[2019] UKFTT 0188 (TC)

TC07038

Appeal number: TC/2016/06002
TC/2017/01581

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – company car benefit – whether car made available to director for private use – yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

AEGIS VISION LIMITED **Appellants**
and MR SANJAY AGARWAL

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
MRS JO NEILL

Sitting in public at Taylor House, London on 1 November 2018

Mr N. Davies and Mr P. Rippon of Independent Tax & Forensic Services LLP for the Appellant

Mrs P. M. O'Reilly, presenting officer for HMRC's Solicitor's Office and Legal Services, for the Respondents

DECISION

1. This is an appeal by the Appellants ("Aegis" and "Mr Agarwal", together "the Appellants") against the following assessments issued by the Respondents ("HMRC") under section 29 Taxes Management Act 1970 ("section 29 TMA") and a decision under section 8(1) Social Security Contributions (Transfer of Functions etc) Act 1999 ("section 8") in respect of the availability of a company car for private use:

Tax Year and SA filing date	Date of assessment or decision	Legislation	Amount
2011-12 5.12.12	23.11.15	Discovery assessment under section 29 TMA	£10,692
2012-13 24.10.13	23.11.15	Discovery assessment under section 29 TMA	£10,016
2013-14 29.7.14	23.11.15	Discovery assessment under section 29 TMA	£9,166.95
2010-15	17.12.15	Decision under section 8	£15,151.50

Background and facts found from the evidence

2. We found the following facts from the evidence in the Tribunal's bundle and the witness evidence of Mr Agarwal and HMRC Compliance Officer Shiya Kugendran:

3. Aegis was incorporated on 21 May 2004. It is a wholesale trader. Mr Agarwal is a shareholder and has been a director of the company since 2004. Mr and Mrs Agarwal live approximately ten minutes away from Aegis's office by car. Mr Agarwal and his wife do not drive. Mr Agarwal has never walked to the office. He always requires a driver to take him to his office.

Car Leasing and arrangements for the use of the Mercedes

4. Mr Agarwal has known Mr Anwar ("the Chauffeur") in his capacity as a mini cab driver since 2004. They have developed a good working relationship over the years. In 2010 Aegis decided that rather than continuing with the ad hoc travel arrangements with mini cab firms, they would seek to engage the Chauffeur to carry out the duties of chauffeur. It was considered that the vehicles available to the Chauffeur would not provide the efficiency and positive image required by Aegis and so it entered into arrangements to lease an executive car. Aegis then entered into

arrangements to sub-lease the executive car to the Chauffeur on the terms set out below.

5. On 22 June 2012 Aegis entered into an agreement with Openstart to lease a Mercedes S350. The agreement provided for an upfront payment of £5,040 and monthly payments of £1,680. Aegis had entered into a similar agreement some two years earlier in relation to another Mercedes car. We have referred to the cars under these lease arrangements from time to time as "the Mercedes" below.

6. On 12 July 2010 the Chauffeur entered into a hire agreement with Aegis for "transportation assignments" and use of the Mercedes. The agreement provides that Aegis may require the Chauffeur to use the Mercedes for the assignments and that the Chauffeur must pay a fee of £200 per month if he does so. The £200 fee is for his use of the Mercedes, but Aegis refund the Chauffeur's petrol and car cleaning costs for the Mercedes. The £200 fee is deducted from the amount due to the Chauffeur each month for his services. The agreement also provides that Aegis is responsible for insuring the Mercedes. The hiring or sub-lease of the Mercedes to the Chauffeur is in breach of the car leasing agreement between Aegis and Openstart.

7. On 12 July 2010 the Chauffeur also entered into the Chauffeur agreement with Aegis. This provides for the Chauffeur to be offered transportation assignments from time to time and that states he may be required to use the Mercedes for these journeys. It is specified that when the Mercedes is not being used it should be parked at Mr Agarwal's home address "or such other location as may be instructed by Mr Sanjay Agarwal from time to time." The Mercedes was therefore parked in an underground garage at Mr Agarwal's home address overnight and at weekends. The Chauffeur drives from his home to Mr Agarwal's home address and parks his car there while he uses the Mercedes. Aegis claim that they put this parking arrangement in place because it does not have safe parking or garaging facilities and that garaging the car reduced the insurance premium, but this requirement was removed from the insurance policy in July 2013.

8. The Chauffeur agreement provides that the Chauffeur may provide a suitable alternative if he is not available to drive, but that he would have to arrange appropriate insurance cover. This has not occurred to date, but it implies that the alternative would be required to drive the Mercedes. Aegis's accountants, Wilkins Kennedy LLP, confirmed in their letter of 25 June 2014 to HMRC that only the Chauffeur drives the Mercedes.

