TC03529

Appeals numbers: TC/2011/04330 & TC/2012/05815

INCOME TAX & NIC – leased cars – whether a benefit in kind to director – whether discovery assessments validly issued – whether NIC liability on accommodation expenses - appeals allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MC & LJ IVE LIMITED **Appellants**
MR MICHAEL IVE

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
MR DAVID EARLE

Sitting in public at Bedford Square, London on 15 October 2013

Mr William Curry (Victor Stewart LLP) for the Appellant

Mr Darren Bradley (HMRC Appeals Unit) for the Respondents

DECISION

1. Mr Ive appeals against income tax assessments for the tax years 2004-05 to 2008-09 inclusive, relating to benefits in kind which the Respondents ("HMRC") claim arise from the provision of cars by his employer, MC & LJ Ive Limited ("the Company"). The Company appeals against Class 1A NIC liability assessments for the same tax years, relating to both the alleged car benefits, and also certain accommodation expenses in relation to other employees (Mr & Mrs Dysell).

2. At the hearing Mr Bradley for HMRC confirmed that if any of the appeals were late then HMRC did not object to their lateness, and the Tribunal agreed to admit any of the appeals that were late.

Findings of fact

3. The Tribunal had formal witness statements signed by Mr Ive and by Mr & Mrs Dysell. None of those individuals attended the hearing. The Tribunal noted that this would make it impossible for HMRC or the Tribunal to ask pertinent questions to clarify matters, and for HMRC to challenge that evidence. Mr Bradley for HMRC also submitted that the style of the witness statements suggested that they had been drafted by professional advisers, rather than being the testimony of the individuals. The Tribunal makes the following findings of fact.

4. Mr Ive ran a restaurant in Sussex. In 2001 he incorporated the business as the Company.

5. The Company entered into leases with unconnected lessors for two vehicles. First, in August 2002 the Company leased a Land Rover Discovery ("the Land Rover") and then in August 2005 the Company leased a Range Rover Sport ("the Range Rover"). On both leases the Company is named as the lessee. For both leases Mr Ive and his wife entered into guarantees and indemnities. The documentation available for the Tribunal was incomplete but the guarantee in relation to the Land Rover lease included (in clause 5): "The liability hereunder of the Guarantor [ie Mr & Mrs Ive] shall be as a primary obligor (as between the Guarantor and the [lessor]) and not merely as a surety …". The vehicles were not shown in the Company's accounts as assets. Mr Ive had the use of both vehicles. The lease rental payments were paid by the Company and charged to Mr Ive's director's loan account. Mr Ive paid all fuel and maintenance bills by private credit card. He claimed a mileage allowance from the Company for business mileage at the "scale rate" applicable from year to year.

6. Mr & Mrs Dysell were employees of the Company. The Company provided living accommodation to Mr & Mrs Dysell, and also met certain accommodation expenses (for electricity, water and calor gas).

7. HMRC conducted a routine compliance visit on the Company in January 2007. One of the points highlighted in the notes of the meeting was that cars had been provided for the use of Mr Ive; HMRC asked for further details. The Appellants and

their accountant answered all the questions put to them; they disputed that the cars gave rise to any NIC liabilities on benefits in kind, and also that any NIC liabilities arose on private utility bills paid on behalf of Mr & Mrs Dysell. On 3 June 2010 HMRC issued Class 1A NIC determinations under s 8 Social Security Contributions (Transfer of Functions) Act 1999 on the Company.

8. On 26 May 2010 HMRC wrote to Mr Ive informing him that they were checking his self-assessment returns for the tax years 2004-05 to 2007-08 inclusive, because they believed the returns omitted car and fuel benefits identified from the compliance exercise on the Company. On the same date HMRC opened an enquiry into Mr Ive's 2008-09 self-assessment return under s 9A TMA 1970. Again, Mr Ive and his accountant answered all the questions put to them; they disputed that the cars gave rise to any taxable benefits in kind. On 25 March 2011 HMRC issued assessments in respect of the tax years 2004-05 to 2006-07 inclusive. On 23 August 2011 HMRC issued an assessment in respect of the tax year 2007-08, and a closure notice in respect of the tax year 2008-09.

