appellant received £40,983, £4,287 and £606 from Sean, Abigail and Phillippa respectively "for Reimbursed benefits".

(3) Three pages of banks statement for an account in the name of the appellant.:

(a) The first showed two receipts of £1,440 and £3,171 from P Couldwell on the account SA & P Couldwell dated 23 May 2013.

(b) The second showed a receipt of £25,187 by cheque no 500120 but no name dated 24 May 2013.

(c) £The third showed a receipt of £17,510 from P Couldwell on the account SA & P Couldwell dated 22 July 2013.

We say now that we think it more likely than not that the payment on the second page (item 3(b)) also came from Sean and Phillippa and we so find. We also note that the first page was in our bundle.

33. Because these documents were only produced at the hearing we gave Mr Burke an opportunity to make written submissions on them, which he did.

The witness statements

34. Each of the statements consist of 18 paragraphs:

(1) Paragraph 1 of each is a statement of identity and position, Sean as director, Phillippa as company secretary.

(2) Paragraphs 2 to 5 of each are opinion evidence and we take no account of them.

(3) In paragraph 6 each statement says: it is seen from the said statement [HMRC's statement of case] that the vehicles were kept at the business premises.

We take this to be a statement in evidence of the fact that the vehicles [sc the cars] were kept at the business premises.

(4) Paragraph 7 states that the "vehicles were available to use by any of the employees." Dr Milton said in evidence that there were four employees, Sean, Phillippa, Abigail and a Rebecca Land who had her own company car which was not the subject of this appeal.

(5) Paragraph 8 states that "Sometimes they were kept at the employees home address but that would be when they had finished late and did not come back to the office so the vehicle would have been used to come into work the next day".

(6) Paragraph 9 states that "we have sent detailed [mileage] logs to HMRC.

(7) Paragraph 10 states that "We got fed up of dealing with HMRC's endless enquiries and to be rid of them reimbursed the company for the alleged benefit."

(8) Paragraphs 11 to 15 relate to later vehicles which are not the subject of this case.

(9) Paragraph 16 is opinion.

(10) Paragraph 17 is about other matters taken to the Tribunal and is irrelevant to this case.

(11) Paragraph 18 is opinion.

(12) After that there is a Statement of Truth. As we have noted, there is no manuscript signature. The statements are dated 30 June 2016.

35. Dr Milton said in evidence in response to questions from Mr Burke and the Tribunal that when the Couldwells wished to go out on private occasions they used a Harley-Davidson motor cycle of which they were fans. They would also cycle to and from work and Abigail would get the bus.

The relevant, but not included, documents

36. We add here that there are documents that we would have expected to see in the bundles but did not. This includes the forms P11D and P11D(b) for each tax year. It was explained to us that there had been none. That makes the absence of calculations of the cash equivalent all the more unfortunate. We were also told that in fact no action has been taken until recently to assess the cash equivalents on the Couldwells as income chargeable to income tax. Mr Burke put in evidence letters relating to assessments to income tax that have recently been made on Sean and Phillippa but not Abigail. They appear to be out of time in the case of at least one year and possibly both, but that is not our concern.

Our findings of fact

The Land Rover(s)

37. We find as a fact from the uncontested evidence of HMRC, the Notes, that, in relation to Land Rover S1 CCF and its predecessor, the vehicle was made available by the appellant (acting as the owner or as lessee from SCPC) to Sean and Phillippa and was used by them.

38. We find as a fact from the mileage records and Mr Burke's analysis of them that the vehicle was used by them for journeys which were not business journeys and that the private usage was in each relevant tax year between 10% and 20%.

39. We find as a fact from the mileage records that the vehicle was kept overnight at the home of Sean and Phillippa on a substantial number of occasions. Dr Milton argued, and paragraph 8 of the witness statements said, that those occasions ("sometimes") were all as a result of employees returning late from a site and not returning to the office. Dr Milton did not however take us to the mileage records to demonstrate which these occasions were. We cannot accept Sean and Phillippa's witness statements as evidence of this, as they did not attend to be cross-examined where they could have been asked to identify the relevant occasions from the records. We find then that there were a significant number of occasions when the vehicle was kept overnight at their home otherwise than in the "working late on site" circumstances.

40. We add that from our scrutiny of the records there seem to be a large number of occasions when 8 miles private mileage is shown, which we have found are "home to office to home". We find that any journey that ends "office to home" cannot be one to which paragraph 8 of the witness statement applies.

41. And there were a number of days when the car was shown as "not used". We consider it is more likely than not that on the majority of those days the car was kept at the Couldwells' home address, and we so find.

The Ford Fiesta

42. We find as a fact from the uncontested evidence of HMRC, the Notes, that in relation to the Ford Fiesta the vehicle was made available by the appellant (acting as the lessee from SCPC) to Sean and Phillippa and was used by them.

43. There were no mileage records for the vehicle before us. We had no evidence of any fetter placed by the appellant or SCPC as lessor on the use of the car, and we find as a fact that the vehicle was in any event used by Sean and Phillippa for journeys which were not business journeys.

44. For the same reasons as given in §39 in relation to the Land Rover we find as a fact that there were a significant number of occasions when the vehicle was kept overnight at their home on a number of occasions otherwise than in the "working late on site" circumstances.

The Fiat 500

45. We find as a fact from the uncontested evidence of HMRC, the Notes, that in relation to the Fiat 500 the vehicle was made available by the appellant (acting as the owner or the lessee from SCPC) to Abigail and was used by her. We had no evidence to show that Sean and Phillippa used this car.

46. We find as a fact from the statement in the Notes that Abigail paid for her fuel herself and did not claim a mileage allowance and as a result we find as a fact that her

use of the car was entirely for private purposes (which includes home to office commuting).

47. We also find that it is more likely than not that this car was never kept at home in the "working late on site" circumstances.

48. But we also find as a fact that the car was not initially made available to Abigail by the appellant by reason of her employment, as she was not employed by the appellant until 17 June 2011. We also find that, in the absence of evidence that, after the car's transfer to SCPC, it was leased back to the appellant, that the appellant ceased to make it available to her after 24 April 2012.

Private use generally

49. It was stated by Dr Milton that there was no private use (in the ordinary sense – ie on non-working days and for travel other than to and from the office or sites) by the Couldwells, and that they made other travel arrangements to get to or from work and that Sean and Phillippa used the Harley-Davidson at weekends.

50. As far as home to office travel is concerned we have found that the Land Rover and Fiesta were used for home to office travel on a number of occasions. We do not we consider need to make any findings of fact about these matters, but had we to do so we would have rejected Dr Milton's evidence as unsubstantiated, especially by the Couldwells themselves.

The law & the issues

51. As there are three different issues in this case and the law relating to each is separate (and in some cases extensive) we will recite the statute law so far as we need to in the sections of this decision dealing with our discussion of the issues.

52. HMRC put forward four decisions of this Tribunal for our consideration. Again we will consider them at the appropriate place in our discussion of the relevant issue.

The issues

53. The parties were agreed that there were two main issues:

(1) Were each of the cars a pooled car within the meaning of s 167 ITEPA? ("the pooled car issue")

(2) If any was not, was a charge under ITEPA, and therefore the NICs legislation, nullified to any extent by payments made by the Couldwells to the appellant? ("the reimbursement issue").

54. We deal with the parties' submissions separately in relation to those issues. But Dr Milton's submissions also raised a number of points which went to both the figures and, he said, the validity of the decisions. We discuss this third issue separately in a section of our decision that follows the discussion of the two main issues.

The pooled car issue: discussion

55. There is no dispute that the only relevant substantive law here is s 167 ITEPA 2003. This provides:

> "(1) This section applies to a car in relation to a particular tax year if for that year the car has been included in a car pool for the use of the employees of one or more employers.
>
> (2) For that tax year the car—
>
> (a) is to be treated under section 114(1) (cars to which this Chapter applies) as not having been available for the private use of any of the employees concerned, and
>
> (b) is not to be treated in relation to the employees concerned as an employment-related benefit within the meaning of Chapter 10 of this Part (taxable benefits: residual liability to charge) (see section 201).
>
> (3) In relation to a particular tax year, a car is included in a car pool for the use of the employees of one or more employers if in that year—
>
> (a) the car was made available to, and actually used by, more than one of those employees,
>
> (b) the car was made available, in the case of each of those employees, by reason of the employee's employment,
>
> (c) the car was not ordinarily used by one of those employees to the exclusion of the others,
>
> (d) 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
>
> (e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them."

56. The parties were also agreed that all of the conditions in subsection (3) were required to be met, and that failure to meet any one was fatal to the appeal on this ground.

57. Accordingly Dr Milton's submission was, and indeed had to be, that all the conditions were met. His prayed in support of this the appellant's witness statements.

58. He also maintained that HMRC's only argument in support of their case was a statement by Mr Lawrence in the Notes that:

> "The officers said that as the cars were being taken home at night, were available for private use and being used for ordinary commuting this attracted a car benefit in every case."

59. This he argued was incorrect and was a tenuous basis for HMRC's assertion that the *onus probandi*, as he called it, lay on the appellant. He said that if HMRC had

questioned the witnesses in more detail at their meeting, the facts in the witness statements would have been elicited then.

60. Mr Burke had in his skeleton argued that the appellants did not meet four of the conditions in s 167(3).

61. He said that the condition at s 167(3)(a) was not met as the cars for which there were details were not available to other employees and actually used by them.

