TC02120

Appeal numbers: TC/2011/03499, 3501, 3502, 3503 & 3504

INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS – cars made available and car fuel provided by partnership - partners were directors of company or family members of such directors - partnership provided administrative services to company as its sole customer - costs of cars and car fuel recovered in service fees charged by partnership to company - whether cars made available and car fuel provided by reason of the employment of the directors by the company - yes - s 114 ITEPA 2003 and s 149 ITEPA 2003 - s 10(1) Social Security Contributions & Benefits Act 1992 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR DAVID JOHN COOPER
MRS SUSAN COOPER
MR NICHOLAS COOPER
MR PAUL DAVID COOPER
LEASIDE TIMBER & BUILDERS MERCHANTS LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
MRS C S DE ALBUQUERQUE

Sitting in public at 45 Bedford Square on 11 June 2012

Alastair Wilson of GSC Solicitors LLP for the Appellants

David Lewis of the Appeals and Reviews Unit of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal relates to assessments to income tax and national insurance contributions made by The Commissioners for Her Majesty's Revenue & Customs ("the Commissioners") under the provisions relating to the taxation of benefits in kind provided to employees and directors (or members of their families) where such benefits are made available by reason of the employment of the employees and directors in question.

2. Mr David John Cooper ("Mr D J Cooper") and Mr Paul David Cooper ("Mr P D Cooper") were at all material times directors of Leaside Timber & Builders Merchants Limited ("the Company"). Neither Mrs Susan Cooper ("Mrs Cooper") nor Mr Nicholas Cooper ("Mr N Cooper") were at any material time directors or employees of the Company. Mrs Cooper is the wife of Mr D J Cooper and Mr N Cooper is the son of Mr D J Cooper.

3. Mr D J Cooper, Mr P D Cooper, Mrs Cooper and Mr N Cooper (together, "the Individual Appellants") were at all material times the partners in a partnership, Cooper Management Services ("CMS"), which provided administrative services to the Company. CMS provided cars and car fuel benefits to each of the Individual Appellants, and the cars were available for their private use. The fees charged by CMS to the Company for the administrative services provided were sufficient to cover the costs of CMS, including the cost of so providing the cars and car fuel benefits.

4. The Commissioners maintain that, having regard to the arrangements between CMS, its partners, and the Company, such car and car fuel benefits provided by CMS were made available to Mr D J Cooper and Mr P D Cooper respectively by reason of their position as directors of the Company, and to Mrs Cooper and Mr N Cooper by reason of Mr D J Cooper's position as a director of the Company. For the years 2002/03 to 2008/09 the Commissioners have assessed the Company as liable to pay Class 1A National Insurance Contributions pursuant to a decision made under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 in respect of such benefits. For the years 2002/03 to 2005/06 the Commissioners have made discovery assessments issued under section 29 of the Taxes Management Act 1970 charging Mr D J Cooper and Mr P D Cooper to income tax in respect of such benefits. The Commissioners initially made such discovery assessments upon Mrs Cooper and Mr N Cooper, but now accept that if there is a liability to income tax in respect of the car and car fuel benefits they have received, the charge to tax falls upon Mr D J Cooper.

5. The Individual Appellants and the Company argue that any benefits received by the Individual Appellants were received by reason of their being partners in CMS and not by reason of the position which Mr D J Cooper and Mr P D Cooper respectively held as directors of the Company, and that accordingly the assessments made by the Commissioners should be discharged.

6. The parties had agreed the issues to be decided in this appeal, in these terms:

(1) Whether the provision of motor cars leased and owned by CMS and car fuel to its partners was taxable as a benefit in kind on Mr D J Cooper and Mr P D Cooper by reason of their employment as directors of the Company; and

(2) Whether the provision of motor cars leased and owned by CMS and car fuel to its partners is chargeable as a benefit in kind on Mr D J Cooper and Mr P D Cooper by reason of their employment as directors of the Company and therefore is subject to Class 1A National Insurance Contributions.