9. HMRC conducted formal internal reviews of the disputed decisions. On 16 March 2011 HMRC issued a revised decision to the Company, and on 8 March 2012 HMRC issued a revised decision to Mr Ive. The Appellants appeal to the Tribunal against the revised decisions.

Law

10. The statutory provisions relating to car benefits are set out below. Other relevant statutory provisions are covered at the appropriate points in this decision notice.

11. Section 114 ITEPA 2003 provides (so far as relevant):

> "(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), and
>
> (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, …"

12. Section 117 ITEPA 2003 provides (so far as relevant):

"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 …"

13. Section 118 ITEPA 2003 provides (so far as relevant):

"(1) For the purposes of this Chapter a car or van made available in a tax year to an employee or a member of the employee's family or household is to be treated as available for the employee's or member's private use unless in that year—

(a) the terms on which it is made available prohibit such use, and

(b) it is not so used.

(2) In this Chapter "private use", in relation to a car or van made available to an employee or a member of the employee's family or household, means any use other than for the employee's business travel (see section 171(1))."

14. Section 121 ITEPA 2003 provides (so far as relevant):

"(1) The cash equivalent of the benefit of a car for a tax year is calculated as follows—

Step 1 - Find the price of the car in accordance with sections 122 to 124.

Step 2 - Add the price of any accessories which fall to be taken into account in accordance with sections 125 to 131.

Step 3 - Make any deduction under section 132 for capital contributions made by the employee to the cost of the car or accessories.

Step 4 - If the amount carried forward from step 3 exceeds £80,000, the interim sum is £80,000. In any other case, the interim sum is the amount carried forward from step 3.

Step 5 - Find the appropriate percentage for the car for the year in accordance with sections 133 to 142.

Step 6 - Multiply the interim sum by the appropriate percentage for the car for the year.

Step 7 - Make any deduction under section 143 for any periods when the car was unavailable. The resulting amount is the provisional sum.

Step 8 - Make any deduction from the provisional sum under section 144 in respect of payments by the employee for the private use of the car. The result is the cash equivalent of the benefit of the car for the year."

15. Section 144 ITEPA 2003 provides:

"(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.

(5) This section is subject to section 145 (modification where car temporarily replaced)."

Appellants' Case

16. Mr Curry for the Appellants submitted as follows.

17. There were three grounds of appeal:

(1) The benefit in kind charges in relation to the vehicles were misconceived.

(2) The discovery assessments were invalid.

(3) The charges in relation to the accommodation expenses were misconceived.

The benefit in kind charges in relation to the vehicles

18. HMRC had assumed that a benefit in kind charge was automatic because the leases were in the name of the Company. In correspondence. HMRC had said that the Company had purchased the cars; that was incorrect.

19. The cars were not shown as assets in the Company's accounts and all hire payments were charged to Mr Ive's director's loan account. Mr Ive was primarily responsible for making the hire payments; that was clear from the primary obligor clause in the guarantees. The Company did not bear any running costs. The Company did not make the vehicles available for use by Mr Ive.

20. The accountants had not been consulted before the documents were signed. The lessor had told Mr Ive that this was the best way to do it, and the market at that time produced the cheapest rentals by this method. HMRC claimed that Mr Ive received the car cheaper because of his position as a director, but the lower contract hire is not the assessed benefit in this case.

21. The Tribunal asked if the Company held merely a legal interest in the vehicles while Mr Ive had the beneficial interest. Mr Curry replied that the taxpayers had treated everything that way, with the Company just being an agent. The Tribunal asked what would have happened if the Company had insisted that Mr Ive should hand back the keys. The answer was that he would expect to keep paying the rentals. The Tribunal pointed out that that would appear to be as guarantor rather than as user of the vehicle.