62. He said that the condition at s 167(3)(c) was not met as the mileage logs were not specific and so it could not be shown that either Sean or Phillippa didn't use the cars to the exclusion of others.

63. The condition at s 167(3)(d) was not met as the mileage logs showed that private use was more than incidental as it comprised home to office commuting to a substantial extent.

64. The condition at s 167(3)(e) was not met as the private use referred to in s 167(3)(d) was not as a result of the keeping the cars overnight in the circumstances set out in s 167(3)((e).

65. In the hearing Mr Burke also argued that the condition in s 167(3)(b) was not met. We did not fully grasp his argument on this point, but we assume it is that any use by a potential pooled car by a person who is not an employee would cause the condition not to be met, and that he had Abigail in mind before her employment. But this overlooks that the condition is to be tested "in the case of each of those employees", not in the case of each user. But quite why it is a relevant condition at all is a mystery to us, as it seems to us that it would always be met in any conceivable set of circumstances.

66. Finally Mr Burke argued that the keeping of records of usage as stated in HMRC Booklet 480 was a "fundamental requirement" of pooled car treatment, and no evidence to this effect has been produced.

67. In support of his case he cited *Erediauwa v HMRC* [2010] UKFTT 630 (TC); *Jubb v HMRC* [2015] UKFTT 0618 (TC); *Munden v HMRC* [2013] UKFTT 427 (TC) and *Vinyl Design Ltd, Hanmer and Templeman v HMRC* [2014] UKFTT 205 (TC).

68. When considering the conditions we have to look at each car in each tax year separately and this we do.

69. The Land Rover and its predecessor were available in 2009/10 to 2012/13.

(1) As to (a) the vehicles met the condition. They were available to two employees, Sean and Phillippa, and were used by them. It is irrelevant to s 167(3) that Sean and Phillippa are married and are both office holders and that there was before July 2011 only one other employee.

(2) As to (b) the vehicles met the condition. They were made available to both Sean and Phillippa by reason of heir employment. Mr Burke did not point to any other reason for their being made available to them.

(3) As to (c) the vehicles met the condition as there was no evidence that the Land Rover was ordinarily used by only one of them. It seems to us highly likely that on many occasions both would have been in the car. Only Phillippa paid for petrol as it was she who was in charge of accounts and administration.

(4) As to (d) the car did not meet the condition on the evidence of the mileage logs.

(5) As to (e) in view of our finding of fact at §39 we hold that the condition is also not met.

We therefore hold that the Land Rover and its predecessor were not in a car pool.

70. We add that the keeping of records in accordance with HMRC publications is not part of the statutory test nor is it a "fundamental requirement" for there to be a pooled car. Without those records an appellant may struggle to convince a Tribunal that the conditions are met: but that a car may be a pooled car without such records is clearly possible, as Mr Burke knows from a decision of Judge Thomas (the judge in this case) in *Dugan v HMRC* [2016] UKFTT 618 (TC), a case which also cited in support *Industrial Doors Ltd v HMRC* [2010] UKFTT 282 (TC) (Judge Gemmell).

71. The Ford Fiesta was available in 2011/12 and 2012/13.

(1) As to (a) the vehicle met the condition. They were available to two employees, Sean and Phillippa, and were used by them. It is irrelevant that Sean and Phillippa are married and are both office holders and that there was only one other employee, apart from their daughter Abigail.

(2) As to (b) and (c) the vehicle met the conditions for the same reason as the Land Rover does.

(3) As to (d) and (e) the car does not meet the conditions. There was no evidence which we could accept that the car was not used more than incidentally for private use including home to office commuting, nor that the only occasions on which the car was kept overnight at the home address were in the circumstances set out in s 167(3)(e).

We therefore hold that the Ford Fiesta was not in a car pool.

72. The Fiat 500 was available in 2009/10 to 2012/13.

73. For 2009/10 and 2010/11:

(1) The car did not meet the condition in s 167(3)(a) as it was not made available to an employee at all. There was no acceptable evidence that this car was used by Sean or Phillippa.

(2) For the same reason it did not meet the condition in (b).

(3) Inevitably it also did not meet the condition in s 167(3)(c) to (e)

and we hold that in those two years the Fiat 500 was not in a car pool.

74. In 2010/11 and 2011/12

(1) the Fiat 500 did not meet condition (a) as there was no evidence that the car was made available to Sean or Phillippa.

(2) It meets condition (b).

(3) It did not meet condition (c) for the same reason as it fails s 167(3)(a).

(4) It did not meet condition (d) and (e) for the same reason, lack of evidence.

75. We hold that in 2011/12 and 2012/13 the Fiat 500 was not a pooled car.

76. We have not overlooked the four cases cited by HMRC. But each pooled car case turns on its own facts and the cases are not binding on us, and we have found nothing in them that helps us in this particular case.

The reimbursement issue: discussion

77. We have held that the cars are not pooled cars, so they are not prevented from giving rise to benefits under Part 3 ITEPA. The parties were it seems agreed that if they were not pooled cars a charge under the benefits code in ITEPA arose unless there was a provision in that Act that applied to reduce or cancel the cash equivalent of the benefit of the car. It was Dr Milton's submission that there was indeed such a provision.

78. We add that at no time had Dr Milton explained in correspondence which provision of ITEPA he was talking about. Mr Burke had therefore prepared his Statement of Case and skeleton argument on the basis that the rules in s 132 ITEPA about a capital contribution to the cost of the car might be relevant. At the hearing Dr Milton said he was not arguing that s 132 applied. Had he done so we would have held that it did not. His only argument was based on s 144 ITEPA which he quoted as set out below.

79. Section 144 provides:

> "**144 Deduction for payments for private use**
>
> (1) A deduction is to be made from the provisional sum calculated under step 7 of section 121(1) if, as a condition of the car being available for the employee's private use, the employee--
>
> (a) is required in the tax year in question to pay (whether by way of deduction from earnings or otherwise) an amount of money for that use, and
>
> (b) makes such payment.
>
> (2) If the amount paid by the employee in respect of that year is equal to or exceeds the provisional sum, the provisional sum is reduced so that the cash equivalent of the benefit of the car for that year is nil.

(3) In any other case the amount paid by the employee in respect of the year is deducted from the provisional sum in order to give the cash equivalent of the benefit of the car for that year.

(4) In this section the reference to the car being available for the employee's private use includes a reference to the car being available for the private use of a member of the employee's family or household.

…"

80. The "provisional sum" in Step 7 of s 121(1) ITEPA is the cash equivalent of the benefit, being found by applying a percentage to the cost of the car. The cash equivalent is the amount of income that is charged to income tax on the employee.

81. Dr Milton argued that the "entirety of the alleged benefits up to 12/13 have been reimbursed". The bank statements when compared with the calculations issued by Mr Lawrence demonstrated this.

82. He argued that if the payments were made too late, as HMRC alleged, then Finance Act 2008 would have the effect that a claim for error or mistake relief could have been made up to four years after the year concerned.

83. HMRC's submissions on this were that no evidence had been submitted by way of personal or company records to confirm this was done and nor have any calculations been provided to show how the reimbursements were calculated.

84. It will be seen that neither party's submissions addressed the terms of s 144(1).

85. We therefore asked Dr Milton what evidence he had to show that it was a condition of the cars being made available for each of the three Couldwell's private use that the Couldwells were required to make the reimbursement.

86. He answered that there was nothing that the appellant had required of the employees, but that it was the issue of the decisions alleging that benefits had been provided ignoring that the cars were pooled cars that was the requirement. It had made it necessary for the employees to pre-empt HMRC's incorrect imposition of NIC (and income tax).

87. We accept that Dr Milton has shown that the Couldwells did make payments to reimburse the appellant for private use of the cars. The payment of £1,440 in May 2013 was not such a payment however as that was the figure (give or take £4) of the additional remuneration arising on the mileage payments, which is not part of the total cash equivalents of the benefits.

88. We note here that it does not matter that the payments were made in 2013/14, after the last of the tax years concerned. This is not because of any possibility of an error or mistake claim (by which Dr Milton meant a claim for overpayment relief) as no such claim had in fact been made.

89. We think that Dr Milton raised the error or mistake point because he had read HMRC's skeleton and noticed what it said was the wording of s 144(1)(b). The

skeleton said that that paragraph read "and pays that amount in that year". Thus, he must have thought, a reimbursement of the 2009/10 cash equivalent must be paid in 2009/10 and not in 2013/14 and the same would apply to all subsequent relevant years.

90. To think that was understandable, but Dr Milton was, and the Tribunal might have been, misled by HMRC. The wording of section 144 as quoted in Mr Burke's skeleton and set out at §79 applies for 2014/15 and later years only. Section 25(1) FA 2014 substituted the wording of the paragraph for a previous wording, "makes such payment".

91. In *Marshall v HMRC* [2013] UKFTT 46 (TC) ("*Marshall*") this Tribunal consisting of Judge Geraint Jones QC and as member Richard Thomas (the judge, as he now is, in this case) held that s 144(1)(b) as originally enacted did not have the effect of requiring the reimbursement to be paid in the tax year. HMRC did not appeal this decision but instead sought Ministers' approval to change the wording so that it did say what HMRC wanted it to say, and Parliament enacted s 25 FA 2014 to do so without retrospective effect.

92. Therefore if Dr Milton is right about the "requirement" then we would hold that the cash equivalents of all the previous years would be reduced to nil (subject to some minor quibbles about the figures – see §87).