9. The Chauffeur agreement sets out an hourly rate of £12 per hour and refers to monthly invoicing for the transport. The evidence is that the Chauffeur invoices Aegis monthly for his chauffeur charges for Mr Agarwal, other Aegis staff, product samples and visitors (for example £2,605 for June 2013 and £2,595 for July 2013). At the hourly rate of £12 per hour, this represents driving 8 hours a day for 27 days in June.

10. The Chauffeur agreement makes clear that the Chauffeur may be engaged in another business, but it does not refer to the use of the Mercedes for the purposes of this business. Similarly, the hire agreement does not refer to use of the Mercedes for the Chauffeur's other activities.

11. Mr Agarwal's evidence is that the Chauffeur was allowed to use the Mercedes in his private business and that this is why Aegis paid for a public carriage office licence for the Mercedes, but Mr Agarwal conceded that he had neither the time nor the inclination to check the use of the Mercedes by the Chauffeur. Aegis submits that the Chauffeur has used it on other occasions by the Chauffeur when he wants to impress customers. The Chauffeur and his wife told HMRC that the Chauffeur would never use the Mercedes to transport private customers as the car was for the transportation of Mr and Mrs Agarwal. The Chauffeur told HMRC that he had used the Mercedes once or twice for appearances only.

12. We find that the Mercedes is driven by the Chauffeur for the purposes of his business with the Appellants and that there is no question of the Mercedes not being available for them because it was being used in the Chauffeur's mini cab business. It is not clear why Aegis pay for a public carriage office licence for the Mercedes, but we agree with HMRC that it does not change the nature of the arrangements between the Chauffeur and Aegis for the "transportation services" in the Mercedes.

13. Aegis pays for an insurance policy for the Mercedes as noted above. The policy names the Chauffeur as the named driver. The 2012-13 policy provides cover for social, domestic and pleasure purposes and in connection with Aegis's business. It excluded use for the carriage of passengers for hire or reward. Later policies from July 2013 cover use of the vehicle for hire by prior arrangement only. The Chauffeur insures and uses a Ford Galaxy (formerly a Seat) in his mini-cab business.

14. The Chauffeur is responsible for filling the Mercedes with fuel and cleaning the car. He presents receipts for the fuel to Mr Agarwal who refunds him in cash. Mr Agarwal then includes this cost in his travel expenses claims from Aegis.

15. When Mr Agarwal needs to be driven somewhere he books or calls the Chauffeur directly. He told us that the Chauffeur takes him to the office in the Mercedes two to three times a month. Aegis's accountants stated that "Mr and Mrs Agarwal may also hire [the Chauffeur] to transport them on non-business trips. Where this occurs they will personally pay for this service in the same way they would pay any other third party transport provider." This is inconsistent with the facts as described by Mr Agarwal. Mr Agarwal described how he rewards the Chauffeur in kind for his private journeys. For example, he has paid for classes to help the Chauffeur with his written English, he has arranged financial assistance for him (loans) and he supports him in other ways. There are no arrangements between them for cash or card payments by reference to the length or duration of each private journey made.

HMRC employer check

16. On 1 October 2013 HMRC wrote to Mr Agarwal, as director of Aegis Vision Ltd, to advise him that the business had been selected for a check to make sure that it was meeting its tax obligations as an employer. A meeting was requested to check its employer records for the period 6 April 2012 to 1 October 2013.

17. HMRC inspected Aegis's employer records on 12 November 2013. The meeting was held at the offices of Aegis's accountants and was attended by HMRC

Compliance Officer Shiya Kugendran ("Ms Kugendran") and Ms Magagnin of chartered accountants Wilkins Kennedy LLP. Following the meeting HMRC queried the arrangements in relation to the leased Mercedes cars and loans to the Chauffeur. Ms Magagnin provided the information requested. HMRC then asked for a further meeting and requested that Mr Agarwal should attend, but they were told that Mr Agarwal travels frequently and the meeting went ahead in his absence on 11 March 2014.

18. Following the meeting on 11 March 2014 HMRC advised that it would be preferable to meet with Mr Agarwal to discuss a potential liability to tax and national insurance. Wilkins Kennedy LLP responded that "Mr Agarwal is not obliged to meet you and as he has instructed us to represent him in this matter, we have advised him not to."

19. The correspondence between HMRC and Wilkins Kennedy continued for some time. In May 2015 Ms Kugendran concluded that the Mercedes was not a pooled car within section 167 ITEPA. There was then further correspondence between July to September 2015 about the case of *Gilbert v Hemsley (1981)* which concerned a taxpayer parking a car at his home which was also his place of work.