The discovery assessments

22. Discovery assessments under s 29 TMA 1970 had been raised against Mr Ive. No enquiries been opened into Mr Ive's self-assessment returns as HMRC were out of time to open enquiries. It was accepted that there was nothing in the self-assessment tax returns concerning the vehicles. In January 2007 there had been an employer's compliance review, and in February 2007 Mr Ive wrote to HMRC with full details of the Range Rover. The discovery assessments were invalid.

The charges in relation to the accommodation expenses

23. In relation to the accommodation, it was unfair and unreasonable for the Company to be charged an NIC liability on utilities expenses paid in relation to Mr and Mrs Dysell. The employees made use of their private car for business trips. There was an unspoken informal agreement that there would be a contra between the car costs and the utilities. Expenses associated with living accommodation were exempt under s 99 ITEPA 2003.

Respondents' Case

24. Mr Bradley for the Respondents submitted as follows.

25. HMRC objected to the witness statements which appear to have been drafted by the accountants. Also, the witness statements contained statements of opinion.

The benefit in kind charges in relation to the vehicles

26. In relation to the car benefits HMRC contended that Mr Ive had the benefit of the use of the cars provided by the Company. It was accepted that references in correspondence to purchase of the vehicles by the Company were mistaken.

27. All the conditions in s 114 ITEPA 2003 were met.

(1) The vehicles had been made available by reason of employment. HMRC had considered the arguments concerning who had made the vehicles available. The lease agreements clearly show that they were with the Company. The case law was clear that a leased vehicle is still a company car – see *Whitby and Ball v HMRC* [2009] UKFTT 311 (TC) and other cases. The only three ways in which a car could be made available were if it was the employee's own vehicle, or had been used with the employer's permission, or had been used without

permission. Here there must have been an implied permission to use because Mr Ive did not own the vehicle. The exact arrangement between the employer and the employee was immaterial. In *GR Solutions Limited v HMRC* [2013] STC 2289 the Upper Tribunal had held that even if the car was jointly owned between the employer and employee then it was made available:

> "[33] It is in our view, agreeing with the FTT in this respect, immaterial how the co-ownership was brought about. Section 114 ITEPA applies to the state of co-ownership, howsoever it came to be established. It does not matter therefore whether the employer makes the initial outright purchase and transfers a fractional interest to the employee (*Vasili*), the employer and employee purchase jointly (*Samson*) or, as in this case, the employee makes the initial purchase and transfers a partial share to the employer. Construing s 114 in accordance with its ordinary meaning, in each case, on each occasion the employee uses the car during the currency of the joint ownership, the employer makes the car available to the employee."

HMRC had noted the information provided concerning the guarantor under the leases, but the Company was the lessee and the Company had made the lease payments. It was not unusual for a director to be a guarantor and prime obligor; that was shown by the nature of the generic guarantee provided by the taxpayer, and the guarantee provisions were just general wording on this point. There was a clear decision to leave the cars in the Company. The case of *Christensen v Vasili* [2004] STC 93 showed that where a part interest in the vehicle was acquired by an employee, even under informal arrangements, the vehicle was made available by reason of the employment. Mr Ive's position was an even clearer case. It was clear that Mr Ive had received the car from the Company cheaper then he should have done, by reason of his employment with the Company. The beneficial ownership argument was not relevant because the vehicle was made available by the employer by reason of employment.

(2) The vehicles were available for private use. On the further expenditure by Mr Ive in respect of fuel, servicing etc, the charge to the benefit in kind is on the cash equivalent which should not be reduced for other expenses. HMRC's view, on the authority of the Court of Session case of *CIR v Quigley* [1995] STC 931, is that not all payments by an employee will necessarily qualify as private use payments that reduce the car benefit charge – not even if the employee is required to make such payments as a condition of having the car available for private use. A payment for specific supplies or services, such as petrol, insurance, or car washing, will not count as it is not a payment for private use.