93. Mr Burke accepted that he had provided the wrong legislation. He accepted that the payments could be taken back to the years involved. We asked him then for his views on s 144(1)(a), the "requirement" point. To our astonishment he said he agreed with Dr Milton. We said that if he was not opposing Dr Milton's argument on this condition as to requirement then we wished to know what we were doing hearing the appeal. Mr Burke had no coherent reply.

94. If in any hearing before this Tribunal counsel were to make a concession about the law then it is highly likely we would follow it and decide accordingly. But in this case we do not do so. We think Mr Burke had become confused. In any event we do not think that to accept his concession and to follow Dr Milton's submission would be in accordance with the overriding objective of this Tribunal, to deal with cases fairly and justly.

95. This is because we consider that Dr Milton's argument is not only plainly wrong, but fanciful in the extreme. The decisions may be the reason why the payments were made but they cannot impose a requirement as mentioned in s 144(1). That requirement has to be imposed by the employer or other person making the car available as a condition of, and therefore at the time, the cars are made available, not many years later.

96. A number of decisions of this Tribunal have considered whether a requirement to make private use payments existed, but they have all turned on the question whether there was evidence to show such a condition. Indeed this was also an issue in *Marshall* - §91.

97. Therefore we hold that s 144 ITEPA *as it was in force in the years with which we are concerned* does not reduce the cash equivalents.

98. We also noted that in the conclusions of the review made by HMRC of the decision to issue the NIC Class 1A decisions, the reviewing officer stated that the position relating to reimbursements for Class 1A NIC was not so clear-cut as that for income tax.

99. We assume what he had in mind was that it is HMRC's view that for Class 1A purposes any reimbursement for private use had to be made before 19 or 22 July in the tax year following that in which the benefit is provided. This can be seen from HMRC's Guidance on Class 1A NICs, and evidence that it is currently HMRC's view can be seen from a Consultative Document ("Condoc") "Alignment of dates for 'making good' on benefits-in-kind" issued 9 August 2016, where in Chapter 3 (page 8) it says:

> "**National Insurance contributions**
>
> 3.6 There is additional complexity in connection with the dates for making good for NICs.
>
> 3.7 For the employer's Class 1A NICs liability to be reduced or removed, the making good payment has to be made before the Class 1A NICs are due to be paid (19 July following the end of the tax year or 22 July following the end of the tax year for those paying electronically). A making good payment made after 19/22 July will reduce or remove the tax charge but not the Class 1A NICs liability.
>
> 3.8 This separate date for NICs payments is an additional consideration for employers and adds further complexity to the current system."

100. The Condoc does not deign to mention a decision of this Tribunal to the opposite effect, *Marcia Willett Ltd v HMRC* [2012] UKFTT 625 (Judge Rachel Short and David Earle), no doubt because HMRC say it is of no precedent value.

101. Had it been necessary to consider the issue of the date of reimbursement then we would have followed that case. We find Judge Short's and Mr Earle's reasoning convincing.

Validity and other issues

102. Dr Milton advanced a number of arguments about the detail of the decisions.

103. He pointed out that:

(1) Abigail was being assessed to benefits for periods when she was not an employee.

(2) The figures shown in Mr Lawrence's calculations are not the figures in the decisions

(3) The information given to HMRC and referred to in the skeleton shows that the Land Rover was not exclusively used by one driver.

and submitted that as a result of HMRC assessing the wrong people for the wrong amounts in the wrong periods it was apparent that the decisions were not made to Mr Lawrence's best judgment.

Abigail's (non-)employment

104. In relation to the first point, it is necessary to set out the provisions that show what is chargeable to Class 1A NICs and who is chargeable, something found in the Social Security (Contributions and Benefits) Act 1992 ("SSCBA"):

> "**Section 10 Class 1A contributions: benefits in kind etc**
>
> (1) Where—
>
> (a) for any tax year an earner is chargeable to income tax under ITEPA 2003 on an amount of general earnings received by him from any employment ("the relevant employment"),
>
> (b) the relevant employment is both—
>
> (i) employed earner's employment, and
>
> (ii) an employment, other than an excluded employment, within the meaning of the benefits code (see Chapter 2 of Part 3 of ITEPA 2003),
>
> (c) the whole or a part of the general earnings falls, for the purposes of Class 1 contributions, to be left out of account in the computation of the earnings paid to or for the benefit of the earner,
>
> a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of the general earnings as falls to be so left out of account.
>
> (2) Subject to section 10ZA below, a Class 1A contribution for any tax year shall be payable by--
>
> (a) the person who is liable to pay the secondary Class 1 contribution relating to the last (or only) relevant payment of earnings in that tax year in relation to which there is a liability to pay such a Class 1 contribution; or
>
> (b) if paragraph (a) above does not apply, the person who, if the general earnings in respect of which the Class 1A contribution is payable were earnings in respect of which Class 1 contributions would be payable, would be liable to pay the secondary Class 1 contribution.
>
> (3) In subsection (2) above "relevant payment of earnings" means a payment which for the purposes of Class 1 contributions is a payment of earnings made to or for the benefit of the earner in respect of the relevant employment.
>
> (4) The amount of the Class 1A contribution in respect of any general earnings shall be the Class 1A percentage of so much of them as falls to be left out of account as mentioned in subsection (1)(c) above.

…

Section 10ZA Liability of third party provider of benefits in kind

(1) This section applies, where--

(a) a Class 1A contribution is payable for any tax year in respect of the whole or any part of general earnings received by an earner;

(b) the general earnings, in so far as they are ones in respect of which such a contribution is payable, consist in a benefit provided for the earner or a member of his family or household;

(c) the person providing the benefit is a person other than the person ("the relevant employer") by whom, but for this section, the Class 1A contribution would be payable in accordance with section 10(2) above; and

(d) the provision of the benefit by that other person has not been arranged or facilitated by the relevant employer.

…

(3) … the liability to pay any Class 1A contribution in respect of--

(a) the benefit provided to the earner …

…

shall fall on the person providing the benefit, instead of on the relevant employer."

105. We note here that s 10(1)(b)(ii) is ambiguous, depending on one's view of the use of excluding commas. Does it mean "an employment …within the meaning of the benefits code which is not excluded employment" or "an employment, other than an excluded employment [ ] within the meaning of the benefits code"? The former seems to add nothing to "employed earners' employment". The latter excludes employments which are excluded by some provision in the benefits code, but since "excluded employment" is defined in s 122(1) SSCBA, albeit by reference to s 63(2) ITEPA which is in Chapter 2 Part 3 of that Act) in a section headed "the benefits code," it is difficult to see why one is sent by s 10 to the benefits code. Whatever the answer if someone is in excluded employment no benefits they reveive thay fall within the descriptions in the benefits code (excluding Chapter 2) make their employer liable to Class 1A NICs, and here "excluded employment" means an employment where the annualised rate of pay is £8,500 or less unless the case is that of a director.

106. For the tax years 2009/10 and 2010/11 Abigail was not in a relevant employment (at least not with the appellant) and did not have any earnings rom employed earner's employment with the appellant or any general earnings from any employment with the appellant. It follows that for those years the appellant is not liable to pay any Class 1A contribution as it is not actually or hypothetically liable to pay secondary Class 1 Contributions in respect of any relevant payment of earnings or hypothetical earnings.

107. For the tax year 2011/12 the appellant is on the face of it liable to pay a Class 1A contribution because from 17 June 2011 Abigail was employed by the appellant. But the decision must be limited to the amount of benefit arising from 17 June 2011 only. This follows from s 143 ITEPA:

> "**143 Deduction for periods when car unavailable**
>
> (1) A deduction is to be made from the amount carried forward from step 6 of section 121(1) if the car has been unavailable on any day during the tax year in question.
>
> (2) For the purposes of this section a car is unavailable on any day if the day--
>
> (a) falls before the first day on which the car is available to the employee,
>
> (b) falls after the last day on which the car is available to the employee, or
>
> (c) falls within a period of 30 days or more throughout which the car is not available to the employee.
>
> (3) The amount of the deduction is given by the formula--
>
> U/Y x A
>
> where--
>
> U is the number of days in the year on which the car is unavailable,
>
> Y is the number of days in that year, and
>
> A is the amount carried forward from step 6."

108. The question is whether the car was unavailable on the days before 17 June 2011. As a matter of simple fact it *was* available to Abigail. But it was not, at any time before that 17 June, made available by reason of her employment. It was therefore not, at those times, made available by virtue of s 116(1) ITEPA:

> "For the purposes of this Chapter a car ... is available to an employee at a particular time if it is then made available, by reason of the employment and without any transfer of the property in it, to the employee or a member of the employee's family or household."

and so s 143(2)(a) applies to reduce the cash equivalent on a day count basis.

109. For the tax year 2012/13 the car was made available by the appellant only until 24 April 2012. From that date SCPC made the car available, not the appellant. The appellant is only liable to pay a Class 1A contrition if "the provision of the benefit by [SCPC] has … been arranged or facilitated by the [appellant]".

110. In our view for there to be arrangement or facilitation there has to be more than a mere transfer of ownership even to a connected person. (And that transfer of ownership was explained by the appellant as a move to cordon off the appellant's then assets in case of financial problems: there is no evidence that it was done for any other motive connected with car benefits).

