TC01928

Appeal number: TC/2010/08032

NATIONAL INSURANCE – Appeal against HMRC decision that Appellant company liable to class 1A National Insurance contributions in respect of car benefit and car fuel benefit – Car initially purchased by employee and 90% interest subsequently transferred from employee to company – Whether car "made available (without any transfer of the property in it) to an employee" (ITEPA s.114(1)) – Yes – Whether fuel "provided for a car by reason of an employee's employment" (ITEPA s.149(1)) – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

G R SOLUTIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS ELIZABETH BRIDGE

Sitting in public in London on 2 March 2012

Mr Mark Ablitt, accountant, for the Appellant

Mr Jon Davis, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a notice of decision dated 15 September 2010, as varied by a decision dated 18 November 2010, by which HMRC decided pursuant to s.8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 that the Appellant company is liable to pay class 1A National Insurance contributions in respect of a car benefit made available to Mr Ray Mark Hall.

2. The following facts were not in dispute. Mr Hall is a director and employee and shareholder of the Appellant company. On 17 April 2004 he purchased a BMW X5 motor vehicle with an invoice cost of £53,645. Some time during the company accounting year ending 31 December 2004, Mr Hall sold a 90% share of the car to the Appellant company for £48,636. The car remained available for Mr Hall's private use after the transfer. Mr Hall did not keep records of his business and private mileage. He made a 10% contribution towards the running costs of the car. He paid the company 10% of the total fuel costs of the car. No car or fuel benefit charge was reported to HMRC by the company on forms P11D/P11D(b) for the period 6 April 2003 to 5 April 2009.

3. In the 15 September 2010 decision, as varied by the 18 November 2010 decision, HMRC determined that the Appellant company was liable to pay class 1A National Insurance contributions in respect of car benefit and car fuel benefit in the sum of £19,726.42.

4. In brief, the Appellant's case is that the car and fuel benefit legislation does not apply to the vehicle because the car was not made available to Mr Hall by virtue of his employment with the company, but rather, by virtue of his 10% ownership of the car. The Appellant claims that 10% of all costs relating to the car and all private mileage was reimbursed by Mr Hall to the company.

5. The HMRC case is that the car and fuel benefit legislation does apply to the vehicle as it was made available to Mr Hall by reason of his employment and was available for private use.

Applicable legislation

6. Section 8(1) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 relevantly provides:

> (1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> …
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay, …

7. Section 1(2) of the Social Security Contributions and Benefits Act 1992 (the "Contributions Act") relevantly provides:

> (2) Contributions under this Part of this Act shall be of the following six classes—
>
> ...
>
> (b) Class 1A, payable under section 10 below by persons liable to pay secondary Class 1 contributions and certain other persons;

8. Section 3(1) of the Contributions Act relevantly provides:

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

9. Section 10(1) of the Contributions Act relevantly provides:

> (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.

10. Section 114(1) and (2) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") relevantly provide:

> (1) This Chapter applies to a car or a van in relation to a particular tax year if in that year the car or van—
>
> (a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household,
>
> (b) is so made available by reason of the employment (see section 117),
>
> (c) is available for the employee's or member's private use (see section 118).

(2) Where this Chapter applies to a car or van—

(a) sections 120 to 148 provide for the cash equivalent of the benefit of the car to be treated as earnings,

(b) sections 149 to 153 provide for the cash equivalent of the benefit of any fuel provided for the car to be treated as earnings …

11. Section 117 ITEPA provides:

For the purposes of this Chapter a car or van made available by an employer to an employee or a member of the employee's family or household 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.

12. Section 120 ITEPA provides:

(1) If this Chapter applies to a car in relation to a particular tax year, the cash equivalent of the benefit of the car is to be treated as earnings from the employment for that year.

(2) In such a case the employee is referred to in this Chapter as being chargeable to tax in respect of the car in that year.

13. Section 149 ITEPA provides:

(1) If in a tax 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 of the benefit of the fuel is to be treated as earnings from the employment for that year.