20. HMRC also interviewed the Chauffeur on a number of occasions in relation to his services for Aegis and Mr Agarwal, but later accepted that the Chauffeur is self-employed. Ms Kugendran of HMRC found that the Chauffeur spoke adequate English and that she did not need to use an interpreter to interview him. We found this consistent with the fact that he has worked as a mini-cab driver for over fifteen years. She found him to be honest. HMRC did not raise the issue of whether the provision of his services was a benefit in kind for Mr Agarwal.

Assessments and penalties

21. On 23 November 2015 Ms Shiya Kugendran of HMRC issued section 29 TMA assessments for 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 for income tax that should have been assessed in respect of the car and car fuel benefit received by Mr Agarwal. HMRC also made a decision under section 8 in respect of 2010-11, 2012-13, 2013-14 and 2014-15 that Class 1A National Insurance Contributions ("NICs") were due on the car and fuel benefit received by Mr Agarwal.

22. A penalty determination was issued on 11 January 2016 on the basis that HMRC considered that the failure by Aegis to return the car benefit was as a result of deliberate behaviour.

Appeal

23. Aegis appealed against the assessments and decision on 23 December 2015. On 9 February 2016 Aegis asked for independent reviews to be carried out. HMRC's independent reviews concluded on 9 June 2016 that the decisions should be upheld, other than the section 29 TMA assessments for 2010-11 and 2014-15 that were cancelled. These assessments were cancelled because one was issued after the four year time limit had expired (2010-11) and the other was issued whilst the window for opening an enquiry was still open (2014-15). The penalty was reduced on the basis that the behaviour was careless but not deliberate. The parties have since agreed and accepted suspension conditions in relation to the penalty and the penalty decision is not the subject of these appeals.

24. On 2 November 2016 Aegis and Mr Agarwal appealed to the Tribunal against the discovery assessments and on 10 February 2017 Aegis appealed against the NICs decision set out in paragraph 1 above.

25. HMRC have since accepted that the appeals are made in respect of all of the assessments and the decision and that they are by both Mr Agarwal in respect of the section 29 TMA discovery assessments and Aegis in respect of the section 8 decision.

Relevant law

26. Section 114(1) Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides:

(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).

27. Section 116 ITEPA provides that 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."

28. Section 117 ITEPA provides that if a car is made available by an employer to an employee or member of an employee's family or household, it is to be regarded as made available by reason of the employment unless either:

> (a) the employer is an individual, and the car in question is made available in the normal course of the employer's domestic, family or personal relationships; or
>
> (b) the employer carries on a vehicle hire business under which cars of the same kind are made available to members of the public for hire, and the car in question is hired to the employee or member in the normal course of that business, and in hiring

that car or van the employee or member is acting as an ordinary member of the public.

29. Section 118 ITEPA provides that a car made available in a tax year to an employee is to be treated as available for the employee's private use unless in that year the terms on which it is made available prohibit such use and it is not so used.

30. HMRC referred us to the cases of *GR Solutions Ltd v HMRC* [2013] UKUT 0278 (TCC) ("*GR Solutions*") and *Southern Aerial (Communications) Ltd and others v HMRC* [2015] UKFTT 538 (TC) ("*Southern Aerial*") in relation to the question of whether the Mercedes was made available to Mr Agarwal. These are referred to in context in the discussion below.

31. Section 120 ITEPA provides that if the car benefit provisions apply 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. The employee is chargeable to tax under section 6 ITEPA in respect of the benefit treated as earnings. Section 121 ITEPA sets out the method of calculating the cash equivalent of the benefit of a car for the purposes of the charge.

32. Sections 167 ITEPA 2003 provides that no car benefit arises on a pooled car that is made available by reason of employment. A car is a pooled car if it for the use of more than one of the employees of an employer by reason of employment and was not ordinarily used by one of the employees to the exclusion of the others. Further, any private use of the car must be 'merely incidental' to the employee's other use of the car. Finally, the car must not be kept overnight at the employee's residential address.

33. Section 29(1) Taxes Management Act 1970 ("section 29 TMA") provides:

"(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
(b) that an assessment to tax is or has become insufficient, or
(c) that any relief which has been given is or has become excessive,
the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

34. As Mr Agarwal had filed self-assessment tax returns for the relevant years, the condition in section 29(5)(a) TMA on which HMRC rely will only be satisfied if, at the time when HMRC ceased to be entitled to make an enquiry into the relevant years, the officer could not have reasonably expected, on the basis of the information made available before that time, to be aware of the situation mentioned in section 29(1) TMA.