111. We note that HMRC did raise the issue of s 10ZA SSCBA with the appellant, but it seems only in connection with the cars where there was a lease back. The outcome of that enquiry seems inconclusive. It certainly does not follow that where there is a lease back to the transferor of an asset that the lessee is not a person who is the primary person liable for making the car available to the employee nor does it follow that the only way a lessee can be liable is by reason of the application of s 10ZA.

112. We therefore hold that s 10ZA SSCBA does not apply and that from 24 April the person who should have been assessed was SCPC, not the appellant. Thus the appellant is liable for 2012/13 only for the period from 6 April 2012 to 24 April 2012 by virtue of s 143(2)(b) when the car ceased to be made available by it.

113. Mr Burke told us that he accepted that any decision was incorrect so far as it purported to charge the appellant in relation to periods before Abigail's employment. He suggested that HMRC could vary the decision accordingly. We said that we needed to consider whether such a course was available to HMRC given that the appeal was before the Tribunal. To decide that question it is necessary to examine the SCAR:

> "**5 Variation of decision**
>
> (1) An officer of the Board may vary a decision under section 8 of the Transfer Act … if he has reason to believe that it was incorrect at the time that it was made.
>
> (2) Notice of a variation of a decision must be given to the same persons and in the same manner as notice of the decision was given.
>
> (3) A variation of a decision may state that it has effect for any period in respect of which the decision could have had effect, if the reason for the variation had been known to the person making the decision at the time that it was made.
>
> (4) A decision which is under appeal may be varied at any time before the tribunal determines the appeal."

114. In this case a decision is under appeal. It was incorrect at the time it was made and Mr Burke at least now has reason to believe that it was incorrect at the time it was made in that it (a) stated the wrong period and (b) stated the wrong amount. It would in our view be wholly inappropriate for Mr Burke or Mr Lawrence to vary the decision before HMRC receive our decision on the appeal, as until they receive it they do not know what the correct periods and amounts are - and we do not know what would or should happen if HMRC were to vary the decision in a particular amount and period and that turned out to be different from that which we determine.

115. However we doubt if the decision has been varied because in his post-hearing submissions Mr Burke told us that HMRC accepted that (for 2011/12 we assume) a Class 1A amount could only arise between 17 June 2011 and 5 April 2012. However he went on to say that in fact HMRC accepted that no Class 1A contribution could arise as Abigail was in "lower paid employment" for that year as her earnings,

including any cash equivalents of benefits, was £8,490 and thus £10 less than the upper limit for lower paid employment.

116. In saying this he was wrong. Chapter 11 of Part 3 ITEPA sets out how to determine whether a person is in "lower paid employment" for a tax year. It is necessary when the employment is not held for the whole tax year to scale down the figure of £8,500 by reference to the ratio between the days of employment and the days in the year – s 218(1) Step 4 ITEPA. Since the employment began in June 2011 it must be the case, without calculating the precise fraction for Step 4, that Abigail's "earnings rate" for the year was above £8,500 if her actual earnings in the period of employment were £8,490.

117. Mr Burke did not suggest that for 2012/13 Abigail was in lower paid employment, so we take it she was not. But as we have said in that year she was only provided with a car by virtue of her employment with the appellant until 24 April 2012, and the amount on which Class 1A is calculated must be reduced in accordance with s 143 ITEPA.

118. But if HMRC have varied the decision before this decision is notified to them, then they must amend it, if necessary, by a further variation in accordance with our decision.

Differences between the calculations and the decisions

119. The second point made by Dr Milton (§103(2)) was that there was a difference in the figures between the decisions and the calculations sent to the appellant in 2013.

120. The decisions were made on the appellant and each of the three named a Couldwell and showed the specific amount relating to that member of the family thus:

Sean	£5,561.72
Phillippa	£83.90
Abigail	£662.05

121. The calculations showed:

Sean	£5,561.72
Phillippa	£83.90
Abigail (total)	£662.05

122. There is no difference, so there is nothing in Dr Milton's objection.

Dual use of the cars

123. His third point, that the information given to HMRC and referred to in the skeleton shows that the Land Rover was not exclusively used by one driver was, we

think, put forward in relation to the claim that there was a car pool. It raised however a matter which we put to HMRC.

124. It is clear from our findings of fact that the Land Rover was used by both Sean and Phillippa. It is also clear from the Notes that both used the Fiesta. Therefore it seemed to us that s 148 ITEPA must come into play:

> "**148 Reduction of cash equivalent where car is shared**
>
> (1) This section applies if in a tax year a car—
>
> (a) is available to more than one employee concurrently,
>
> (b) is so made available by the same employer, and
>
> (c) is available concurrently for each employee's private use,
>
> and two or more of those employees are chargeable to tax in respect of the car in that year by virtue of section 120.
>
> (2) The cash equivalent of the benefit of the car to each of those employees for that year—
>
> (a) is to be calculated separately under section 121
>
> …
>
> (2A) The provisional sum calculated under step 7 in section 121(1) is to be reduced on a just and reasonable basis before making any deduction under step 8."

125. This seems clearly to apply in relation to Sean and Phillippa. But HMRC have not, in calculating the Class 1A NICs referable to each of them, reduced the cash equivalent of the cars on a just and reasonable basis: instead they have charged the company in relation to Sean only in respect of the Land Rover and Phillippa only in respect of the Fiesta, and we could also see from documents given to us by Mr Burke at the hearing, that this was the basis on which Sean and Phillippa had been charged to income tax.

126. In relation to Class 1A NICs, apportionment of a benefit to two or more employees has no effect on the overall liability as all chargeable amounts are charged at the same rate on the same person, so long as all the employees concerned are within the scope of Class 1A NICs (ie not in excluded employment). There is not as far as we know any basis or reason for attributing Class 1A contributions to individual employees eg for benefit calculation purposes. As a result, for Class 1A NICs we would probably not have bothered to disturb HMRC's initial allocation of the whole of each car's cash equivalent to each of the two employees, but for regulation 36 of the Social Security (Contributions) Regulations 2001 (SI 2001/1004) ("SSCR"):

> "**36 Reduction of certain Class 1A contributions on account of the number of employments in the cases of something provided or made available by reason of two or more employments and of something provided or made available to two or more employed earners**

(1) This regulation applies if something is provided or made available [to*]—

…

(b) two or more employed earners concurrently by reason of their respective employed earner's employments under the same employer,

and all of those employed earner's employments are employments other than excluded employments within the meaning of the benefits code (see Chapter 2 of Part 3 of ITEPA 2003).

….

(2) If this regulation applies the amount of any Class 1A contribution payable for the year by the person liable to pay such contribution shall be reduced ... by deducting from that amount an amount equal to the fraction—

(X – 1)/X

of the amount which would be payable but for this regulation.

Here X is the total number of employments in respect of which the thing is provided or made available."

*The word "to" appears to be missing from the chapeau of paragraph (1) of the regulation.

127. This regulation seems to cover the case here so that applying the formula where X is 2, the "the amount of any Class 1A contribution payable for the year by the person liable to pay such contribution" is halved. That can only sensibly be interpreted as meaning the amount in respect of each employee is halved, so that the amount chargeable in relation to Sean is half the total of the Class 1A percentage applied to the cash equivalent, and equally for Phillippa. This is also HMRC's reading (see eg HMRC Leaflet CA33-13-14 at paragraphs 72 & 73)

128. We asked for post-hearing submissions on s 148 ITEPA and this regulation and in his Mr Burke accepted that s 148 ITEPA *and* regulation 36 applied and that as a result the cash equivalent for each of Sean and Phillippa should be halved, in the absence of mileage records showing who was using the car. We agree that a 50:50 split is a just and reasonable one to use in these circumstances, as is required by s 148, and Mr Burke also accepts that the effect of regulation 36 is to split the Class 1A amount 50:50 though, as he rightly adds, that it makes no difference to the amount the appellant has to pay, at least in the circumstances here.

129. We could simply accept Mr Burke's suggestion as being pragmatic and sensible in this case, but there are two things that make us think that there are difficulties here that are not so easily disposed of in other situations. Suppose one employee used the car say 75% of the time and the other 25%, a just and reasonable apportionment would be that split but the formula in regulation 36 would still give the answer of a 50:50 split.

130. The second issue is one of practicality: in the normal course of events, a employer files P11Ds showing benefits paid and a P11D(b) showing, among other things the Class 1A NICs due. There is nothing on the P11D which allows for a reduction of a benefit because of s 148 ITEPA, but there is a way that a regulation 36 reduction can be shown on a P11D(b) (see Part 4). The difference here is no doubt due to the fact that the regulation 36 adjustment is simple, and there are examples in the HMRC Guidance for employers on Class 1A NICs. A section 148 enquiry could involve intrusive questioning by an employer of employee's use of the vehicle which may be one reason why the P11D does not cater for it. It presumably then is left to the employee to claim a reduction of the chargeable benefit in their tax return or coding notice.

131. Difficulties thrown up by this apparent clash between s 148 ITEPA and regulation 36 have caused us to wonder why the two provisions continue to exist side by side. But because we have accepted the pragmatic basis put forward by Mr Burke the point is not germane to our decision.

132. If it was necessary for us to come to a decision, we would need to examine all the possibilities. To do that would require a substantial amount of exegesis, and to avoid making an already lengthy decision even longer we put our thinking on this in the Appendix to this decision. Our views on the relationship between s 148 and regulation 36 are however based on an acceptance of that which is common ground between the parties, that it is correct to regard, after 2000, the measure of the cash equivalent as calculated in accordance with s 121 ITEPA for the purposes of ITEPA as the basis for the Class 1A charge. We have doubts about that as a true statement of the law in the light of a recent Supreme Court decision and we also include in the Appendix a consideration of this issue.

