TC01299

Appeal number: TC/10/06684

NATIONAL INSURANCE CONTRIBUTIONS – Class 1A NIC – whether cars owned privately and if so whether all costs paid for privately – whether car and car fuel charge due. Appeal refused – The Social Security Contributions and Benefits Act 1992 - Section 10.

FIRST-TIER TRIBUNAL

TAX

AUTOWEST LIMITED **Appellant**

- and -

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

TRIBUNAL JUDGE: W Ruthven Gemmell, WS
MEMBER: Ian Condie, CA

Sitting in public in Edinburgh on 16 May 2011

Mr Abid Hussain, for the Appellant

Mrs Christine Cowen instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Autowest Limited ("AW"), a used car dealing company, against assessments in respect of car and car fuel benefits issued by the Respondents ("HMRC") for 2003-04 to 2008-09, inclusive, in respect of Class 1A National Insurance Contributions ("NICs") in the sum of £4,022.76.

2. Section 10 of the Social Security Contributions and Benefits Act 1992 states that employers have to pay Class 1A NIC on any benefit provided to employees by reason of their employment.

3. Abid Hussain ("AH"), the principal director of AW, claimed that he did not use cars from the used car dealing stock belonging to AW for private motoring and that he only used privately owned vehicles for private journeys and received no fuel benefit from AW.

4. Evidence was given by two employees of HMRC, Ms Rebecca Clubb ("RC") and Miss Carol McConnachie ("CMcC"), both of whom were credible witnesses.

5. The Tribunal did not find AH to be a credible witness and the principal reason for the case appearing before the Tribunal was because AH, having previously confirmed to the two HMRC witnesses and also in writing that he had used cars from stock for private motoring, subsequently denied this.

Legislation

The Social Security Contributions and Benefits Act 1992
Section 10
Class 1A contributions

(1)Where —

(a) for any tax year an amount in respect of a car is by virtue of section 157 of the [1988 c. 1.] Income and Corporation Taxes Act 1988 chargeable on an earner to income tax under Schedule E; and

(b) the employment by reason of which the car is made available is employed earner's employment,

a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of the earner and car in question.

(2) The Class 1A contribution referred to in subsection (1) above is payable by—

(a) the person who is liable to pay the secondary Class 1 contribution relating to the last (or only) relevant payment of earnings in the tax year in relation to which there is a liability to pay such a contribution; or

(b) if no such contribution is payable in relation to a relevant payment of earnings in the tax year, the person who would be liable but for section 6(1)(b) above to pay a secondary Class 1 contribution relating to the last (or only) relevant payment of earnings in the tax year.

(3) A payment of earnings is a "relevant payment of earnings" for the purposes of subsection (2) above if it is made to or for the benefit of the earner in respect of the employment by reason of which the car is made available.

(4) The amount of the Class 1A contribution referred to in subsection (1) above shall be—

(a) the Class 1A percentage of the cash equivalent of the benefit of the car to the earner in the tax year; or

(b) where for the tax year an amount in respect of fuel for the car is by virtue of section 158 of the [1988 c. 1.] Income and Corporation Taxes Act 1988 also chargeable on the earner to income tax under Schedule E, the aggregate of—

(i) the Class 1A percentage of the cash equivalent of the benefit of the fuel to the earner in the tax year; and

(ii) the amount mentioned in paragraph (a) above,

the cash equivalents of the benefit of a car or fuel being ascertained, subject to the provisions of this section, in accordance with section 157 or, as the case may be, 158 of the Income and Corporation Taxes Act 1988 and Schedule 6 to that Act.

(5) In subsection (4) above "the Class 1A percentage" means a percentage rate equal to the percentage rate for secondary Class 1 contributions specified in section 9(3) above as appropriate for the highest secondary earnings bracket for the tax year in question.

(6) In calculating for the purposes of subsection (4) above the cash equivalent of the benefit of a car or fuel—

(a) the car shall not be treated as being unavailable on a day by virtue of paragraph 2(2)(b) of Schedule 6 to the Income and Corporation Taxes Act 1988 for the purposes of section 158(5) of that Act or paragraph 2(2), 3(2) or 5(2) of that Schedule, unless the person liable to pay the contribution has information to show that the condition specified in paragraph 2(2)(b) is satisfied as regards that day;

(b) the use of the car for the earner's business travel shall be taken—

(i) for the purposes of section 158(5) of that Act and sub-paragraph (1) of paragraph 3 of that Schedule to have amounted to less than 18,000 miles (or such lower figure as is applicable by virtue of sub-paragraph (2) of that paragraph); and

(ii) for the purposes of sub-paragraph (1) of paragraph 5 of that Schedule to have amounted to not more than 2,500 miles (or such lower figure as is applicable by virtue of sub-paragraph (2) of that paragraph),

unless in either case the person liable to pay the contribution has information to show the contrary; and

(c) for the purposes of paragraph 5(3) of that Schedule, the car shall be treated as not having been the car used to the greatest extent for the employee's business travel, unless the person liable to pay the contribution has information to show the contrary.