7. We are asked by the parties to give a decision in principle as to whether the assessments are validly made: figures for the amounts of tax payable have not been finalised (as a result of the change in the Commissioners' position with regard to Mrs Cooper and Mr N Cooper). The amounts of tax at issue are significant: in the case of the Company in the order of £70,000, and in the case of the Individual Appellant in aggregate in the order of £145,000.

8. Our decision, for the reasons given below and by reference to the issues agreed by the parties, is that:

(1) The provision of motor cars leased and owned by CMS and of car fuel to its partners Mr D J Cooper, Mrs Cooper and Mr N Cooper is taxable as a benefit in kind on Mr D J Cooper by reason of his employment as a director of the Company;

(2) The provision of a motor car leased by CMS and of car fuel to its partner Mr P D Cooper is taxable as a benefit in kind on Mr P D Cooper by reason of his employment as a director of the Company; and

(3) Such provision of motor cars leased and owned by CMS and of car fuel to its partners is chargeable as a benefit in kind on, respectively, Mr D J Cooper and Mr P D Cooper by reason of their employment as directors of the Company and therefore is subject to Class 1A National Insurance Contributions.

Accordingly we dismiss the appeals of the Individual Appellants and of the Company.

The legislation

9. We are concerned with the special statutory provisions which treat the provision of cars and car fuel as taxable benefits in kind where a car is made available by reason of a person's employment.

10. In relation to the income tax charge assessed on the Individual Appellants (more strictly, upon Mr P D Cooper for the benefit he received and upon Mr D J Cooper for the benefit he received and also for the benefits received by his family relations, Mrs Cooper and Mr N Cooper) the relevant statutory provisions are found in Chapter 6 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). (For the first of the years assessed, 2002/03, the predecessor legislation to ITEPA 2003 had effect, but the parties were prepared to refer throughout to the ITEPA 2003 provisions, on the basis that the predecessor legislation is not materially different from the ITEPA 2003 provisions. We shall do the same.)

11. Section 114 ITEPA 2003 is headed "Cars, vans and related benefits", and so far as relevant to this case provides as follows:

> *(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 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 ... -*
>
> *(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. In this case we are not concerned with section 117 ITEPA 2003, since that explains when a car is to be regarded as made available by reason of the employment in the circumstances where it is made available by the employer (and it is common ground in this case that the cars were made available by CMS, which was not the employer of any of the Individual Appellants). Neither are we concerned with section 118 ITEPA 2003 which explains when a car is to be treated as available for the private use of the employee or the member of his family or household: it is common ground in this case that the cars were available for the private use of the Individual Appellants.

13. Section 120 ITEPA is headed, "Benefit of car treated as earnings", and provides as follows:

> *(1)If this Chapter applies to a car in relation to a particular tax year, the cash equivalent of the benefit of the car is to be treated as earnings from the employment of that year.*
>
> *(2) In such a case the employee is referred to in this Chapter as being chargeable to tax in respect of the car in that year.*

14. Subsequent provisions set out the way in which there is calculated the cash equivalent of the benefit of a car. Of particular relevance to the alternative case argued by the Individual Appellants is section 132 ITEPA 2003, which provides that if an employee contributes a capital sum to expenditure on the provision of the car, then for the tax year in which the contribution is made (and for subsequent years) a deduction is to be made in relation to such capital sum which is not, for any tax year, to exceed £5,000. Further, section 144 ITEPA 2003 provides that where the employee is required to pay for his private use of the car, then the amount of the taxable benefit is correspondingly reduced by the amount of such a payment.

15. Section 149 ITEPA 2003 is headed, "Benefit of car fuel treated as earnings", and so far as relevant to this case provides as follows:

(1) If in a tax year -

(a) fuel is provided for a car by reason of an employee's employment, and

(b) that person is chargeable to tax in respect of the car by virtue of section 120,

the cash equivalent of the benefit of the fuel is to be treated as earnings from the employment for that year.

(2)The cash equivalent of the benefit of the fuel is calculated in accordance with sections 150 to 153.

16. In calculating the cash equivalent of the benefit of car fuel provided to the employee (or family or household member) there is a reduction to the extent that the employee makes good the expense incurred by the person providing the fuel of so providing such fuel for the employee's private use.

17. For the purposes of the benefits in kind provisions in Part 6 of ITEPA 2003, reference to an employment includes employment as a director of a company.