133. To sum up on Dr Milton's first two points on this issue, we agree that the decisions are incorrect for not taking into account Abigail's employment history (2009/10 and 2010/11) and for not taking into account s 148 ITEPA or regulation 36 in relation to Sean and Phillippa (2009/10 to 2012/13).

134. But before we consider his more general point about "best of judgment" we explore whether the fact that Abigail is related to Sean and Phillippa makes any difference.

135. Section 116(1) ITEPA provides that:

> "For the purposes of this Chapter a car … is available to an employee at a particular time if it is then made available, by reason of the employment and without any transfer of the property in it, to the employee *or a member of the employee's family or household*."

136. When the appellant made the Fiat 500 available to Abigail it was making it available to a member of Sean and Phillippa's family who was not then an employee. Thus on the face of it the car it was made available to Sean and Phillippa, and this continued to be the case even after 27 June 2011 when Abigail became employed by the appellant.

137. The next question is whether s 169 ITEPA applies in this situation:

> "**Car available to more than one member of family or household employed by same employer**
>
> (1) This section applies where—
>
> (a) an employee ("E") and a member of the employee's family or household ("M") are employed by the same employer, and
>
> (b) as a result of a car being made available to M in a tax year, E would (apart from this section) be chargeable to tax in respect of the car in that year by virtue of section 120.
>
> (2) The cash equivalent of the benefit of the car … by reason of E's employment is not to be treated as E's earnings for that year if—
>
> (a) M is chargeable to tax in respect of the car in that year by virtue of section 120, ….

138. It seems that the section does apply because Sean and Phillippa are E (the singular equating to the plural by virtue of s 6(c) Interpretation Act 1978) and Abigail is M but can only be M from 27 June 2011 when Abigail became an employee. Thus section 169 would exclude Sean and Phillippa from a charge to income tax on the benefit of the car made available to Abigail but only after Abigail started employment and only if she was chargeable to tax under the benefits code. This was the case in 2011/12 (despite Mr Burke's post-hearing submission) and it was in 2012/13. Accordingly Sean and Phillippa seem to be chargeable under the benefits code on the cash equivalent of the car made available to Abigail but only in 2009/10 and 2010/11. This makes sense because Abigail is, after that date, chargeable in her own right. (The fact that Abigail only became employed from 17 June 2011 seems irrelevant to the question posed by s 169 for that year)

139. However s 169 ITEPA directly determines the amount of income tax chargeable on Sean and Phillippa is not what this appeal is about. It is for HMRC to decide what action to take on that if they can now take any.

140. What we have to decide is whether a cash equivalent arising as a result of the making of a car available to a relative is within the charge for Class 1A and in relation to who.

141. The test in s 10(1) SSCBA is whether there are general earnings received by Sean or Phillippa in the tax year which might fall to be left out of account. So to be left out of account of general earnings the making of the car available to Abigail by the appellant has to have resulted in general earnings being "received" by Sean and Phillippa. We have to turn to the convoluted provisions of Part 2 ITEPA to see if the counterintuitive notion of A receiving earnings which arise from their employer making a car available to B nevertheless amounts to receipt. In s 19(2) ITEPA we find that it does. Then the question is do the payments of benefit to Abigail but deemed to be to Sean and Phillippa fall out of account for Class 1 purposes. We explore this issue in the Appendix, but as there seem to be nothing equivalent to regulation 36 SSCR relating this point we accept that Class 1A applies.

142. Thus the decisions in respect of Sean and Phillippa are wrong for 2009/10, 2010/11 and 2011/12 in that they do not include any amount for the benefit of the Fiat 500 made available to Abigail.

143. We turn now to the question of best judgment raised by Dr Milton in the light of the errors we have determined to be present in the decisions. We start first with the law on decisions in the SCAR:

> "**3 Decisions – general**
>
> (1) A decision which, by virtue of section 8 of the Transfer Act, falls to be made by an officer of the Board under or in connection with the Social Security Contributions and Benefits Act 1992 … —
>
> (a) must be made to the best of his information and belief, and
>
> (b) must state the name of every person in respect of whom it is made and--
>
> (i) the date from which it has effect, or
>
> (ii) the period for which it has effect.
>
> (2) Where an officer of the Board has resolved to make a decision of a kind referred to in paragraph (1), he may entrust to some other officer of the Board responsibility for completing the procedure for making the decision, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the decision on any person named in it.
>
> (3) In the case of a decision to which section 11 of the Transfer Act … applies …. each person who is named in the decision has a right to appeal.
>
> **4 Notice of decision**
>
> (1) Notice of a decision by an officer of the Board referred to in regulation 3(1) must be given--
>
> (b) to every person named in the decision.
>
> (2) A notice under this regulation must state the date on which it is issued and may be served by post addressed to any person to whom it is to be given at his usual or last known place of residence, or his place of business or employment.
>
> (3) Where notice is to be given to a company, it may be served by post addressed to its registered office or its principal place of business."

144. The first point to note is that it is not "best judgment" which is in play here, but the "best of information and belief". This seems to us to impose a lesser burden on HMRC. But even if we applies the best judgment criterion, we can say that from authoritative decisions on the use of this phrase in VAT assessing such as *Pegasus Birds Ltd v Commissioners of Customs and Excise* [2004] EWCA Civ 1015 ("*Pegasus Birds*"), that Dr Milton has come nowhere near being able to impugn the decisions on best judgment grounds.

145. In *Pegasus Birds* Carnwath LJ (as he then was) gave this warning at [10]:

> "10. The term "best of their judgment" is derived from section 73(1) of the 1994 Act:
>
> > "Where a person has failed to make any returns required under this Act ... or to keep any documents and afford the facilities necessary to verify such returns, or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him *to the best of their judgment* and notify it to him." (emphasis added)
>
> It should be noted that the shorthand "best judgment", as used in some of the cases, may be misleading, if it is taken to imply a higher standard than usual. The statutory words "to the best of their judgment" are used in a context where the taxpayers' records may be incomplete, so that a fully informed assessment is unlikely to be possible. Thus the word "best", rather than implying a higher than normal standard, is a recognition that the result may necessarily involve an element of guesswork. It means simply "to the best of (their) judgment on the information available" (*Argosy Co v IRC* [1971] 1 WLR 514, 517 per Lord Donovan)."

146. He added at [16]:

> "In *Rahman v Customs & Excise Commissioners* [1998] STC 826, I drew attention to phrases used by Woolf J in the leading case under this Act (*Van Boeckel v Customs & Excise Commissioners* [1981] STC 290) and in previous authorities in other tax contexts, to explain the effect of the "best of their judgment" requirement:
>
> > "The passages I have underlined show that the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required: for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles ([1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment." (p 835)."

147. Dr Milton had it seems to us suggested by the medium of the witness statements that he prepared for Sean and Phillippa that Mr Lawrence had an ulterior motive for asking for the meeting that took place on 4 April 2013, and that this was intended as a foundation for an attack on the bona fides of the decisions. We find that there was no evidence of such an ulterior motive and that there was none. We can see nothing wrong at all in what Mr Lawrence did by way of making the decisions. It turns out that he was wrong about some of the figures because of the operation of complex legislation. The most serious mistake was in relation to Abigail's employment but that was understandable in the light of the vehicle registration evidence that he had obtained.

148. The decisions were undoubtedly made to the best of Mr Lawrence's judgment on the basis of the information he had. Dr Milton's points are proper grounds of

appeal and are properly to be considered by the Tribunal exercising its statutory functions.

149. Our reference to the "basis of the information which he had" in the last paragraph brings us to the actual test in the SCAR, "best of information and belief". We have in that paragraph dealt with "best of information". There is nothing in any of the evidence to suggest that Mr Lawrence's belief as to the correctness of his decisions was not an honest one. We therefore reject Dr Milton's arguments on this issue.

150. We add that if he wished to impugn Mr Lawrence's honesty or motives, he could have requested Mr Lawrence to attend and give evidence or asked the Tribunal to issue a witness summons. But he did not.

151. In all other respects we consider that the decisions were valid as they stated the name of each of the employees as well as the employer and stated the period for which they had effect. They did not state expressly and separately the start date, but as the period stated was from one date to another, the first date must be the start date.

152. We have to say we were rather surprised that the notice did not split the liability by tax year as the calculations had, but that is not a requirement of the SSCDAR and so long as the split is apparent from the calculations (as it is) there is no legal ground for complaint. We do think that it might have been better practice had HMRC attached calculations relating solely to Class 1A NICs and not relied on the appellant finding the original calculations to check the figures, and it would also have been better had the price of the cars and the source of that information been shown, especially given that no P11Ds were filed, the normal source of such information. But these points do not impugn the validity of the notice.

153. We do note there is nothing in SSCBA, SETA or any regulations that says anything like, or attracts, section 114 Taxes Management Act 1970 (want of form not invalidate assessment). It could be argued that, without such a provision, want of form may invalidate a decision. The income tax cases seem to stress that want of form is only a grave matter if the period is wrong. This is an issue in relation to Abigail, but only in that the period stated extends beyond the period for which contributions are payable in respect of Abigail's benefits. That could have misled a less aware person than Dr Milton, but we do not think it is serious enough to warrant invalidating the decision. The amounts wrongly determined in relation to Abigail are correctly to be charged in respect of Sean and Phillippa so that the overall amount is correct.

