[2012] UKFTT 70 (TC)

TC01766

Appeal number TC/2010/07174

Income tax – employment income – benefits – car leased to employee through agency of employer – s 144 ITEPA- Whitby TC255 not followed – determination of amount of benefits received - taxpayer providing no evidence to displace HMRC conclusions- appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

VICTOR BALDORINO **Appellant**

- and -

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

TRIBUNAL: CHARLES HELLIER
SHEILA CHEESMAN

Sitting in public in Sutton on 1 December 2011

David Benson of Stephen Hughes Partnership (SHP), accountants, for the Appellant

Eleanor Gardiner for the Respondents

DECISION

Introduction

1. Mr. Baldorino appeals against assessments and amendments to his self-assessments for the years 2000/01 to 2007/08. The amounts in dispute relate to: (1) car benefits; (2) fuel benefits, (3) personal expense payments, (4) household costs payments, and (5) loan account benefits, which in each case HMRC said the taxpayer received as a director of Atmosphere Management Limited ("AML"), and which they say are part of the appellant's taxable employment income in the relevant years. We deal with it each of these benefits under separate headings.

2. The amendments to the appellant's self assessments for 2004/05 to 2007/08 were all made within the statutory time limits. The assessments for 2000/01 to 2003/04 were made under the provisions of section 29 TMA 1970. Where a taxpayer has delivered a tax return, an assessment under section 29 may be made only if the taxpayer was careless or negligent in making the return, or if the information in HMRC's hands at an earlier time was insufficient for an inspector to have made the assessment at that earlier time (section 29(4) and (5)). We deal with this at the end of this decision.

3. There is one point we should deal with the outset. In the letter making the appeal Mr. Benson writes on behalf of the appellant:

> "On a separate point we have also indicated to HMRC that if we have to treat the attached noted transactions as benefits in kind then we will have to adjust the previous 8 years accounts which will result in a corporation tax refund. HMRC has said that they will only deal with the personal tax issue and corporation tax is totally separate. Although this is technically the case, surely they (HMRC) should have some foresight and understand the amount of time they have put in and will continue to put into resolve the issue. The net effect should be a cost to the taxpayer in our opinion."

4. This is an appeal against income tax assessments. We are not concerned with the corporation tax position of the company. However we should say that our initial view is that Mr. Benson is wrong in the remarks he makes in the quoted paragraph about the company's position. That is because the taxable trading profits the company are determined and different way from the amounts of taxable benefits accruing to its employees. Thus for example payment made to an employee might well be deductible on the company's hands but taxable in the hands of the employee. Further the taxable profits the company will be determined by reference to the accounts and returns already submitted: even if the company's self-assessments overstated its profits the company may well be out of time to seek any changes in the tax due.

5. We should also record that HMRC did not dispute the appellant's statement that Mr. Baldorino had co-operated fully in its investigation.

6. The appeal arises out of the adjustments made following an employer compliance review carried out by HMRC. The review was in relation to AML, the company of

which the appellant is a director. Following the review enquiries were opened into Mr. Baldorino and his tax returns, and at a later date that the assessments and closure notices under appeal were issued.

7. We heard oral evidence from Mr. Baldorino and Mr. Benson and had before us a bundle of copy correspondence. Our task is to decide on the evidence before us is whether the assessments should stand. The taxpayer produced no additional documentary evidence at the hearing: no accounts or accounting records of the company, no working papers reconciling figures in the accounts to figures which had been discussed in the correspondence, no records of mileage, and no evidence from those who prepared the accounting records other than Mr. Benson. Without such evidence the taxpayer's arguments were almost bound to fail because there was nothing before us on which we could make a judgement that the taxpayer was right and HMRC were wrong.

Car benefits.

(a)The statutory provisions

8. Section 114 ITEPA provides that Chapter 3 of that Act (which applies to bring benefits into charge) applies to a car if it is:

(1) made available to the employee by reason of his employment, and

(2) available for the employee's private use.

9. By section 118 a car is to be treated is available for private use unless

(a) "the terms on which it is made available prohibits that use, and

(b) it is not so used."

10. We note also section 117:

" For the purposes of this Chapter a car or van made available by an employer to an employee ... is to be regarded as made available by reason of the employment unless --

(a) the employer is an individual, and

(b) it is so made available in the normal course of the employer's domestic, family or personal relationships."

11. Thus if a car is made available by a third party to an employee, the question of whether it is made available by reason of employment is one which is at large; by contrast where the car is made available by the employer it is deemed to be made available by reason of the employment.

12. By section 120 the "cash equivalent" of the benefit of such a car is to be treated as earnings. Section 121 provides a formula for the calculation of the cash equivalent. Section 144 permits a deduction from the cash equivalent 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 a deduction from earnings or otherwise) an amount of money for that use, and

(b) makes such payment."