18. Section 6 of ITEPA 2003 contains the charge to tax on employment income, including "specific employment income", and by section 7 ITEPA 2003 any amount treated as earnings under Chapter 6 (that is, benefits in kind, including the provision of a car and car fuel for private use) comprises "specific employment income".

19. In relation to the liability of the Company to make National Insurance Contributions with respect to the provision of the cars and the car fuel benefit in the present case it is sufficient to say (since the language and effect of the provision was not in dispute between the parties) that section 10 of the Social Security Contributions and Benefits Act 1992 (read together with the relevant regulations) provides that since car and car fuel benefits taxable under ITEPA 2003 are left out of account for the purposes of an employer's liability to make Class 1 National Insurance Contributions, Class 1A contributions are payable in respect of the taxable amount of such benefits. Thus if it is the case that Mr D J Cooper and Mr P D Cooper are properly chargeable to income tax in respect of such benefits then it follows that the Company is liable to make Class 1A National Insurance Contributions by reference to the amount brought into the income tax charge.

The evidence, the findings of fact, and inferences from the facts

20. Mr D J Cooper had prepared a short witness statement, and gave evidence at the hearing, where he was cross-examined by Mr Lewis, who represented the Commissioners. We had in evidence three bundles of documents and correspondence, which included accounts and self assessment tax returns of CMS for the years relevant to this appeal; purchase, lease purchase and hire purchase agreements entered into by CMS in relation to the cars provided to the Individual Appellants; invoices rendered to CMS by various suppliers to CMS of goods and services; monthly invoices rendered by CMS to the Company for the years 2002 to

2009; and correspondence and meeting notes relating to the enquiries made by the Commissioners in this matter and the resulting assessments.

21. In addition the parties had agreed a statement of agreed facts, as follows:

At all material times during the tax years to which the appeals relate:

(1) CMS was a partnership formed on 1 April 1999.

(2) CMS carried on the business of providing the services of its personnel and administrative services to the Company, in return for fee income paid against monthly invoices, to CMS. Value Added Tax has been charged and paid by CMS on all invoices sent to the Company and the Company has credited that VAT as input tax in its own returns.

(3) The partners in CMS were the Individual Appellants, Mr D J Cooper, Mrs Cooper, Mr N Cooper and Mr P D Cooper.

(4) CMS received business income solely from the Company.

(5) CMS either leased from unconnected lessors, or in one case bought from an unconnected supplier, motor cars. These motor cars were made available for the use of the partners in CMS, including their own private use not connected with the business of CMS. Therefore, throughout, these motor cars were used both for business and private purposes.

(6) Accounts for CMS were sent to HM Revenue & Customs with the tax returns of its individual partners. The tax returns of the individual partners in CMS included their respective shares of the profits of CMS. The profit shares of the individual partners were calculated after adding back a private use value and depreciation charged in the partnership accounts in respect of the cars leased or owned by CMS and made available to its partners.

(7) The individual partners in CMS have paid personal income tax on their shares of the profits of CMS, as stated in their individual tax returns.

(8) The accounts of CMS indicate that the partners' capital account balances were:

Year to 31 March	**Partners Capital Accounts Closing Balance in £**
2002	32,584
2003	64,097
2004	77,192
2005	73,352
2006	78,952

(9) Note 3 of the accounts of CMS for its 2003 year detail the partners' capital accounts and indicate:

(a) Partners Mr D J Cooper and Mrs Cooper contributed £21,000 in funds to CMS during the year ended 31 March 2003

(b) The opening balance of Mr D J Cooper's capital account at 1 April 2002 was £7,664 and the closing balance at 31 march 2003 was £20,167.

(c) The opening balance of Mrs Cooper's capital account at 1 April 2002 was £21,944 and the closing balance at 31 March 2003 was £34,447.

(d) Profits are retained by CMS.

(10) The payments made by the Company to CMS were deducted from gross profit as management charges in the accounts of the Company. These deductions were allowed in the calculation of the profits of the Company for the purposes of corporation tax.

(11) The Company has carried on the trade of builders merchant.