(7) Regulations may make such amendments of this section as appear to the Secretary of State to be necessary or expedient in consequence of any alteration to section 157 or 158 of the [1988 c. 1.] Income and Corporation Taxes Act 1988 or Schedule 6 to that Act.

(8) A person shall be liable to pay different Class 1A contributions in respect of different earners, different cars and different tax years.

(9) Regulations may provide—

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

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

Cases Referred To

Haythornthwaite (T) & Sons Ltd v Kelly (Inspector of Taxes), (1927) 11 TC 657;

Norman v Golder (Inspector of Taxes) [1945] 1 All ER 352;

Nicholson v Morris (Inspector of Taxes) [1977] STC162.

The Facts

6. The following facts were found:-

7. AH and his wife are directors of a used car sales company, AW, which was incorporated in February 2003.

8. As part of a corporation tax enquiry in 2007, AH confirmed at a meeting that he regularly used stock vehicles for both business and private motoring.

9. At a meeting on 1 April 2009, at which AH and RC were present, AH said he had never owned a car of his own, that he used stock cars for business travel and to return home and that he was able to walk or use vehicles from the business to get to where he needed to go.

10. A note of this meeting was sent to AH on 24 April 2009 asking him to indicate within 30 days if anything contained within the note was incorrect and no such indication was received.

11. The letter of 24 April 2009 stated that AH had confirmed at the meeting that he used vehicles from stock for personal motoring and there was also a reference to repair work for vehicles.

12. By letter dated 6 June 2009, AH replied stating that "repair works are very rare and if any should be listed in the heading ("Other Incomes")" and "I can confirm that I use a car from stock for personal use but my wife has a car that is paid for".

13. A further meeting took place on 29 July 2009, at which AH and RC were both present, and a note of this meeting made reference to the previous discussion where AH said he had used various cars from stock for personal use. He was advised that both car benefit and fuel benefit should have been declared as benefits in kind and AH confirmed that no benefit had been declared.

14. It was agreed that HMRC, through the appropriate department, would arrive at a reasonable figure given that AH had not kept any records of the vehicles used or the mileage. AH stated that he would normally use medium size BMW or Mercedes vehicles with an average cost of £5,000 and preferred to use a diesel vehicle. He estimated that mileage between home and work was approximately 30 miles per day and AH stated that the cars were sometimes used for rent collection and other personal uses. 1000 miles per month was agreed as typical.

15. A note of that meeting was sent on 30 July 2009 with the same request to advise if anything contained therein was incorrect within 30 days. No such notification was received.

16. The letter of 30 July 2009 referred to the undeclared car and fuel benefit and, in order to ensure that the correct value of the benefits could be calculated, AH was asked to provide a note of the average level of CO2 omissions for such cars.

17. At the meeting on 30 September 2009, AH confirmed that the CO2 levels for the cars he had used were between "162 and 175" and these were band H.

18. HMRC said they would arrange for the benefit to be calculated by their colleagues in the Employer Compliance Unit of HMRC.

19. HMRC wrote on 1 October 2009 enclosing a note of 30 September meeting and asking for any corrections to be made within 30 days. No such corrections were intimated.

20. On 6 October 2009 in response to a telephone call, AH stated "after checking my records I had my own car which I bought on hire purchase from March 2007 to November 2008" and that " the best way to test a car (with problems) to see if it is going to be OK is to take it home for a good drive".

21. AH was advised that a colleague in the Employer Compliance Team would be contacting him to calculate the car and fuel benefits and meanwhile RC would conclude the corporation tax issues.

22. On 4 February 2010 AH and AW received a letter from CMcC concerning the payment of the correct amount of tax and national insurance contributions and a meeting between them took place on 10 February 2010. At this meeting AH stated he had access to company vehicles each year from around 2003-04 varying between a mid range BMW and a 1.4 Renault Megane which was then "his current car". Cars changed frequently throughout the year and could be used for one to three months.