(3) The calculation of the benefits assessed was in accordance with s 121. Under Step 7, HMRC considered that a further reduction could be made to reflect reduced availability of the vehicles in some years; there were revised figures in HMRC's revised statement of case and a numerical breakdown was handed up at the hearing.

(4) Step 8 of the calculation allowed a reduction for contribution for private use. HMRC had given a deduction for the whole amount of the lease costs met by Mr Ive on a *concessionary* basis because s 114 was not strictly met, because there was no *requirement* for the employee to reimburse.

28. Mr Ive's contribution to the fuel costs meant that the fuel benefit had been reduced to nil for all years.

The discovery assessments

29. HMRC's employer compliance visit to the Company on 31 January 2007 was the first identification of the provision of the Range Rover. Nothing had been put in Mr Ive's tax returns in relation to the vehicle, so therefore HMRC had made a discovery. The accountant's letter of 29 November 2010 was the first mention of the Land Rover, so that was a further discovery at that point. In August 2007 HMRC had asked about the running costs; the accountants had replied that they were not relevant.

30. HMRC considered there was careless behaviour of Mr Ive or his representative. The omission of the car benefit was careless and therefore the discovery assessments were valid. Even if there was not careless behaviour, HMRC did not know about the Land Rover until outside the enquiry window. The information provided was not sufficient to allow tax to be properly assessed. HMRC needed availability dates and those were only provided by the accountant in November 2011. The Tribunal had pointed out that the assessments had been issued in March 2011 – i.e. before that information was provided – so HMRC were presumably in a position to assess then; that was accepted, but HMRC were not in a position to quantify the insufficiency of tax.

The charges in relation to the accommodation expenses

31. HMRC accepted that the provision of the accommodation was exempt under s 99 ITEPA 2003, as Mr & Mrs Dysell were on-site mangers. However, the employees had not pad for any of the utilities, other than telephone, and those benefits were taxable under s 315 ITEPA and attracted a straight class 1A NIC liability. HMRC had accepted the taxpayer's estimates for the utilities supplied.

32. The witness statements submitted were objected to. HMRC would wish to challenge the suggestion of an agreement to offset certain costs. No claim had been made by the Company for car expenses. Since there was no question of any repayment claim this did not affect the employer's NIC liability. The argument about making good would not extend to offsetting of one benefit against another.

Consideration and Conclusions

33. We consider first the argument that some of the assessments on Mr Ive are not valid; then move to the benefit in kind charges on Mr Ive; then the NIC charges on the Company in relation to the accommodation expenses payments and any benefits in kind.

Validity of the assessments on Mr Ive

34. We are satisfied that HMRC have made a "discovery" for the purposes of s 29 TMA 1970. Mr Ive's tax returns for the relevant tax years did not make any reference to the cars. The existence of the cars came to HMRC's attention as a result of a compliance visit, and that is new information sufficient to constitute a discovery – see, for example, the analysis of the Upper Tribunal in *Charlton & others v HMRC* [2013] STC 866.

35. TMA 1970 gives taxpayers certain protections against potential discovery assessments. The first protection is that one of two conditions must be satisfied in order for HMRC to be able to assess (s 29(3)).

(1) The first condition is that the potential tax loss "was attributable to … negligent conduct on the part of the taxpayer or a person acting on his behalf" or, from 1 April 2010, "was brought about carelessly … by the taxpayer or a person acting on his behalf" (s 29(4)). We have taken (at least on the facts of this case) there to be no material distinction between negligence and carelessness. Having carefully considered the evidence before us, in particular the comprehensive bundle of correspondence prepared by HMRC, we conclude that Mr Ive's behaviour was not negligent or careless within s 29. He had taken a legitimate position on professional advice in completing his tax returns; he and his adviser still maintain that position in the proceedings before us and, even if in due course we determine that position is incorrect, that does not render the position adopted so unreasonable as to constitute negligence or carelessness. Accordingly, we consider that the first condition is not satisfied in this case.