35. The onus of proof in relation to section 29 TMA lies with HMRC to demonstrate that the conditions for the issue of the discovery assessment have been satisfied. If

HMRC establish that the conditions are satisfied, the onus of proof shifts to Mr Agarwal to prove that he is overcharged by the assessments, failing which they stand good in accordance with section 50(6) TMA.

36. It is agreed that liability for national insurance contributions in respect of a car benefit will follow the income tax liability that arises under ITEPA. The relevant law in relation to national insurance contributions is set out in section 10 of the Social Security Contributions and Benefits Act 1992 ("section 10 SSCBA"). This provides for Class 1 A national insurance contributions to be payable in respect benefits not chargeable for the purposes of Class 1 contributions.

37. Section 8 (1)(c) Social Security Contributions (Transfer of Functions) Act 1999 ("section 8") provides that it shall be for an officer of the Board 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.

Discussion

38. This appeal concerns the application of the car benefits legislation to the somewhat unusual arrangements put in place by Aegis for the use of the Mercedes. In order to determine the appeal in relation to the income tax and NICs charges raised by HMRC we have addressed each of the components of the car benefits legislation in section 114 ITEPA in turn.

Is the car "made available"?

39. Section 114 ITEPA provides that the car benefit charges apply to a car that is "made available". The Upper Tribunal in *GR Solutions* observed that "made available" must be given its ordinary meaning. In that case the car was co-owned by the employer and employee and it was noted that whether a car is made available to an employee "does not in our view depend on the existence of any agreement for the use of the car. But where a chattel is co-owned, its physical use (as opposed to the legal right to possession of it) is subject to an agreement or understanding between the co-owners, which may be express or tacit."

40. Aegis submits that the Mercedes is leased to the Chauffeur for him to use in his business as he chooses and that the Mercedes is therefore under his control at all times. Aegis submits that the Mercedes can only be made available by the Chauffeur in these circumstances and that these arrangements effectively prohibit the car being made available by Aegis. HMRC submit that these non-commercial arrangements do in fact result in Aegis making the Mercedes available to Mr Agarwal.

41. It is difficult to see any commercial justification for the hire agreement as explained by the Appellants. Aegis entered into a costly lease (£1,640 pm in 2012-14) with Openstart because they had decided that they needed an appropriate car for their growing business. But, instead of simply insuring the Chauffeur as the named driver of the Mercedes, they decided to sub-lease it to the Chauffeur for only £200 per month and to pay for a public carriage office licence for him to use the Mercedes in his mini cab business.

42. In practice the Chauffeur holds the Mercedes available for Aegis and the Agarwal's "transportation assignments" in the Mercedes. He holds the keys and he is the only insured driver, but neither the documentation nor the evidence of its physical use and parking at the Agarwal's home address support the submission that the Mercedes was hired to the Chauffeur to use in his mini cab business. The Chauffeur drives his own car in his mini cab business and he told HMRC that he does not use the Mercedes to transport fare paying passengers. Any use to impress potential contract customers or hotels is an insignificant perk for the Chauffeur. This finding is supported by the Chauffeur's evidence and invoicing for Aegis (paragraphs 9 and 11 above). We have concluded, following *GR Solutions*, that notwithstanding the hire arrangements with the Chauffeur, the Mercedes was made available to the Agarwals by Aegis in practice because their physical use of the Mercedes was as a result of the arrangements agreed between the Aegis and the Chauffeur.

Available by reason of employment?

43. Section 117 ITEPA sets out what is referred to in *Southern Aerial* as "an irrebuttable presumption that if an employer (other than an individual which is not the case here) makes a car available to an employee then that car is so made available by reason of the employment of that employee." The circumstances of that case were that the employer company entered into hire purchase contracts for cars. These provided that the company was not permitted to sell or otherwise part with the car or allow any other person to obtain rights over them. The cars were used by the directors under arrangements put in place for the cost of the cars to be charged to the directors' partnership. The Tribunal held that these charging arrangements did not change the fact that the employer company was the only person in a position legally to make the car available to the directors and that the "by reason of employment" test was passed.

44. In this case it is Aegis that has entered into the lease with Openstart for the Mercedes. It is Aegis who pays the lease charges and who arranges the insurance. The arrangements entered into with the Chauffeur are in breach of the lease agreement, but their practical effect is to secure the driving services of the Chauffeur for "transportation assignments". The agreements with the Chauffeur do not create an interest in the Mercedes for any period of time, but provide instead that Aegis "may require/permit" the Chauffeur to use the Mercedes and, should he do so, he is liable to pay the £200 fee.