23. It was explained that special rules applied to cars provided by companies within the motor industry and in this case the car "averaging method" would apply to obtain a notional list price. CMcC said she would check the Glass's Guide to obtain list prices and CO2 omissions and calculate accordingly. Calculations would be made for the years 2003-04 to 2008-09 but excluding 2007-09 when Mr Hussain claimed he drove a privately owned vehicle, initially a BMW X5 then a Range Rover.

24. At this meeting AH was asked how the vehicles were fuelled and AH replied that AW's credit card was used.

25. It was established that there was no documentary evidence to distinguish between AH's business and private mileage or evidence of any reimbursement to the company for private motoring. In view of this CMcC stated that the fuel scale charge would also be appropriate and would be based on an average CO2 figure for a diesel car. AH was advised that unless it could be shown that absolutely no private motoring was paid for by AW then the fuel scale charge automatically applied.

26. A note of this meeting was sent by letter from HMRC to AH on 12 February 2010 enclosing a computation of the national insurance due on the car and fuel benefit for the tax years 2003-04 to 2008-09 excluding 2007-08 and produced a total computation of approximately £4,144.

27. On 20 February 2010 AH wrote to HMRC stating that since the visit AH had had time to think about the vehicles that he owned for private use and that such information had been unavailable at the time of the meeting when "I really did not understand the implication".

28. AH stated that from January 2003 to March 2007 he had a "classic" Jaguar registration number 185AH and from January 2007-2010 a Chrysler PT Cruiser.

29. These statements were in contradiction to those previously made by AH.

30. AH referred to V5 DVLC registration certificates which stated that the registered keeper is not necessarily the legal owner.

31. The V5 document for the Jaguar, registration 185AH, had Abid Hussain as the registered keeper and showed the vehicle as being acquired on 15 March 2005.

32. The V5 document for the Chrysler vehicle, registration SN51 UEC, had AW as the registered keeper and showed the vehicle as being acquired on 1 March 2007.

33. An estimate by RS Coachworks dated 5 February 2010, relating to an alleged accident, set out a cost of repairs for the Chrysler vehicle and was addressed to AH and AW.

34. On 26 February 2010, HMRC wrote to AH stating that they noted the Jaguar vehicle was only acquired on 15 March 2005 whereas AH claimed to have owned it from January 2003 to March 2007 and that the Chrysler vehicle showed this to be registered to AW.

35. On 23 March 2010 AH said that he used the Jaguar on a daily basis and that the registered keeper of the Chrysler vehicle was not necessarily the owner.

36. AH claimed that he was the owner of the Chrysler which had been sold to AH on 20 February 2007 in terms of a handwritten receipt. A similar hand written receipt for £3,500 for the Jaguar dated 5 April 2003 was also submitted to the Tribunal.

37. HMRC wrote on 30 March saying that the statement that the Jaguar vehicle was used on a daily basis "completely contradicted" what was said at the meeting of 10 February where AH indicted he had used a variety of stock vehicles from 2003 and that at no time during that meeting or in previous meetings had any mention been made of the Jaguar vehicle. Mention was also made of the lack of disclosure of the Chrysler vehicle expressing surprise at "this sudden realisation".

38. At a meeting on 12 April 2010 AH stated that he did not use company cars for personal use and wholly disagreed with the findings that tax and NICs would be due on a car and fuel benefit charge. He claimed not to have understood the implications, had "forgotten that he had used privately owned vehicles" and had grown bored and just kept answering "yes" to whatever RC asked.

39. HMRC expressed surprise that only as a result of the computation being issued had AH suddenly remembered his own private vehicles being used for the entire period covering the computation.

40. In light of this meeting, revised computations were issued with an approximate amount of £4,803. The notes of the meeting of 12 April were sent on 15 April 2010.

41. In a letter dated 26 March 2010, but referring to the letter of 12 April 2010, AH enclosed a copy of an original proposal form submitted to Northridge Finance for the Range Rover for an amount of £479.17 stating this corresponded to an entry on bank statements which had been previously sent to HMRC.

42. AH said that the Range Rover which was sold on 15 January 2008 to a Mr Amjad Mobarak who had an address in Glasgow but who wished to take the car to Egypt. The date of the transaction of the sale of the Range Rover, according to the sales invoice, was 26 October 2008.

43. This invoice was in the name of AW which AH explained was for reasons of convenience by which he would transfer any personally owned cars to AW shortly

prior to sale so the sale would be "put through AW". A similar process would apply in relation to the purchase of cars by AH.

44. MOT history requests were also submitted to the Tribunal showing the relevant mileages of the Chrysler and Range Rover vehicles and reference was also made to a HMRC explanatory note EIM23640.