(2) The second (alternative) condition for the purposes of s 29(3) is given in s 29(5):

> "The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

Mr Bradley for HMRC submitted that one reason why HMRC delayed (our word, not his) in issuing the discovery assessments was that they needed detailed information about, for example, availability dates of the cars before they were in a position to quantify the assessments. However, the test in s 29(5) is not that the officer should be able to quantify the potential tax loss, only that he/she could be reasonably expected to be aware of the potential tax loss. As the Upper Tribunal in *Charlton* stated (at [89]) (in the context of a detailed tax avoidance scheme):

> "It is not necessary that the hypothetical officer should understand precisely how a scheme works, or any claimed tax treatment is said to arise. All that is needed is that from the information made available to the hypothetical officer he can reasonably be expected to be aware of the insufficiency of tax such as to justify an assessment."

Having carefully considered the evidence before us, we consider that HMRC were in that position in relation to the Range Rover when they received Mr Ive's letter dated 20 February 2007 (ie his letter after the compliance visit giving details of the Range Rover). Mr Bradley for HMRC submitted that HMRC were not aware of the Land Rover until the accountant's letter dated 29 November 2010; however, it appears to us that HMRC were aware before that letter that Mr Ive had received what HMRC would regard as car benefits dating back to before the start of the Range Rover lease. In a letter dated 11 November 2009 HMRC wrote to the accountant (emphasis added):

> "I understand the facts to be:
>
> - *Since 2002* the company has acquired a succession of vehicles by way of lease or lease purchase agreement(s).
> - The vehicles have been made available for private use of the directors Mr and Mrs Ive.
>
> … In seeking to ascertain whether a car benefit arises, it must be considered whether all the conditions for a car benefit charge to apply are present. … Based on the information held, it would appear that *all these conditions have been satisfied*. …"

Thus we consider that HMRC were alert to the potential tax loss relating to alleged car benefits other than in relation to the Range Rover by (at the latest) 11 November 2009.

To apply those conclusions to the disputed assessments:

(a) The enquiry window for the 2004-05 return closed on 31 January 2007 (s 9A). The second condition is satisfied in relation to tax year 2004-05.

(b) The enquiry window for the 2005-06 return closed on 31 January 2008. For this year (and onwards) the relevant vehicle is the Range Rover, and we have determined above that HMRC could reasonably have been aware of the potential tax loss in relation that vehicle as from 20 February 2007. The second condition is not satisfied in relation to tax year 2005-06.

(c) The enquiry window for the 2006-07 return closed on 31 January 2009. For the same reasons as set out above in relation to 2005-06, the second condition is not satisfied in relation to tax year 2006-07.

(d) The enquiry window for the 2007-08 return closed on 31 January 2010. For the same reasons as set out above in relation to 2005-06, the second condition is not satisfied in relation to tax year 2007-08.

(3) Our conclusion is that neither of the two alternative conditions required by s 29(3) is satisfied in relation to any of the tax years 2005-06 to 2007-08 inclusive. Thus those assessments are invalid. The second condition (s 29(5)) *is* met in relation to the tax year 2004-05, and thus it is necessary to consider whether any other protection against that discovery assessment is available to the taxpayer.

36. The second protection available to a taxpayer is that TMA 1970 sets time limits on HMRC's ability to raise discovery assessments. Under s 34 the "ordinary time limit" is four years after the end of the relevant tax year. That time limit was substituted with effect from 1 April 2010 (by FA 2008) and, although the disputed 2004-05 discovery assessment relates to a tax year before that date, the disputed assessment was not issued before that date, and thus the relevant ordinary time limit under s 34 is four years. Section 36 extends that time limit to six years after the end of the relevant tax year "in a case involving a loss of income tax … brought about carelessly by the person". We have already determined ([36] above) that Mr Ive's behaviour was not careless. Accordingly the relevant time limit is four years, which for the 2004-05 tax year expired on 5 April 2009. Thus the 2004-05 discovery assessment was out of time, being issued on 25 March 2011.