13. Mr Benson said that Mr Baldorino did not have a company car: the cars available to him were leased to the company as this was the only way he could purchase a car, "... although the payments were made by AML they did you go through Mr. Baldorino's director's loan account and this was repaid back via a mileage charge and dividend.". There is implicit in this and later statements of SHP the suggestion that the real lessee of the car was Mr Baldoriono, not AML.

14. HMRC say that the arrangement entered into by Mr. Baldorino with the company does not prevent a car benefit arising. In this context they draw our attention to the FTT decisions in *Whitby and Ball v HMRC* TC 255 and *Stanford Management Services Ltd and others v HMRC* TC 409.

15. In *Stanford* the tribunal said at [47] said that even if there had been an agreement such that the company acted as agent of the employee in leasing the car, "the legislation is not concerned with agency or any other law. It stipulated the correct tax treatment to be used when an employer provides a car for its employees. The contract was in the name of the company, the legislation was satisfied and so benefit arose."

16. We disagree. The legislative question is whether a car is made available to a person "by reason of his employment". If the car was made available because the company acted as the employee's agent in forming a contract between the employee and the lessor, it may well be the case that the car cannot be said to have been made available by reason of the employment. Whether or not that is the case will depend on the facts. The nature and circumstances of the agency relationship will affect the answer to the statutory question, but the mere fact that the company has acted as the employee's agent in forming the contract will not determine the answer. Further if the employer has acted as the employee's agent in leasing the car, then the car is not made available by the employer but by the lessor and the deeming of section 117 does not automatically cause the car to be treated as having been made available by reason of the employee's employment.

17. *Whitby* was cited as being to the same effect as *Stanford*. It is not. The case was about the leasing of a car by the employer to employees. In that case the taxpayer "accepted ... that the leasing contracts were between the employer (or a company associated with the employer) and the employees." At ([16]) the tribunal concluded that the car was "made available" within the meaning of section 114. The tribunal did not specifically address the whether the provision was by reason of the employment. The point was not argued. But the deeming provision in section 117 would have applied because the car was made available by the employer. The tribunal did not address the circumstance in which a car was leased through the agency of the employer. The tribunal did not conclude that a relationship under which a car was leased to the employees through the agency of the employer necessarily gave rise to the provision of a car in circumstances to which section 114 applied.

18. In this case the question is whether the cars were made available to Mr Baldorino by reason of his employment, or made available by reason of contracts between Mr. Baldorino and the lessor. The answer depends upon the nature of the evidence in relation to (1) the agreements between the parties, and in particular, (2) whether a contract with the lessor existed by reason of Mr. Baldorino's employment. In that context there is a difference between something being made available "by reason of" a person's employment, and it being something which would not have been made available had a person not been employed.

(b) The available evidence and our conclusions of fact

19. From the note of a meeting on 30 May 2006 between Mr. Roach of HMRC and Mr. Hughes, the accountant acting for AML, and from the letters from SHP to HMRC thereafter we find that:

(1) three cars were the subject of leasing agreements expressed to be between a lessor and the company:

(a) a Toyota, between 26 May 2001 May 2003;

(b) a Landcruiser, tween 2 May 2003 and 9 April 2006, and

(c) a VW,after 10 April 2006.

(2) these cars were driven and available to Mr. Baldorino;

(3) there is no evidence of any restriction placed upon the private use of the cars by Mr. Baldorino;

(4) in 2005/04 and 2005/06, the payments made under the leasing contracts by AML were debited to Mr. Baldorino’s loan account with the company;

(5) on 8 September 2008 SHP wrote to HMRC and, in relation to the VW, said

> "but we have never claimed tax relief through the company (Atmosphere Management Limited) of the VW Toureg although this was under the lease. All payments were posted to the Directors Loan Account during 2006/2007 and subsequent years. Therefore no benefit is derived as Mr. Baldorino is paying this personally. ..."

20. The record of the meeting of 30 May 2006 records that the accountant said "he did not realise that the cars, had been leased by the company and because of this the loan account would have to be rewritten and he would also have to take out any mileage payments."

21. In the bundle is before us were copies of re-worked loan accounts prepared by Mr. Benson on 26 June 2006. These had been prepared in response to the investigation by Mr. Roach. These accounts charged the lease payments made by the company to Mr. Baldorino’s loan account for the period between April 2011 to 31 March 2005.

22. Mr. Benson did not provide a balance sheet or accounts for AML for the relevant periods. We were not able to reconcile the balances in these reworked loan accounts

to the formal accounts the company. We saw no evidence to suggest that the revised balances in these accounts had been adopted in the company's accounts.