45. In referring to EMI23640 Car Benefit Miscellaneous "Employees in the Motor Industry – when there is a car benefit charge" AH made reference to a section of the text where is stated that "in cases where employees have the use of company owned cars on a permanent basis the occasional use of a test car for private journeys would not give rise to additional charge to tax" and "where, as part of the normal duties, a director, car sales person or demonstrator takes the car home for the express purpose of calling on a prospective customer, do not on that count alone treat the car as being available for private use. In essence, the whole journey is for a genuine business purpose".

46. On 19 May 2010, HMRC wrote to AH stating that in their view the Chrysler vehicle was registered to AW and that AH had not yet provided sufficient proof of personal ownership or purchase.

47. HMRC stated that the Chrysler had travelled 8000 miles per annum per the MOT history which they claimed was 4000 miles short of what AH had agreed at the meeting with RC on 29 July 2009 when AH agreed that 1000 miles per month was typical.

48. A review took place on 21 July upholding the decision of HMRC.

49. A document was submitted on the day of the hearing being a hire purchase agreement in respect of a BMW X5 in the name of AH but which was undated. This referred to a monthly payment of £479.17 which was due two months after the date of the agreement and a single payment of £629.17 which was payable one month after the date of the agreement.

50. Reference was made by AH to his Bank of Scotland property account bank statement where two pages of the statement had been produced. On 10 April 2007 a payment had been made to Northridge Finance for £629.17 and a payment of £479.17 on 6 October 2008 to Northridge Finance although on the same date there had been a corresponding entry cancelling this amount. AH claimed this proved that the payment of these amounts taken in conjunction with the Northridge Finance document amounted to proof that the BMW X5 belonged to AH and to his purchasing the vehicle one month prior to the first payment, that is to say 3 March 2007, and ceasing ownership in September or October 2008.

Submissions by AH

51. AH says that he did not really understand the significance of the questions and comments about cars when meeting with HMRC officials and that as the matter progressed he did not wish to "open any more doors" as in his view if he answered a

question it would then lead to more questions such as how the cars were paid for and so on.

52. AH had been trying to bring the matter of the HMRC enquiry to a close as quickly as possible and wished above all for the matter to conclude. AH stated that he was naive in making statements to the HMRC officers and in writing and would say anything just to have the matter brought to an end. In his view it was case of saying "the less the better". AH stated that having an HMRC enquiry was stressful and interfered with the running of his business.

53. AH says that it is entirely legal and permissible for vehicles to be held by a registered keeper which is not proof of legal ownership and similarly to make transfers to and from AW when buying or selling cars.

54. AH says that when he was asked how the cars were fuelled he was referring to the stock cars owned by the company and not to his private cars, that he decided to withhold information and that he was not aware of the significance of the amount that may be due to HMRC.

55. AH says that the V5 documents, the bank statements, the MOT mileage history and receipts prove that the Jaguar, the BMW and the Chrysler vehicles were his private vehicles and only used for private use. He says he should have claimed mileage from AW for the private use of his vehicles when they were used for business use.

56. AH claims that AW is not due the NIC between 2003 and 2009 as AH owned four cars which were used for his sole benefit for travelling from home and to work.

57. AH says the appeal should be allowed.

Submissions by HMRC

58. HMRC says that AH had access to the use of stock vehicles for private use between 2003 and 2009 inclusive and that Class 1A NICs are due.

59. AH admitted the use of AW vehicles and even provided the makes of cars and the approximate mileage in order that the charge could be calculated which is incurred when cars are made available and which does not require any transfer of property.

60. HMRC claim that AH used cars for home to work travel even when this was part of business use and that AH admitted on 29 July 2009 that he had used the vehicles for rent collection and other personal use and had a mileage of 1000 miles per month.

61. HMRC say that the assessment is based on what AH said to four officers at face to face meetings and was also confirmed in writing.

62. HMRC say that fuel was paid for by AW and where the company meets the cost of fuel, a car fuel benefit charge applies where there is no evidence of reimbursement and that there was no such evidence.

63. HMRC say that no P11D forms were submitted and although AH says he did not understand, he did not challenge or question any of the notes of meeting that were sent to him and that he only did so when he saw the actual amount of the assessment at which time he began to "backtrack" on what he had said previously.

64. HMRC accept that the "classic" Jaguar car was privately owned but do not believe, as a classic car, it was used for all private journeys.

65. HMRC say that the Chrysler vehicle owned between January 2007 and 2010 is not a privately owned vehicle and refer to the V5 form and the repair invoice both of which provide evidence that it was not privately owned.