Disposition of the appeal

154. Our decision will be only in relation to Class 1A NICs. We realise that there are assessments in relation to income tax that are not final – unless they have not been appealed. We do not intend to spend time on exploring whether and to what extent our decision may or (more likely) may not bind HMRC in relation to the income tax assessments (and see the Appendix). We would expect them to follow our decision, if and when they deal with any appeals by the employees, although we also consider

that whatever the effect of our decision on HMRC it cannot bind the employees. Had they been parties to the appeal to the Tribunal it might have been different. Although they appealed to HMRC their appeals were not notified to the Tribunal and we do not think our decision can bind them. This means we think that they are at liberty to contest the assessments to income tax in any way they think fit. But that is an argument that must be joined with HMRC and if necessary the Tribunal hearing any appeals notified in relation to the income tax assessments.

155. Of more immediate relevance is our power in relation to an appeal against decisions in relation to NICs. SSCDAR applies as follows:

> "**7 Application of the Taxes Management Act 1970 in relation to reviews and appeals with modifications**
>
> (1) In this regulation reference to a section alone is reference to the section so numbered in the Management Act.
>
> (2) For the purposes of these regulations, sections 49A to 49I of the Management Act shall apply to appeals with the following modifications--
>
> (a) in section 49A(4) for "in accordance with section 54" substitute "in accordance with regulation 11 of the Social Security Contributions (Decisions and Appeals) Regulations 1999",
>
> (b) in section 49C(4) for "agreement in writing under section 54(1)" substitute "agreement under regulation 11 of the Social Security Contributions (Decisions and Appeals) Regulations 1999",
>
> (c) omit section 49C(5),
>
> (d) in section 49F(2) for "agreement in writing under section 54(1)" substitute "agreement under regulation 11 of the Social Security Contributions (Decisions and Appeals) Regulations 1999",
>
> (e) omit section 49F(3)
>
> **10 Determination of appeals by the tribunal**
>
> If, on an appeal . . . under Part II of the Transfer Act … that is notified to the tribunal, it appears to the Tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

156. Regulation 7 has been complied with. There was a review and it upheld the decisions, and the appeal was notified in time. It does appear to the Tribunal that each decision should be varied and we set out the manner in which it should be varied.

157. For the decision in relation to Sean:

(1) For 2009/10 the amount of the benefit is increased from £0 to £324.50 in relation to the Fiat 500.

(2) For 2010/11 the amount of the benefit is reduced from £9,391 to £4,695.50 by the operation of regulation 36 SSCR or s 148 ITEPA and

increased by £141.65* in relation to the Fiat 500, making the correct figure £4,837.16.

(3) For 2011/12 the amount of the benefit is reduced from £15,796 to £7,898 by the operation of regulation 36 SSCR or s 148 ITEPA and increased by £141.65* in relation to the Fiat 500, making the correct figure £8,039.65.

(4) For 2012/13 the amount of the benefit is reduced from £15,796 to £7,898 by the operation of regulation 36 SSCR or s 148 ITEPA making the correct figure £8039.65.

158. For the decision in relation to Phillippa

(1) For 2009/10 the amount of the benefit is increased from £0 to £324.50 in relation to the Fiat 500.

(2) For 2010/11 the amount of the benefit is increased from £0 to £4,695.50 by the operation of regulation 36 SSCR or s 148 ITEPA and increased by £141.65* in relation to the Fiat 500, making the correct figure £4837.16.

(3) For 2011/12 the amount of the benefit is increased from £0 to £7,898 by the operation of regulation 36 SSCR or s 148 ITEPA and increased by £141.65* in relation to the Fiat 500, making the correct figure £8039.65.

(4) For 2012/13 the amount of the benefit is increased from £608 to £7,898 by the operation of regulation 36 SSCR or s 148 ITEPA making the correct figure £8506.

159. *£141.65 is 50% of 82/265 of £1261, as there are 82 days from 6 April to 17 June when Abigail started employment.

160. For the decision in relation to Abigail:

(1) For 2009/10 the amount of the benefit is reduced from £649 to £0.

(2) For 2010/11 the amount of the benefit is reduced from £1,271 to £0

(3) For 2011/12 the amount of the benefit reduced from £1261 to £977.70**.

(4) For 2012/13 the amount of the benefit is reduced from £1,765 to £91.88 (19/365 of £1764 to reflect the transfer on 24 April 2012).

**In further information supplied to the Tribunal post-hearing Mr Burke calculated the 2011/12 amount as £995. Abigail was employed from 27 June 2011 which makes the fraction of days employed in the year 283/365. Applying that to the figure of £1261 gives £977.70.

Decision

161. Each of the three decisions of Class 1A NICs is varied under regulation 11 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 in accordance with the figures in §§157 to 160. The relevant rates of Class 1A contribution are to be applied to the figures.

162. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22 November 2016

APPENDIX

Which prevails – regulation 36 SSCR or s 148 ITEPA?

163. In this Appendix:

(1) ITEPA means the Income Tax (Earnings and Pensions) Act 2003

(2) SSCBA means the Social Security (Contributions and Benefits) Act 1992

(3) SSCR means the Social Security (Contributions) Regulations 2001 (SI 2001/1004)

164. In order to find an answer to the questions raised in §129 of this decision, it is necessary to do a bit of legal archaeology. Regulation 36 SSCR, along with other regulations in Part 2A of SSCR derives from the Social Security (Contributions) Amendment (No. 3) Regulations 1992 (SI 1992/667) ("the 1992 regulations").

165. The Explanatory Note to the 1992 regulations, which came into force on 6 April 1992, explains that:

> "The inserted regulations provide for exceptions from liability to pay Class 1A contributions, and for reducing Class 1A contributions, in the circumstances specified in each regulation."

166. Included in the vires for these regulations is s 4A Social Security Act 1975 ("SSA 1975"). Section 4A was inserted in SSA 1975 by the Social Security (Contributions) Act 1990 ("SSCA 1990"). The inserted section read, relevantly:

> "4A.—(1) Where—
>
> (a) for any tax year an amount in respect of a car is by virtue of section 157 of the Income and Corporation Taxes Act 1988 chargeable on an earner to income tax under Schedule E; and
>
> (b) the employment by reason of which the car is made available is employed earner's employment,
>
> a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of the earner and car in question.
>
> (4) The amount of the Class 1A contribution referred to in subsection (1) above shall be—
>
> (a) the Class 1A percentage of the cash equivalent of the benefit of the car to the earner in the tax year;
>
> …
>
> the cash equivalent[ ] of the benefit of a car … being ascertained, subject to the provisions of this section, in accordance with section 157 … of the Income and Corporation Taxes Act 1988 and Schedule 6 to that Act.
>
> …

(6) In calculating for the purposes of subsection (4) above the cash equivalent of the benefit of a car …. [see below]

(7) Regulations may make such amendments of this section as appear to the Secretary of State to be necessary or expedient in consequence of any alteration to section 157 or 158 of the Income and Corporation Taxes Act 1988 or Schedule 6 to that Act.

…

(9) Regulations may provide—

(a) for persons to be excepted in prescribed circumstances from liability to pay Class 1 A contributions;

(b) for reducing Class 1A contributions in prescribed circumstances."

167. A number of points arise on this. First, it is clear that the amount on which a Class 1A contribution is based is, as its starting point, the cash equivalent of the benefit of the car found in the Income Tax legislation. Second, subsection (6) shows that the employer is required to make some assumptions when calculating the amount due. The particular provisions described in ss (6)(a) are where a car is unavailable for a period of 30 days or more to the employee, and what that paragraph provides is that the employer is not meant to take that into account (so as to reduce the cash equivalent) unless they have information (from the employee etc) about the unavailability, it being presumed that the employer may not know about it.

168. Subsection (6)(b) also provides that an employer is to assume that the business mileage is between 2,500 and 18,000 (mileages below and above that range affected the cash equivalent then) when calculating the amount on which Class 1A is payable again unless they have evidence from the employee. Subsection (6)(b) is to similar effect in relation to an increase in the cash equivalent where two or more cars are available to an employee.

169. Third, as would be expected, regulations may amend s 4A if there are changes to income tax law.

170. Fourth, the cash equivalent, even with the ss (6) assumptions, may be reduced by the regulations.

171. This is where the predecessor of Part 2A SSCR comes in. The 1992 regulations inserted regulations 22A to 22G into the Social Security Regulations 1979 ("SSR 1979"). There is no need to reproduce them, but their effect was:

(1) Regulation 22B (22A was introductory) provided for an exception from Class 1A liability where a car was deemed available to a family member subject to conditions. It prevented two cash equivalents being counted for Class 1A purposes.

(2) Regulation 22C dealt with a case where two or more cars were made available concurrently to one employee. It reduced the Class 1A contribution so

as not to take into account an increase under paragraph 5(3) Schedule 6 ICTA 1988.

(3) Regulation 22D deals with the case where a car is made available to the same employee by reason of two or more employments. It also deals with the case where a car is made available to two or more employed earners concurrently. A reduction is made by reference to mileage is all the combined employments.

(4) Regulation 22E also deals with the case where a car is made available to the same employee by reason of two or more employments. It also deals with the case where a car is made available to two or more employed earners concurrently. In this case it apportions the cash equivalent by reference to the number of employments.

(5) Regulations 22F and 22G apply where a car is made available to a disabled person and reduce the liability and remove it respectively.