45. We find that the effect of these arrangements is that Aegis remained in control of the use of the Mercedes. It was therefore Aegis that made it available to Mr and Mrs Agarwal and section 117 ITEPA applies to make this "by reason of the employment".

Available for Mr & Mrs Agarwal's private use?

46. Section 116 ITEPA provides that 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. Section 118 ITEPA provides that a car made available in a tax year to an employee is to be treated as available for the employee's private use unless in that year the terms on which it is made available prohibit such use and it is not so used.

47. Aegis and Mr Agarwal have not claimed that there is a prohibition on private use, but Mr Davies submits that there is no private use by reason of employment because Mr Agarwal makes his arrangements with the Chauffeur direct for any private journeys and he pays the Chauffeur for these journeys in the same way as any member of the public would do in the Chauffeur's business. It was submitted that Aegis does not pay for private journeys and that such journeys are arranged because of the personal relationship between Mr Agarwal and the Chauffeur.

48. We have considered the facts about the practical arrangements in place for Mr and Mrs Agarwal's use of the Mercedes. The car was parked at their home and the Chauffeur drove them in the Mercedes to the office, as well as to meetings and the airport as required by them. Mr Agarwal concedes that the Chauffeur "would tend to use the [Mercedes] he leases from the company" to drive him on non-business journeys and he concedes that the Chauffeur drives him to his office in the Mercedes a few times a month. We noted that Mr Agarwal is a full-time businessman and that he may well make calls and read documents when he is in the Mercedes, but does not change private use, such as travel to and from the office, into business travel.

49. The fact that Mr and Mrs Agarwal do not drive was raised repeatedly by the Appellants. This argument ignores the fact that the charge under the benefits code in ITEPA applies because an asset is made available or placed at the disposal of the employee or director. There is no provision for a reduction in the cash equivalent or annual value of a car, plane or yacht because the employee or director does not have a licence or competency to use them unassisted. The fact that the employee or director does not drive raises instead the question of additional tax charges on the benefit of the services of the Chauffeur. It is not clear why HMRC chose not to pursue this charge.

50. We do not accept that Mr Agarwal makes payments or reimbursements to the Chauffeur in the same way as his mini cab passengers. Mr Agarwal provides the Chauffeur with assistance with his English and finances, but there is no link between each private journey made and the assistance provided. Even if there were payments and such a link, we agree with the finding in *Southern Aeri*al that bearing the cost of the journeys cannot override the fact that employer arranged to lease the car and for the director to use it as and when required. It is also relevant in this context that it was Mr Agarwal, as director of Aegis, who put the arrangements in place for the lease of the Mercedes and the arrangements with the Chauffeur.

51. We conclude that the Mercedes was made available for private use by Mr and Mrs Agarwal, whether or not they chose to use it for all of their private journeys.

Fuel

52. Aegis has not challenged the basis of calculation of the fuel charge, but has submitted that the charge does not arise as there was no private use of the Mercedes. Mr Davies also submitted at the hearing that any arrangements for Mr Agarwal to reimburse the Chauffeur for fuel for private journeys would be between them and that was why they were not reflected in the company's records. We were not told how

such arrangements were taken into account when Aegis reimbursed Mr Agarwal for the Chauffeur's fuel costs.

53. On the basis of the evidence provided and the balance of probabilities, the Appellants have not established that Mr Agarwal refunded the Chauffeur for his fuel costs for private journeys or that he reduced his claim for reimbursement from Aegis by this amount.

54. As we have found that the Mercedes was made available for private use by Mr Agarwal and that Aegis paid the fuel costs, the fuel charge applies.

Section 29

55. HMRC made a discovery within section 29(1) TMA when they carried out employer checks and established that Aegis had leased a car from Openstart but that it had failed to make a return of a car and fuel benefit in respect of the car. The "discovery" was made in the late summer of 2015 after it was established that car-pooling relief was not available and that the further arguments raised by Aegis were not accepted. HMRC has raised assessments under section 29(5)(a) TMA as the officer could not have been reasonably expected to be aware that the assessment to tax was insufficient when she ceased to be entitled to make an enquiry into Mr Agarwal's returns for the relevant years. We accepted Mrs O'Reilly's submission at the hearing that the conditions for the issue of the discovery assessments were satisfied.

56. Aegis and Mr Agarwal have not established that the amounts of the assessments or the decision are excessive. The assessments and the decision therefore stand good in accordance with the provisions of section 50(6) TMA.

Decision

57. For the reasons set out above the appeals are refused. The section 29 assessments and the section 8 decision set out in paragraph 1 above are confirmed.

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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 14 MARCH 2019