37. The outcome is that none of the discovery assessments (tax years 2004-05 to 2007-08) are valid. For completeness, the dispute as to 2008-09 relates to a s 28A closure notice, the validity of which is not in issue.

Benefit in kind charges relating to the vehicles

38. We have devoted considerable thought to whether the Company could be said never to have provided the cars to Mr Ive, on the basis that the Company acted as merely some form of nominee for Mr Ive and that Mr Ive was the true lessee all along. Although not expressly stated in those terms, that seems to be the drift of some of the representations made to HMRC in correspondence by Mr Ive's accountant. In that connection we have reviewed the analysis in the recent decision of the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, concerning (in very different circumstances from the current case) the distinction between piercing the corporate veil and attributing beneficial ownership of assets to a controller of a company. However, the Supreme Court was concentrating on the special case of a matrimonial home and deliberate evasion (see Lord Sumption at [52]) and we feel that it would not be appropriate to try to read that case as offering guidance in the straightforward commercial circumstances of the current case. Here it was open to Mr Ive to lease the cars in his own name but – for doubtless legitimate commercial reasons – he decided that the Company should lease the vehicles and then provide the use of them to him. The requirements of s 114 are met and the best that Mr Ive can argue for is relief for his expenditure (for example, for servicing) against the cash equivalent car benefit.

39. HMRC have given a deduction for the lease rental costs reimbursed by Mr Ive. That was described as being "by concession", which we understand to mean that the strict terms of s 144 are not accepted by HMRC to have been met. We do not intend

to disturb the concessionary treatment granted by HMRC to Mr Ive, but we agree with HMRC that the terms of s 144 have not been met with regard to payments by Mr Ive – whether in relation to the rental costs or other expenditure. Section 144 grants a deduction where "the employee is required … to pay … an amount of money for [private] use". That point was considered by the Inner House of the Court of Session in *Quigley*. Although, as a Scottish decision, that case is not strictly binding on this Tribunal, it is of persuasive authority. In that case an employee paid the insurance premiums on a company car and sought to deduct those from the calculation of the car benefit. Lord Hope stated (at 938):

> "A reduction is available under para 4 [of sch 6 ICTA 1988 – now s 144 ITEPA 2003] only 'if in the relevant year the employee was required, as a condition of the car being available for his private use, to pay any amount of money ... for that use'. If he was so required, the amount so paid is the measure of the reduction from the cash equivalent. It is the words 'for that use' which lie at the heart of the argument. For the Crown Mr Hodge submitted that, if full weight was given to these words according to their ordinary meaning, their effect was to confine the reduction to amounts paid by the employee in return for, or as the price for, the use of the car for his private use. The fact that the amount was paid as a condition of the car being available for his private use was not enough. Both tests required to be satisfied. For the taxpayer Mr Tyre submitted that the Crown's approach involved reading into the provision words which were not there. He said that there was a single test, which was whether the payment was made as a condition of the car being available for the employee's private use. The words 'for that use' did not limit the amount to money paid by him for the use of the car. So long as the money was paid as a condition of the car being available for his private use, it was an amount which was paid 'for' that use. The obligation on the taxpayer in this case to arrange and finance the insurance of the vehicle was clearly set out in the agreement. That was enough to bring the amounts paid by the taxpayer for the insurance into account by way of reduction.
>
> I think that it is clear from its wording that para 4 permits only those payments which are made for the private use of the car to be brought into account for this purpose. These payments must be made as a condition of the car being available for the employee's private use, otherwise they do not qualify. But it is not all payments which are made as a condition of the car being available for his private use that can be claimed by way of reduction from the cash equivalent. They must be amounts paid 'for that use'. In this context the word 'for' simply means 'in respect of' or 'in exchange for'. Its effect is that the use of the car for private use and the payment by the employee for this benefit are counterparts one for the other. I do not see this approach as reading into the statute words which are not there. It does no more than give the word 'for' its ordinary meaning according to the context in which it is used.
>
> As I understand this paragraph there are two tests which must be satisfied. The payments must be payments which the employee is required to make as a condition of the car being available for his