172. In 1992 s 4A SSA 1975 was consolidated, becoming s 10 SSCBA. It continued to read as s 4A did.

173. A major change to Class 1 did come about in Part 4 of the Child Support, Pensions and Social Security Act 2000 ("CSPSSA"). The Explanatory Notes say relevantly:

> "**Benefits in kind**
>
> 846. The Chancellor announced in the March 1999 Budget that all taxable benefits in kind not already subject to NICs would become liable to a Class 1A charge from April 2000. This will align more closely the tax and NICs treatment of provided benefits such as private medical insurance, beneficial loans or assets transferred to the employee.
>
> 847. This will implement a recommendation of the Task Force chaired by Martin Taylor, ex-Chief Executive of Barclays plc., in the report The Modernisation of Britain's Tax and Benefit System.
>
> . . .
>
> 851. The extended Class 1A charge follows the shape of the existing charge on car and fuel benefits. *The Class 1A due will be calculated using the valuation figures already required for tax purposes which an employer enters on a P11D form* – a report to the Inland Revenue of the value of benefits in kind provided throughout the tax year* to each employee. This is intended to keep extra reporting requirements to a minimum." [My emphasis]

174. The Explanatory Notes on s 74 CSPSSA which substituted a new s 10 in SSCBA however say:

> "**New section 10: Class 1A contributions: benefits in kind etc.**
>
> 864 New section 10(1) defines the circumstances when a Class 1A contribution is due. An earner receives an emolument which is

chargeable to tax under Schedule E from employed earners' employment to which Chapter II, Part V ICTA applies – i.e. the earner is a director or earns £8,500 per year or more. As all or some of the emolument received is exempted from, or not liable to, Class 1 NICs, then Class 1A NICs are due.

…

866 New section 10(4) provides that the amount of Class 1A due is the amount of the emolument not subject to Class 1 - as per subsection (1) - multiplied by the Class 1A rate for the tax year.

…

870 New section 10(8) provides regulation-making powers for the Treasury to amend the effect of 10(7). It will allow, should this be needed, the matching by regulations of any alterations to relevant tax legislation. For example, if a new ICTA section introduced a new relieving provision which needed to be included for the coherence of the Class 1A NICs scheme this could be done in regulations."

175. As Notes paragraph 866 say, the rule that was enacted in the substituted s 10 SSCBA is this:

"(1) Where—

…

(c) … part of the emoluments *falls, for the purposes of Class 1 contributions, to be left out of account* in the computation of the earnings paid to or for the benefit of the earner,

a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of the emoluments *as falls to be so left out of account*."

176. There is nothing about Schedule E, or s 167 ICTA in the new section 10. The old s 10(6) dealing with certain exceptions by reference to ICTA is no longer there. Instead the amount to which the Class 1A percentage is applied is an amount determined by reference to the provisions of Class 1 NICs.

177. The next event was the replacement of the SSR 1979 by the SSCR. Regulations 22A to 22G SSR 1979 became regulations 32 to 38 SSCR. Regulation 40 provided that certain "prescribed emoluments" were ones in respect of which no Class 1A contribution was payable. The regulations retained their references to ICTA 1988.

178. In 2003 The employment income provisions of ICTA 1988 were rewritten as ITEPA. ITEPA itself did not affect Class 1A. But the Social Security (Contributions, Categorisation of Earners and Intermediaries) (Amendment) Regulations 2004 (SI 1994/770) did. Regulation 6 revoked regulations 32 to 35 and 37 SSCR. But for regulation 36 it only amended references to Chapter 2 Part 5 ICTA 1988 to become those to the benefits code in ITEPA and did not revoke.

179. The explanation for the revocation of regulations 32 to 35 and 37 is given indirectly by the Explanatory Notes to ITEPA. The explanation of Change 27 in the

Act is that ITEPA enacted an existing Extra-statutory Concession (A71) and the enactments to achieve that were ss 148, 153 and 169 ITEPA.

180. This explains the revocation of regulations 33 to 35 and 37, but it does not explain the failure to revoke regulation 36. Regulation 36 seems to me to be the exact equivalent for NICs of part of ESC A71. For that it is necessary to look at regulation 36 a bit more closely. Unlike regulations 33 to 35 and 37 it does not refer to a *car* being made available, but to "something".

181. This change appears to have been made first in the SSCR and is not a consolidation of an earlier amendment. It must have been made because there were circumstances where assets other than cars could be used by two people concurrently or by reason of two or more employments, and, presumably, no legislation on that circumstance to found in ITEPA (or possibly an ESC).

182. But why then, following the enactment of s 148 ITEPA was regulation 36 not amended to limit its application to assets other than cars, so that there would be no clash between their respective fields of operation? Section 148 would have sole application where a car was made available to two or more employees and would apply for income tax (because it is in ITEPA) and apply for Class 1A NICs (because that is what s 10(4) SSCBA requires).

183. A possible answer is that, as we have seen, s 148 provides for a "just and reasonable" apportionment (as do many other provisions in the benefits code where assets are provided). It must be assumed that an employer cannot be expected to calculate the just and reasonable apportionment (and we have also seen that the P11D does not allow for this) so where there are two or more employees involved the rather crude division given by regulation 36 must apply when the employer calculates the Class 1A NICs.

184. A second possibility is that it was in fact intended to disapply regulation 36 in the case of cars but for some reason it was not done. This seems less likely given what we say about practicality and its application to things that are not cars.

185. Turning to the question "which prevails?" in a case where it matters. We can see from Bennion on Statutory Interpretation at §50 that where primary legislation gives one solution to an issue, but secondary legislation gives a different answer to the same issue, the primary legislation should prevail unless there is a clear indication that the secondary should prevail. There is no such indication here.

186. However for the reasons we set out in §187 and having regard to the structure of Class 1A NICs where s 10(9)(b) SSCBA allows regulations to be made which reduce the Class 1A contribution in certain circumstances (regulation 36's predecessor was made under this power), we think that the better view is that regulation 36 applies in Class 1A NICs to the exclusion of s 148 ITEPA. This is one case where there is an indication that the delegated legislation should prevail.

Is there an autonomous meaning for the amount on which Class 1A is calculated?

187. But there is also a possibility that regulation 36 and not s 148 ITEPA applies because there is an autonomous meaning for the "tax" base on to which the Class 1A percentage is applied. Regulation 36 does not anywhere refer to the cash equivalent of the benefit of the car. This is not entirely surprising because the substituted s 10 SSCBA inserted by CSPSSA in 2000 does not refer to it either.

188. Recall that the amount on which Class 1A is calculated has since CPSSSA been the amount disregarded in computing the Class 1 amount. There is good reason for believing that this calculation has nothing to do with income tax law. That reason is the decision of the Supreme Court in *Forde & McHugh Ltd v HMRC* [2014] UKSC 14 ("*Forde*").

189. Lord Hodge (giving a judgment with which the other Justices agreed) considered the history of NICs[1] and then held that "earnings" for Class 1 purposes cannot be equated with "emoluments" in the Income Tax Acts, now relabelled in ITEPA as "general earnings".

190. There is helpful material in the judgment of Arden LJ in the Court of Appeal [2012] EWCA Civ 692 in that case:

> "My third reason [for saying that earnings for NICs is not the same as emoluments for income tax] is based on the use of the word "paid" in section 6(1) of the 1992 Act. This demonstrates that Parliament in primary legislation proceeded on the basis that the meaning of the term "earnings" was not limited to the meaning of the term "emoluments". The reasons are as follows. The word "payment" can be used in the context of both cash and kind. While Mr Bramwell may not have accepted this point, he did not pursue any submissions on the meaning of "paid" or "payment" in the context of the 1992 Act. In my judgment, as Mr Jones submitted in his oral submissions, it is used in the sense given in the charging provision in section 6(1) of the 1992 Act. In any event, "earnings" is defined in section 3(1)(a) of the 1992 Act as including "any remuneration or profit derived from an employment", and a "profit" may obviously be made by the acquisition of an item in kind (such as free accommodation or precious stones). (Section 3(2A) (set out in paragraph 16 above) uses both terms: payment and the provision of a benefit. Section 3(2A) was added by amendment in 1998 but it still falls to be interpreted as one with the 1992 Act as originally enacted.) Furthermore, as Mr Jones submitted, that wider connotation means that section 6(1) of the 1992 Act covers payments in kind. …
>
> My fourth reason is that there are other ways in which it can be seen that Parliament has approved the autonomous meaning of "earnings". As I have said, delegated legislation cannot be used to govern the

[1] From which we have gratefully drawn much of what preceded this point in the Appendix.