(12) The directors of the Company were as follows:

Tax Year	**Directors**
2002 - 2003	Mr D J Cooper Mr P D Cooper
2003 - 2004	Mr D J Cooper Mr P D Cooper
2004 - 2005	Mr D J Cooper Mr P D Cooper
2005 - 2006	Mr D J Cooper Mr P D Cooper Mr J D Cooper

22. From the evidence before us we find the following further facts:

(1) Mrs Cooper is a director of Swanlea Limited and Mr N Cooper is a director of Sandhill Homes Limited, both of which companies are in the same group of companies as the Company.

(2) CMS has no written partnership agreement. The partners meet annually after the accounts of CMS have been prepared and agree the division of partnership profit between the partners.

(3) For each year the accounts of CMS record in the balance sheet the cost of the cars, the amount by which they are depreciated for accounting purposes for that year, and the net book value of the cars as at the balance sheet date.

(4) The net book value of the cars in each year represents by far the greater part of the assets of CMS in its balance sheet: thus, by way of example, as at the year end 31 March 2006 out of fixed and current assets totalling £141,398: £112,194 comprised the net book value of the cars; £9,990 comprised the net book value of computer equipment; £7,153 comprised the net book value of fixtures and fittings; and £12,061 comprised current assets of debtors and cash. At that date there were current liabilities (creditors) of £62,447, giving net assets totalling £78,951 financed by partners' capital accounts in aggregate totalling that amount.

(5) In the tax computations of CMS for each year capital allowances have been claimed for the capital expenditure incurred by CMS on the provision of the cars.

(6) For each year the accounts of CMS record in the trading and profit and loss account the income of the CMS (being the fees charged to the Company) and the expenses of CMS. Included in the expenses are motor running expenses and the depreciation of the cars as calculated for the purposes of the balance sheet.

(7) For the year ended 31 March 2003 the trading and profit and loss account of CMS recorded income of £137,000 and the major items of expenditure were: wages and salaries £66,181; motor running expenses £21,039; and depreciation on motor vehicles £22,967. Total expenses amounted to £123,571 and profit for division between the partners was £13,429. That pattern of expenses and fee income was broadly repeated in subsequent years, and for each subsequent year the profit (or loss) for division between the partners was as follows: year to 31 March 2004 £14,511; year to 31 March 2005 loss of £2,447; year to 31 March 2006 £8,543; year to 31 March 2007 £18,034; year to 31 March 2008 £26,895.

(8) CMS's sole income was management charges invoiced to the Company. Monthly invoices were raised at a flat rate. In some years the monthly flat rate was increased part way through the year, and on some occasions the monthly rate was reduced or a credit given.

(9) All contracts for the hire-purchase or lease purchase or outright purchase of the cars were in the name of CMS or (in the case of the car purchased outright) in the name of an individual partner acting in his capacity as a partner of CMS. Payments made under such contracts were made by CMS from its resources.

(10) All payments of car fuel bills and other bills relating to the running of the cars (insurance, servicing, and so forth) were made by CMS from its resources.

(11) CMS has a number of employees who between them carry on the business of CMS. The Individual Appellants, as partners of CMS, have a minimal role in carrying on that business, but they participate in matters relating to the partnership and in particular the agreement each year as to the division of profits and the approval of partnership accounts.

23. From these facts we draw the following inferences:

(1) CMS is a valid partnership independent in its legal organisation from the Company.

(2) CMS carries on for its own account a commercial business, but that business is wholly dependent upon the Company, its sole customer.

(3) CMS's business does not require that its partners are provided with the use of cars.

(4) Although the capital and any finance costs relating to the acquisition of the cars are met out of the partnership capital and other resources of CMS, all those costs are recouped from the Company by means of the management charges which CMS invoices to the Company, those charges being fixed for each year at a level which equals or exceeds all the expenses of CMS including the annual depreciation of the capital cost of the cars. In the same way the costs incurred by CMS in relation to car fuel are recouped from the Company. By this means such capital, finance and car fuel costs are ultimately borne by the Company.