23. Mr. Benson told us that previously accounts for AML had been prepared by a member of staff at a SHP who had left the firm in February 2006. Mr. Benson had been unable to reconcile his version of the loan accounts to that of this member of staff. The member of staff was not called as a witness and his working papers were not available to us.

24. It seemed to us that from 2000 to 2006 the company had treated payments under the leases as its own liability without that right of recourse to Mr. Baldoirno which would have existed if it had acted as his disclosed or undisclosed agent. That suggested to us that in that period the company did not act as Mr. Baldorino's agent in leasing a car; instead the contract to the lease was made between the lessor and AML, and AML made the car available to Mr. Baldorino. Since the company made the car available it was to be treated as made available by reason of Mr. Baldorino's employment as a result of section 117.

25. Thus the Toyota and the Landcruiser were in our view made available to Mr. Baldorino by reason of his employment.

26. The evidence in relation to the VW is different. It appears that, although it is accepted that the leasing contract was expressed to be between AML and the lessor, rental payments were made by the company were charged to Mr.Baldorino when, or shortly after, they had been accounted for. It is possible therefore that when AML entered the leasing contract for the VW it did so as agent for Mr. Baldorino. Had that been the case then the car would, as a matter of law, have been provided to Mr Baldorino by the lessor rather than by AML, and the deeming provision of section 117 would not apply. As a result the question for us would be whether on the facts the availability of the car to Mr Baldorino was in these circumstances by reason of his employment. It need not have been: it could have been by reason of his being the shareholder of the company; it could have been by reason of a separate agency agreement between Mr. Baldorino and the company which did not derive from his employment.

27. However there was no evidence that this was the case. No documentary evidence of an agency agreement or board minutes were produced. Mr. Baldorino gave no oral evidence to that effect. We find that it is more likely that the company did not enter into the contract with the lessor as agent for Mr Baldorino, and that, as a result, the company, not the lessor, made the car available to Mr. Baldorino. Therefore, as a result of 117,the car is to be treated as having been made available by reason of his employment.

28. As a result we find that in each of the relevant years the cars were made available to Mr. Baldorino by reason of his employment.

29. The taxpayer did not dispute computation of the cash equivalent benefit charge. It did not seem wrong to us.

30. The payments debited to Mr. Baldorino's loan account in 2005/6 and 2006/07 have been deducted from these scale benefits. That is based on a generous interpretation of section 144 with which we see no reason to interfere.

31. We uphold the calculation of cash equivalents of the net benefits in respect of cars in the relevant years.

(2) Fuel Benefit.

32. We find that the company paid some or all of the cost of fuel for the cars in each of the relevant years. No evidence to the contrary was put before us (such as, for example, an analysis supported by relevant documents of the accounts' charge for motoring expenses in each of the relevant years showing that the company did not bear any of the cost of the fuel). It was accepted by its accountant, as evidenced by then note of the meeting of 30 April 2006, that the company was paying for fuel. Fuel receipts were provided in relation to 2006/07 and 2007/08 but are receipts were for both unleaded petrol and diesel and it is unclear that they all related to the car. The car was a diesel car. Even had the receipts been for petrol supplied to the car we would have had to have been shown how the receipts showed that the company bore none of the cost of fuel for the car. It might have been possible to do that by an analysis of the accounts and receipts, but was not done. We could not do it on the limited information before us.

33. We can see no way in which the fuel can be said to have been provided otherwise than by reason of Mr. Baldorino's employment.

34. Section 149 ITPA provides:

> (1) If in a year --
>
> (a) fuel is provided for a car by reason of an employee's employment, and
>
> (b) that person is chargeable to tax in respect of the car by virtue of section 120,
>
> the cash equivalent benefit of the fuel is to be treated as earnings from the employment for that year.
>
> (2) The cash equivalent of the benefit of the fuel is calculated in accordance with sections 152 and 153.
>
> (3) Fuel is to be treated as provided a car, in addition to any other way in which it may be provided if -- ...
>
> (a) any liability in respect of the provision of fuel to the cars is discharged…
>
> (d) any sum is paid in respect of expenses incurred in providing fuel to the car.

35. It is clear that the condition in (1)(a) is satisfied. We have found above that the condition in (1)(b) is also satisfied.

36. There was no argument that the cash equivalent was wrongly calculated.

37. We uphold the car fuel benefit adjustments.

(3) Personal Expenses

38. The general scheme of ITEPA 2003 is that all benefits provided to an employee (which will include a director) and all payments made in respect of expenses to an employee are taxable, but the employee may then qualify for a deduction for certain expenses incurred by him. Section 336 ITEPA provides

> (1) "The general rule is that a deduction from earnings is allowed for an amount if –
>
> (a) the employee is obliged to incur and pay it as holder of the employment, and
>
> (b) the amount is incurred wholly, and exclusively and necessarily in the performance of the duties of the employment. ..."