> meaning of primary legislation. However, if we were to find in later primary legislation that Parliament has acted upon the view of "earnings" taken in earlier delegated legislation, then in my judgment Parliament must be taken to have approved that meaning, at least to that extent. On that basis, some assistance can be obtained from section 10 of the 1992 Act, as amended by section 74(2) of the Child Support, Pensions and Social Security Act 2000. This was the form in which section 10 stood at the date of the payments in question in this case, though it has since been amended. The fact that it was subsequently amended is not material to the point which I am making. Section 10 as amended in 2000 by primary legislation provides [as we have seen above at §175]
>
> …
>
> This provision applies to all benefits in kind treated as emoluments. It constitutes a recognition in primary legislation that national insurance contributions may be levied on earnings in the form of benefits in kind even though such benefits are not emoluments for income tax purposes, but are only *treated* as such emoluments. Parliament also recognises in subsection (1)(c) that there is legislation that, in the case of some benefits in kind, leaves them out of account for the purposes of national insurance contributions. By implication there is other legislation already on the statute book that levies national insurance on earnings in the form of benefits in kind. In fact that other legislation would have been the 1979 Regulations. For these reasons, section 10 approved the meaning of "earnings" assumed in the Regulations and leaves no real doubt that earnings are a separate and stand-alone concept, which is not merely the mirror image of emoluments for income tax purposes.
>
> Of course, it may be said that there is nothing surprising in this because national insurance legislation is merely treating as earnings payments that are treated as emoluments under income tax legislation. But that misses the point. There is no provision of the 1992 Act that automatically treats any payment treated as emoluments as earnings. Section 4(6)(a) of the 1992 Act (set out in paragraph 17 above) was only inserted by amendment by section 50(2) of the Social Security Act 1998, and it is directed to sums treated as income, and not specifically to sums treated as emoluments, though the latter may be included in its scope."

191. What we derive *Forde* is:

(1) "Earnings" for the purposes of Class 1 has an autonomous meaning, and is not to be equated with "emoluments" or "general earnings" in income tax legislation.

(2) "Earnings" for the purposes of Class 1 when not qualified, includes payments in kind etc ("PiK[2]"), and to fit within that that term does not require that the payments are of money or money's worth.

---

[2] We use this as a portmanteau expression for what is covered by paragraph 1 Part 2 Schedule 3 SSCR.

(3) But certain PiKs are disregarded (ie left out of account) in finding earnings – regulations 24 and 25 of, and paragraph 1 Part 2 Schedule 3 to, SSCR.

(4) Certain PiKs are not disregarded for Class 1 purposes – Schedule 2 SSCR.

192. The main rules for determining the amounts to be left out of account in calculating the Class 1 contributions are in Schedule 3 to SSCR. Paragraph 1[3] Part 2 Schedule 3 says:

> "Part II Payments in kind
>
> Certain payments in kind to be disregarded
>
> 1 A payment in kind, or by way of the provision of services, board and lodging or other facilities is to be disregarded in the calculation of earnings.
>
> This is subject to the paragraph 2 and also to any provision about a payment in kind of a particular description or in particular circumstances in any other Part of this Schedule."

193. There are no other provisions relevant; at least not about car benefits. A very similar version of the first sentence of paragraph 1 has existed at least as far back as 1975.

194. What paragraph 1 does *not* say is that what is to be disregarded[4] is the amount charged under the benefits code in Part 3 ITEPA, the "cash equivalent". They say merely that a payment in kind etc[5] ("PiK") is to be disregarded. This reflects the general structure of the rules relating to Class 1 NICs. The main "charging" rule is in s 6 SSCBA:

> "(1) Where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment … [a contribution is payable]"

and here "earnings" (unlike "general earnings" has a SSCBA definition in s 3):

> "(1) In this Part of this Act and Parts II to V below—
>
> (a) "earnings" includes any remuneration or profit derived from an employment ..."

195. It follows from the exclusion from Class 1 of payments in kind etc that, but for the exclusion, "earnings" for Class 1 purposes includes them.

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[3] The Schedules to SI 2001/1004 are renumbered from the beginning in each part, a dreadfully confusing practice which we would have hoped had died out by 2001.

[4] Why do the regulations say "disregarded" when the primary legislation says "left out of account"? This is an all too common dissonance within Social Security legislation.

[5] We use this as a portmanteau expression for what is covered by paragraph 1 Part 2 Schedule 3 SSCR.

196. There is on the face of it little difficulty for employers who need to decide what is the amount of the payments on which they have to account for Class 1 on their employee's behalf and their own. They look at money payments they have made that are not payments in kind etc. and the relevant thresholds and percentages are applied to those payments. They do not have to worry about what the NICs amount of a payment in kind etc is when running the monthly payroll and accounting for Class 1 NICs.

197. But as is mentioned at §191(4) certain PiKs are not disregarded for Class 1 purposes. They are to be found in paragraphs 2 to 7, 11, 11A and 14 Schedule 2 SSCR. With the exception of paragraph 7 there is no reference to, as the basis for computation, any provision of ITEPA. For example, paragraph 2 – payment of a beneficial interest in certain assets contains a simple open market value rule; paragraph 3 dealing with payment of a beneficial interest in units in a unit trust uses the lowest daily selling price. However paragraph 7 dealing with certain securities (restricted interest securities and the like) gratefully adopts the rules in Part 7 of ITEPA.

198. These rules are therefore designed to allow employers to calculate the Class 1 NICs as easily as possible, though not without a requirement to do some valuation in some cases. It is reasonable to think, though, that the cases where employers offer units in a unit trust rather than cars are fewer.

199. When we turn to Schedule 3 and paragraph 1 Part 2 in particular[6] there are no special NICs valuation rules for the PiKs disregarded by paragraph 1 (and of course no reference to ITEPA).

200. This is an odd state of affairs as while for Class 1 purposes there are no circumstances in which an employer needs to know the full amount of earnings (as we have see), for Class 1A purposes employers very much need to know, because they need to know what the value is that they apply the percentage to when completing their Class 1A return.

201. Before 2000 that was an easy task – employers simply calculated the cash equivalent of the car benefits chargeable under ICTA 1988 and used that, after employing where necessary the assumptions in Part 2A SSR 1979. But as we have seen that is not what s 10 SSCBA now requires. The assessing subsection is clear:

> "(4) The amount of the Class 1A contribution in respect of any general earnings shall be the Class 1A percentage of so much of them as falls to be left out of account [for the purposes of Class 1 contributions]"

A percentage in this context must be of a monetary amount or value, and we have seen that Schedules 2 and 3 SSCR are of no help.

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[6] There are other payments which fall to be disregarded. Certain non-cash vouchers which fall in paragraphs 2 to 9 of Part 5 of Schedule 3 are disregarded, but the only reference in those paragraphs to ITEPA is to indicate which non-cash vouchers are disregarded – mostly those which fall within an exemption in ITEPA. There are no valuation rules.

202. From the above it is clear that the only two competitors for construing "so much of them as falls to be left out of account" in s 10 SSCBA are an autonomous one and the ITEPA one in the benefits code in Part 3 ITEPA.

203. Since SSCBA contains, as *Forde* established, an autonomous meaning for earnings, then that seems to us to be strong support for the view that the amount of the value of the PiKs that is disregarded for the purposes of Class 1 also has an autonomous meaning and not the meaning in Part 3 ITEPA. If it has an autonomous meaning, then the amount to be charged is not the ITEPA valuation of the cash equivalent. No one could come up with s 121 ITEPA as an appropriate amount for an autonomous meaning.

204. In his masterly account of the UK tax system Revenue Law Hart Publishing, Oxford, Prof. John Tiley sets out the three possible ways of valuing benefits in kind given by an employer to an employee[7], the value to the employee, the convertibility amount (what the employee could get by converting it to cash) and the cost to the employer. But of these the only practical one for the employer to apply if the burden of tax or contribution falls on the employer is the last, the cost to the employer.

205. It has never been necessary for National Insurance purposes to value benefits in kind. From 1911 to 1975 conventional amounts were assumed to represent the value of board and lodging in deciding what the rate of remuneration was, but if these did represent the cost to an employer it was a minimum cost not an attempt at valuation (the figure was £1/10/0 from 1911 to beyond 1946 and was £5 in 1965) (see also *Forde* at [11]).

206. In 1948 the Finance Act ("FA") of that year provided for a basis of establishing the value of a benefit in kind for tax purposes, and used the cost to the employer. Section 40 FA 1948 is headed "Valuation of benefits in kind" and imposes the cost to the employer basis. It also says that in the case of an asset being made available without the property in it passing, the cost to the employer is the annual value without defining what that might be.

207. Given that for Class 1A it is the employer who calculates and pays Class 1A cost is the only feasible way of calculating the amount disregarded for Class 1 purposes. In a case involving cars the cost to the employer of allowing an employee to use the employer's car would probably equate to something like the mileage payments approved by HMRC for business use of an employee's own car.

208. There is however a difference between Class 1A and Class 1. Class 1 nowhere refers in its charging provisions to "general earnings", and given what *Forde* says there is no need for it to do so. But what s 10 SSCBA says is that what the disregarded amount for Class 1 are excluded from is "general earnings" not "employed earner's earnings". This points to a calculation of the disregarded amounts being made by reference to ITEPA. And using a mileage allowance or some

[7] See the 4th edition (the best of recent years) at 15.1.2 (Tax Rule Choices).

other basis of cost could be difficult, though arguably no more difficult than some of the valuation rules already found in NICs legislation (see §197).

209. In the end it seems to us that the argument for HMRC's view, that what one starts with is the ITEPA cash equivalent is one of convenience. Convenience (of the employer) suggests that rather than use an autonomous meaning of the value of PiKs, the use of the ITEPA meaning is the only sensible possibility, especially given the references in s 10 to "general earnings".

210. Before *Forde* there was clear consensus that the ITEPA value was the right one, even after the changes in 2000 had removed the direct references to the benefits code. HMRC clearly had that view as the way the P11D(b) figure is calculated directly from the P11D shows. And the Explanatory Notes on CSPSSA support this with their reference to the P11D.

211. The HMRC approach has not changed since *Forde*. We have not considered whether the ITEPA basis can lead to any difficulties or anomalies. But it is not entirely obvious that some change to section 10 would not be appropriate to put the matter beyond doubt.