> private use. Voluntary payments by him for whatever purpose cannot be brought into account. Then the payments must also be made by the employee for the use of the car for his private use. Payments made by him for some other purpose, or to entitle him to some other benefit, must also be left out of account. So far as the cost of the insurance in the present case is concerned, it is clear that the taxpayer was required to pay for this by his agreement with the Forestry Commission. So these payments do not fall out of account as having been made voluntarily. On that point there is no difficulty. But they were made in respect of, or in exchange for, the insurance of the vehicle, not for the use of it. That insurance was, as the commissioners have held, a necessary prerequisite for the day-to-day use of the car, for both private and business use. Thus the payments which the taxpayer made for the insurance were made for a different purpose than for the private use of the vehicle. In my opinion the taxpayer was not entitled, on these facts, to bring the payments which he made for the insurance into account by way of reduction of the cash equivalent of the benefit of the car for his private use."

40. The situation before us is that there was no formal agreement between the Company and Mr Ive concerning payments as a condition of private use of the cars. Further, the payments made by Mr Ive were (as expressed by Lord Hope) "a necessary prerequisite for the day-to-day use of the car, for both private and business use". Accordingly, we agree with HMRC that no deduction can be made from the cash equivalent benefit for those expenditures.

41. As already recorded, at the hearing Mr Bradley for HMRC handed up a revised calculation which made a reduction of amounts to reflect dates of availability of the cars.

42. For completeness, we note that HMRC consider that no fuel benefit arises under the arrangements between the Company and Mr Ive, and thus that point is not before the Tribunal.

Accommodation expenses payments

43. HMRC accept that no benefit in kind arises in relation to the provision of accommodation to Mr and Mrs Dysell, because of the provisions of s 99 ITEPA 2003 (accommodation provided for performance of duties). We agree with HMRC that it is clear from the wording of s 315 ITEPA 2003 that a separate benefit arises from the meeting by the employer of accommodation expenses (eg utilities bills); s 315 grants a limited exemption for such expenses if s 99 (or s 100) is met, and that exemption would not need to be made if there were not a charge in its absence.

44. Mr Curry for the Company does not dispute the detail of the calculation made by HMRC (which we understand is in any event based on figures provided by the Company) but instead submits that there was no benefit because there was an informal agreement that the expenses should be offset in full by Mr & Mrs Dysell not making any charge for the use they provided of their private vehicle for business purposes.

45. We have already noted that none of Mr Ive, Mr Dysell or Mrs Dysell attended the hearing and thus neither HMRC not the Tribunal were able to ask questions concerning the nature of this purported arrangement. We consider it may be possible to eliminate a benefit for class 1A NIC purposes by specifically making good a liability, but we are not satisfied on the evidence available that that has occurred here. Accordingly, we do not accept that any offset should or could be made to reduce the NICable benefits.

Decision

46. In relation to the Company's appeals against the Class 1A NIC determinations, the amounts assessed are to be varied as agreed by HMRC in relation to the dates of availability of the vehicles. Subject to that adjustment, the appeals are DISMISSED.

47. In relation to Mr Ive's appeals against the income tax assessments and closure notice:

(1) The appeals against the assessments for the tax years 2004-05 to 2007-08 are ALLOWED.

(2) The closure notice for the tax year 2008-09 is to be varied as agreed by HMRC in relation to the dates of availability of the vehicles. Subject to that adjustment, the appeal is DISMISSED.

48. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 1 May 2014