14. Section 150 ITEPA provides for the method for calculating the cash equivalent of the benefit of the fuel.

15. Section 151 ITEPA provides:

(1) The cash equivalent of the benefit of the fuel is nil if condition A or B is met.

(2) Condition A is met if in the tax year in question—

(a) the employee is required to make good to the person providing the fuel the whole of the expense incurred by that person in connection with the provision of the fuel for the employee's private use, and

(b) the employee does make good that expense.

(3) Condition B is met if in the tax year in question the fuel is made available only for business travel (see section 171(1)).

The evidence and submissions of the parties

16. At the hearing, the Appellant was represented by Mr Ablitt, and HMRC was represented by Mr Davis. The Tribunal had before it the case file, a document bundle, a bundle of statutes and case law, a supplementary bundle of statutes and case law, and a statement of case and skeleton argument for HMRC.

17. On behalf of the Appellant, Mr Ablitt submitted as follows.

18. The issue in this appeal is whether the car was made available to Mr Hall by the Appellant company by reason of his employment. The car was initially purchased by Mr Hall in its entirety. It was entirely his personal property. He subsequently sold a 90% interest to the Appellant company. Mr Hall and the company were thereafter tenants in common, with the former owning 10% and the latter owning 90%. As joint owner, the Appellant enjoyed the most extensive possessory right in property law. This right was due to his joint interest in the car, and not due to his employment. An asset already available for use by a person by virtue of that person's ownership rights cannot be deemed to have been made available to that person by another person who only subsequently acquired a partial ownership right and there has been no discontinuance of ownership by the former person.

19. HMRC rely on the case of *Christensen (HMIT) v Vasili* [2004] EWHC 476 (Ch) ("*Vasili*"), but that case concerned a different situation, where initially it was the company which bought the car, and then subsequently transferred a partial interest as tenant in common. In *Vasili*, the court took the view that the company had made the car available to the employee when the employee acquired an interest in the car from the company that had previously been the sole owner. *Vasili* did not deal with the converse situation where the employee is originally the sole owner of the car, and is therefore not relevant. In *Vasili*, the employee had no right to use the car until a right was bestowed on him by his employer. In the present case, Mr Hall always had a right to use the car, without anything being bestowed on him by his employer.

20. On behalf of HMRC, Mr Davis submitted as follows.

21. The Appellant company provided benefits to Mr Hall by making available to him a car which he could, and did, use for private purposes, and by providing him with fuel for private use which was not fully reimbursed by him. Mr Hall had 100% use of the car, despite owning only 10%. Part-ownership of a car by an employee does not remove it from the specific car benefit legislation: *Vasili*. A car is "made available (without any transfer of the property in it)" (s.114(1) ITEPA) unless the employee owns the car in its entirety. It is not possible to "use" a share in a car, and s.114 ITEPA establishes a special regime for cars which takes precedence over the general benefits legislation. The facts of the present case are not sufficiently distinguishable from *Vasili*.

22. Section 10(1) of the Contributions Act applied to Mr Hall. He received a benefit chargeable under s.114 ITEPA having had a car made available to him for his personal use by his employer. ITEPA s.114(2)(a) provides that the cash equivalent of the car is to be treated as earnings. ITEPA s.114(2)(b) provides that the cash equivalent of the fuel is to be treated as earnings. By virtue of s.3(1)(a) of the Contributions Act, the car benefit and car fuel benefit also fall to be considered as earnings. The company has provided Mr Hall with benefits chargeable under ITEPA ss.114 and 149. Income tax and National Insurance contributions are payable in respect of benefits treated by all employees other than those excluded by s.216 ITEPA, which is not applicable in the present case.