66. HMRC say that the V5 for the Range Rover from 2007 to 2008 makes no mention of AH and there is no other evidence of AH's private ownership.

67. HMRC say that the test driving guidance does not apply to used car dealers but instead relates to the use of "demonstration, test and experimental cars".

68. HMRC say the burden of proof is on the tax payer, AW, to prove beyond the balance of probabilities that the assessment of HMRC is incorrect and that AW have not discharged that onus of proof that the used cars from stock were used for private use and that a car benefit and car fuel benefit arise.

69. HMRC say that in addition fuel was provided and AH was not required to, nor did he, make this good and so the assessment should stand and the appeal should be dismissed.

Reasons for the Decision

70. The issue before the Tribunal was whether the NIC charge for car and fuel benefits was due in respect of the use of used car dealing stock or whether the cars were owned privately and if so, whether all the costs were paid for privately. This depended on the strength of evidence and the burden of proof rests with AW to prove that HMRC's decision is wrong.

71. The Tribunal were mindful of the statements and the written admission made by AH that he had used the used stock for business travel and to travel between home and work and that he had never owned a private car. Furthermore, AH had indicated the approximate mileage he travelled in these motor cars and provided details of their CO2 omissions.

72. At the point where an assessment was issued AH then began to contradict these earlier statements and produced evidence, none of which was accepted by HMRC with the exception of the ownership of the Jaguar motor car which they did not believe had been used exclusively for all private journeys.

73. In order for the Tribunal to dismiss the appeal it was necessary for AW and AH to prove on the balance of probabilities that the assessment of HMRC was incorrect and taking the previous statements and written admission into account with the evidence submitted at the Tribunal, AW and AH failed in this regard.

74. Whereas the V5 DVLA document state that the registered keeper is not necessarily the registered owner, there was an insufficiency of evidence, especially in view of the previous statements made of AH's personal ownership of the vehicles.

75. Although handwritten receipts were exhibited for the purchase of the Jaguar and Chrysler motor vehicles, there was no other evidence or bank statements to corroborate this and no evidence of the amount of private motoring or of any business use.

76. The Tribunal were not minded to accept the submission by AW and AH that these vehicles had merely been used to travel to and from work, a distance of only 30 miles per day, as estimated by AH.

77. The finance agreements were similarly inconclusive as to ownership and were accompanied by no other documents to prove a direct link to AH.

78. The Northridge Finance Ltd hire purchase agreement referred to a BMW 3000 and was undated. The two pages of bank statements submitted to the Tribunal in order to corroborate the commencement and termination of this particular loan in AH's bank account, contained a corresponding cancelling entry on 6th October 2008 making the status of that payment meaningless. No other evidence was shown of the payments which would have been made each month between April 2007 and 31st October 2008.

79. A further finance document was simply a proposal form relating to a BMW 7300 which, without further documentary evidence, AH claimed had been transferred to a Range Rover.

80. The V5 document for the Land Rover showed the registered keeper to be Mrs Lorna Hendry with a sale to Mr Mobarack on the 15th of January 2008. Whereas this evidence may have been conclusive of a method of completing the sale, the Tribunal had to see this in light of the previous statements made to HMRC.

81. In each instance there appeared to be unexplained reasons for vehicles having invoices which were not in AH's name.

82. In relation to the EIM 236440 note, the Tribunal were of the view that this was designed to ensure that cars made available to employees in the motor trade should be charged tax as benefits in the same way as cars made available to employees in other employments. The note, although badly written and difficult to understand did, however, attempt to give guidance on particular problems which arose in the motor industry in connection with demonstration, test and experimental cars.

83. In particular, the paragraph which claims that it is unlikely a tax charge would arise quite clearly related to the use for testing purposes of

experimental/developmental cars by engineers and accordingly the Tribunal were unable to see how this was applicable to AW.

84. The Tribunal were mindful of the fact that the verbal statements made to HMRC were, on each occasion, put in writing and then sent to AH to give him an opportunity to correct, or deny them shortly thereafter. No such denial or corrections were ever made in this reasonable timescale

85. The Tribunal were provided with no evidence that fuel charges, which AH had stated had been paid for using AW's credit card and which appeared as significant items on the AW's profit and loss account in the years 2005 to 2007, were not for private use or that the cost of all fuel provided for private use was made good to the company by AH.

86. 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.

W Ruthven Gemmell

TRIBUNAL JUDGE
RELEASE DATE: 5 July 2011