39. For the years 2000/2001 until 2005/06 AML paid, or credited Mr. Baldorino with sums in respect of, certain expenses. In relation to the assessments under appeal HMRC had concluded that some of these expenses were not allowable under section 336.

40. The payments are to be treated as income and the question for us is whether Mr. Baldorino was entitled to a deduction from his income for an amount equivalent to the expense.

41. Mr. Benson did not dispute that the amounts included in the for 2000/2001 to 2003/04 assessments in respect of these items, but disputed the disallowance of £2086.47 and £1869.55 in respect of 2004/05 and 2005/06.

42. These two sums comprised round sum payments of between £200 and £400 each and certain other items such as weekend hotel accommodation for Mr. and Mrs Baldorino and restaurant expenses.

43. No breakdown of the round sum amounts was offered to us. No diary entries or correspondence was produced relating to the purpose of the hotel or restaurant accommodation. There is nothing in the correspondence between HMRC and SHP to shed any light on the make up of the sum amounts.

44. We asked Mr. Baldorino about the lump-sum payments. He said that he used to pile up receipts for business expenditure and send them to SHP. We asked him about the hotel expenses; he said he "assumed" and that at the time he was attending a trade show in London.

45. This evidence was insufficient for us to conclude that it was likely that these sums represented expenses incurred wholly, and exclusively and necessarily in the course of Mr. Baldorino's employment. Even if the expenses he incurred did add up

to a round sum amounts, which seemed unlikely, there was nothing which would have enabled us to conclude that they were amounts which were wholly, exclusively and necessarily incurred in the course of the employment of Mr. Baldorino. And Mr. Baldorino's assumption about the purpose of the hotel stay was insufficient for us to find that it was a necessary part of what he was doing for AML.

46. We therefore uphold the adjustments in relation to these items.

(4) Household expenses

47. Mr. Benson told us that within Mr. Baldorino's house he had a dedicated office to deal with the company's affairs "kitted out with a chair, desk, draws and a separate phone line". In addition Mr. Benson said that the company's scuba-diving equipment was stored in Mr. Baldorino's garage in relevant periods. For these reasons he said SHP had included costs associated with the office in the garage in the company's accounts.

48. Although Mr. Benson produced no photographs, plans or other evidence to support his contentions we accept this evidence.

49. The company's accounting statements showed that in each relevant period, premises costs (which included,depending on the period, rent, light and heat, service charge and rates) were costs borne by the company. It seems likely to us that these amounts were paid to or for the benefit of Mr. Baldorino and are therefore to be treated as part of his employment income. The question is therefore whether any part of these expenses was incurred wholly, exclusively and necessarily in the course of his employment. HMRC allowed an amount of £2 or £3 a week as having been so incurred, and in the assessments treated the balance of these costs as part of Mr. Baldorino's income.

50. Mr. Benson volunteered no evidence, documentary or otherwise, in relation to these expenses. He provided nothing from which we could decide what was spent and why. As a result we are unable to conclude that any of this expenditure was incurred by Mr. Baldorino in the course of his employment.

51. Mr. Benson's letter to HMRC on this subject confused the question of whether the expenses incurred by the company would be deductible in determining the company's profits with the deductibility of the cost in the hands of Mr. Baldorino. The fact that payment made by the company may benefit the company and may be deductible in computing its trading profit does not necessarily mean that the corresponding expense incurred by the employee is necessarily incurred in the course of his employment.

52. Therefore we uphold HMRC's adjustments.

(5) Loan account benefits.

53. The appellant's director's loan account with the company in 2004/05, and 2005/06 shows that it was overdrawn by some £5000.

54. Mr. Benson did not provide any figures for the loan account balances, or evidence of transactions in the loan account, or anything which would have enabled us to conclude that it was likely that Mr. Baldorino owed the company less than the amount shown in the loan accounts. There was no other evidence before us which indicated that HMRC's conclusion as to the loan account balances was wrong or their assessment of the taxable benefit wrong.

55. We therefore uphold HMRC's adjustments in relation to these figures.

(6) Time limits: section 29

56. An assessment may be made under section 29 only if the inspector makes a discovery that less tax has been assessed than ought to have been. It seems clear to us that this condition is satisfied in relation to the relevant years. Subsections 29 (3) and (4) permit the assessment to be made if this situation was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. Is clear that the omission from Mr. Baldorino's tax returns of benefits was careless. As a result we find that the time limit condition in section 29 is satisfied and that the assessments were validly made.

Conclusion

57. We dismiss the appeal.

Rights of Appeal

58. 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.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 20/01/2012