23. The car was made available to Mr Hall for his personal use by reason of his employment, and it is not relevant whether or not he made any payments to the company. Section 117 ITEPA provides that if the car was made available by the Appellant company to Mr Hall, the car is to be regarded as made available *by reason of the employment* unless certain conditions are satisfied, which in this case they are not. The meaning of "made available" was considered in *Vasili* at [12]-[13]. Income tax is an annual charge, and it is therefore necessary to consider for purposes of s.114 ITEPA whether a car has been "made available" in a particular tax year. Even though the car is co-owned, it remains a single indivisible asset. If both the employer and the employee want to use the car at the same time, it is not possible for part of the car to go to one destination and part of the car to another. Thus, when the employee uses the car for private purposes, the employer's share of the car is being made available to the employee at that time. In *Samson Publishing Ltd v Revenue & Customs* [2010] UKFTT 489 (TC) ("*Samson*"), *Vasili* was found not to be distinguishable in circumstances where the directors purchased the car jointly with the employer.

24. *Vasili* was decided under s.157 of the Income and Corporation Taxes Act 1988 ("ICTA"), while this case falls under ss.114 and 120 ITEPA. However, ITEPA is a re-enactment of ICTA.

25. In relation to the fuel, s.151 ITEPA was inapplicable. Mr Hall's contribution of 10% of the cost of the fuel was based on his percentage ownership of the car, and not the amount of actual private use of the vehicle. The amount of fuel benefit therefore falls to be calculated in accordance with s.150 ITEPA. Neither are ss.152 or 153 ITEPA applicable.

The Tribunal's findings

26. Mr Davis on behalf of HMRC has taken the Tribunal through a series of statutory provisions in support of the argument that class 1A national insurance contributions were applicable both in relation to car benefit and car fuel benefit. The Tribunal has found this useful. Ultimately, however, both parties' arguments turn on a narrow issue of whether the car was "made available" to Mr Hall by the Appellant company. If the car was "made available" to Mr Hall by the company, it would be deemed to have been made available *by reason of his employment* by virtue of s.117 ITEPA. The Tribunal is also satisfied that if the car was "made available" to Mr Hall by the Appellant company by reason of his employment, the fuel was similarly made available for the car by reason of his employment, for purposes of s.149 ITEPA.

27. In relation to the expression "made available", it was said in *Vasili* at [12] that:

> Turning now to the words in issue, I consider that the words "made available (without any transfer of the property in it)" are not to be construed in a manner which has the result that the conferring of any interest upon the employee sufficient to give the employee an independent right to possess and use the asset is sufficient to prevent the car from being "made available".

28. In *Samson*, as noted above, *Vasili* was found not to be distinguishable in circumstances where the directors purchased the car jointly with the employer.

29. The Tribunal considers that although *Vasili* and *Samson* involved different legislative provisions to those applicable in the present case, the principles are not materially different.

30. The Tribunal is not persuaded that this case can be distinguished on the basis that Mr Hall initially had sole title to the car, unlike *Vasili* where the company initially had sole title to the car, or *Samson* where the company and employee had joint ownership from the outset.

31. The Tribunal sees merit in the HMRC argument that Income tax is an annual charge, and that it is therefore necessary to consider for purposes of s.114 ITEPA whether a car has been "made available" in a particular tax year. The expression "made available" needs to be applied to the facts in the tax year in question, rather than to the point in time at which property titles were established, which might have occurred in a previous tax year. It follows from this, in the Tribunal's view, that the expression "made available" should be applied to the point in time at which the vehicle is used, rather than the point in time at which it is purchased, or the point in time at which a partial property title is transferred from the company to the employee or *vice versa*. If at the time of use of the car, the company owns 90% of the car and the employee owns 10%, that is the relevant circumstance to which the expression "made available" must be applied. It is irrelevant how the circumstances of that joint ownership came to be established at some point in the past.

32. The Tribunal is also persuaded by the HMRC argument that if both the employer and the employee want to use the car at the same time, it is not possible for part of the car to go to one destination and part of the car to another, and that when the employee uses the car for private purposes, the employer's share of the car is being made available to the employee at that time.

33. The Tribunal therefore does not find that this case is relevantly different from either *Vasili* or *Samson*.

34. It follows that the appeal must be dismissed in relation to the car benefit. In relation to the fuel benefit, the Tribunal also accepts the HMRC argument, and for the reasons above, the appeal must also be dismissed.

Conclusion

35. The appeal is dismissed.

36. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 02 April 2012