(5) The terms of business between CMS and the Company are not such as would pertain were they independent parties acting at arm's length. In particular there is no evidence that the management charges comprise an arm's length fee for the value and benefit of the services provided by CMS. The fact that a substantial element of the expenses of CMS each year, which it recoups out of the management charges, comprises depreciation of the cars and car running costs, strongly indicates that the management charges exceed the fees which could be charged were CMS and the Company independent parties acting at arm's length.

The parties' submissions

24. Mr Wilson appeared for the Individual Appellants and the Company. He submitted that the only issue to be determined is whether the cars were made available to the Individual Appellants by reason of the employment by the Company of, respectively, Mr D J Cooper and Mr P D Cooper. It is not the case that the cars were made available by the employer itself (it being agreed that they were made available by CMS and not by the Company), and so section 117 ITEPA 2003 (which provides that where the employer makes the car available then it is to be regarded as made available by reason of the employment) is not in point. The question therefore is in what circumstances a car is to be regarded as made available by reason of a person's employment where it is made available to that person (or a member of his family) not by the employer but by a third party.

25. Mr Wilson referred in detail to the joint case of *Wicks v Firth (H M Inspector of Taxes)* and *Johnson v Firth (H M Inspector of Taxes)* in both the Court of Appeal and the House of Lords, reported at 56 TC 318. The case concerns a scholarship discretionary trust established and funded by ICI Ltd for the purpose of making awards to children of employees of ICI Ltd to help them with their further education. The trustees of that trust made such awards out of the trust fund to the children of the respective taxpayers, those taxpayers being employees of ICI Ltd. The first issue

before the court was whether, in the terms of the benefits in kind legislation then applicable, the benefit which was provided to each employee's child by means of the award was provided "by reason of his [i.e. the employee's] employment".

26. He took us first to the judgment of Lord Denning MR in the Court of Appeal (at p 338), who, having reviewed the earlier "benefits in kind" legislation in the Income and Corporation Taxes Act 1970, turns to the legislation in point in the case, section 61 Finance Act 1976, which brings such a benefit into charge to income tax where it is provided to an employee "by reason of his employment":

> "**By reason of his employment** - It seems to me that the words 'by reason of' are far wider than the word 'therefrom' in the 1970 Act. They are deliberately designed to close the gap in taxability which was left by the House of Lords in *Hochstrasser v Mayes*. The words cover cases where the fact of employment is the *causa sine qua non* of the fringe benefits, that is, where the employee would not have received fringe benefits unless he had been an employee. The fact of employment must be one of the causes of the benefit being provided, but it need not be the sole cause, or even the dominant cause. It is sufficient if the employment was an operative cause - in the sense that it was a condition of the benefit being granted. In this case the fact of the father being employed by ICI was a condition of the student being eligible for an award. There were other conditions also, such as that the student had sufficient educational attainments and had a place at a University. But still, if the father's employment was one of the conditions, that is sufficient. If two students at a university were talking to one another - both of equal attainments in equal need - and the one asked the other 'Why do you get this scholarship and not me?', he would say 'Because my father is employed by ICI'. That is enough. The scholarship was provided for the son 'by reason of the father's employment'."

27. Mr Wilson also referred us to the judgment of Oliver LJ in the Court of Appeal (at p 344), who had this to say in his consideration of the relevant provision:

> "One is directed to see whether the benefit is provided by reason of the employment and in the context of these provisions that, in my judgment, involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reason why that person may have been prompted to apply for the benefit or to avail himself of it."

28. The Court of Appeal decided that the scholarship awards were benefits provided to the child of each employee by reason of the employee's employment.

29. The House of Lords determined the matter on different grounds (namely, that even if the scholarship awards were taxable benefits in kind, they were exempt from income tax by reason of the special provision which exempts from tax income arising from scholarships), but Mr Wilson referred us to the speech of Lord Templeman, who considered that the scholarships were provided at the cost of ICI Ltd (and hence were

to be treated as provided by ICI Ltd itself) because they funded the trustees and conferred on the trustees all their powers and discretions pursuant to which the awards were made. That conclusion by Lord Templeman meant that he did not have to decide if they were provided by a third party, but he said this in relation to the situation where a third party provides a benefit to an employee (at p 364):

> "Whether a benefit provided at the cost of a third party is provided by reason of his employment must depend upon a variety of circumstances including the source of the benefit and the relationship, rights and expectations of the employer, the employee and the third party respectively."

30. In Mr Wilson's submission the circumstances of the Individual Appellants and the Company can be distinguished from those of the taxpayers in *Wicks v Firth*.

31. In that case the trust was simply the mechanism for providing benefits to employee family members, with the employer making payments to trustees who held the funds subject to discretionary trusts until they were disbursed upon the making of awards, which could only be made in accordance with the powers and within the discretions laid down by the employer. There was a clear nexus between the employment and the provision of the benefit in that the trustees were, in substance, a surrogate for the employer.

32. In the present case CMS was not in the position of receiving and holding funds as a trustee, and there was no contractual or other arrangement between CMS and the Company as to how CMS expended its income - that was a matter determined by the partners of CMS. CMS was not required to acquire the cars, nor to make them available to the Individual Appellants: it chose to take that action, and having done so it implemented that action at its own cost from its own resources, namely the capital contributed by its partners and their undrawn profits. The cars were made available to the Individual Appellants by reason of their being partners of CMS and not by reason of any other factor or circumstance. This was equally the case in relation to the car fuel benefit provided by CMS to its partners.

33. Mr Wilson argued that the effect of the Commissioners' case was that the Individual Appellants would be taxed twice on the same value: once as partners on their share of partnership profits (since in calculating such profits for tax purposes the accounting deduction in the trading account for depreciation of the cars is added back) and once under the benefit in kind provisions. In his submission the decision of the House of Lords in the case of *Vestey v IRC (Nos 1 and 2)* [1979] 3 All ER 976 requires that an unlikely construction of tax legislation must be avoided if it results in a double tax charge, and in the present appeal a double tax charge is avoided if the construction of the expression "by reason of employment" for which the Individual Appellants and the Company contend is adopted.

34. As an alternative submission Mr Wilson argued that if the cars were made available and the car fuel was provided by reason of the employment of Mr D J Cooper and Mr P D Cooper as directors of the Company, so that there was in principle a taxable benefit, then the "offset" provisions in relation to car fuel benefits

(section 151 ITEPA 2003) and the provision of the cars (sections 144 and 132 ITEPA 2003) should be applied. By leaving undrawn profits in CMS, the Individual Appellants had "made good" the costs to CMS of providing car fuel, had paid an amount for the private use of the cars, and had in the like manner contributed a capital sum to CMS's expenditure on the provision of the cars as contemplated by section 132 ITEPA 2003. Any computation of the amount of the taxable benefit should therefore take account of these matters, and this would deal with the inequity of the Individual Appellants being taxed twice on the same value.

35. For the Commissioners Mr Lewis accepted that CMS owns or is acquiring on hire-purchase or finance lease terms the cars. He argued that if one applies the tests laid down by Lord Denning MR and Oliver LJ in *Wicks v Firth* as to whether a benefit is provided to an employee by reason of his employment, the conclusion on the facts is that one of the factors that enables the Individual Appellants to enjoy the benefit is the employment of Mr D J Cooper and Mr P D Cooper as directors of the Company.

36. All of the costs of providing and fuelling the cars are met by the Company through the management charges it pays to CMS. The cars are in fact provided only to persons who are directors of the Company (or family members of a director) and there is no commercial or other reason to suppose that CMS would make its cars available to anyone other than employees or directors of the Company (or, perhaps, a related company). If the Company were not doing business with CMS, CMS would not be in a position to provide the cars and meet their fuel and other running costs.

37. He argued that in so far as the cars were used for a business purpose, they were used (in the case of Mr D J Cooper and Mr P D Cooper) on the business of the Company and not on the business of CMS.

38. Looking to the substance of the arrangements, CMS is little more than an extension of the Company set up and operated in order to avoid or reduce an income tax charge for the Individual Appellants and a National Insurance Contributions liability for the Company. The cars and the car fuel are provided to the Individual Appellants by reason of the employment of Mr D J Cooper and Mr P D Cooper as directors of the Company, and those individuals should be taxed accordingly and correspondingly the Company is liable to make National Insurance Contributions with respect to the benefits provided.

39. Mr Lewis did not agree that the Individual Appellants would be taxed twice in relation to the same income if the Tribunal upheld the income tax assessments with regard to the provision of the cars. CMS had claimed capital allowances in respect of the capital cost of the cars, by which means, over time, the partners, when assessed to tax on their respective shares of the profits of CMS, had enjoyed tax relief to the extent of such capital cost.

Discussion and conclusion

40. The parties have rightly identified the issue for our decision. The cars in question which were made available to the Individual Appellants were owned (outright or under hire-purchase terms) by CMS and not by the Company of which Mr D J Cooper and Mr P D Cooper were directors. The question is whether the cars were made available to them by reason of the employment of Mr D J Cooper and Mr P D Cooper as directors of the Company. The same question arises with regard to the car fuel provided by CMS to the Individual Appellants.

41. It is clear beyond doubt, on the authority of *Wicks v Firth*, that a benefit in kind, such as the provision of the use of a car, can be provided (or, in the case of a car, having regard to the terms of section 114 ITEPA 2003, made available) by reason of the employment of a person in circumstances where it is provided (or made available) by an entity which is not the employer of the person enjoying the benefit. Whether this is so "must depend on a variety of circumstances including the source of the benefit and the relationship, rights and expectations of the employer, the employee and the third party respectively", as Lord Templeman expressed it, as we have cited above. It is thus necessary to have regard to the entirety of the arrangements - and not merely the legal rights of the parties concerned, but also their expectations. According to Lord Denning in that case (also as cited above), "The fact of employment must be one of the causes of the benefit being provided, but it need not be the sole cause, or even the dominant cause. It is sufficient if the employment was an operative cause - in the sense that it was a condition of the benefit being granted."

42. As we have set out above, Mr Wilson argued to distinguish the circumstances and facts of *Wicks v Firth* from those in the present case. His essential point was that the educational trust which provided the scholarships in *Wicks v Firth* was little more than a creature or extension of ICI Ltd, the employer, funded directly and expressly by ICI Ltd for the purpose of providing the benefit, with the trustee having no choice, once it chose to exercise its discretion, other than to provide the scholarship benefit. That contrasted with the commercial independence of the partnership, CMS, in the present case, which included its independent right to use its assets for whatever purposes it chose, regardless of the wishes or directions of the Company, the employer in this case.

43. Whilst we can accept that there are factors which distinguish this case from the facts in *Wick v Firth*, we do not consider that this assists the Individual Appellants and the Company. Lord Templeman's remarks may be *obiter* since he held that the benefits were provided at the cost of the employer and hence, under the relevant provisions, were provided by the employer, but we respectfully agree that, in deciding whether or not a third party provides or makes available a benefit "by reason of the employment", it is necessary to have regard to all the circumstances, including "the relationship, rights and expectations of the employer, the employee and the third party respectively".

44. In the present case CMS, even if legally independent of the Company, was, as a commercial matter, wholly dependent upon the Company: it had no business other than providing services to the Company, and although it obtained capital from its

partners (in the form of capital contributions and undrawn profits), all its expenses were recovered by the fees it charged to the Company.

45. Moreover, as we have found, those fees were excessive, if one applies a test of what would be commercially reasonable in dealings between independent parties acting at arm's length. The three largest components of CMS's annual expenditure were the salary costs of its three employees who provided administrative services to the Company; the depreciation of the cars; and the fuel provided for the cars. Only the first of these items comprised a cost reflected in the services which CMS provided to the Company. It is barely conceivable that an independent customer of CMS would be prepared to pay a fee for the services provided which was set at a level to recoup all these items of expenditure, and in particular the high level of expenditure on cars, all of which was extraneous to the services (and the value of the services) actually provided.

46. It may be the case that CMS acquired the cars from capital contributed by its partners (although only one car, that made available to Mr D J Cooper, was purchased outright - the others were acquired on hire-purchase or similar terms, so that no outright capital was required for that purpose by CMS), but the cost of the cars was, as we have said, ultimately borne by the Company through the fees charged to it by CMS. Until the year 2005/06 the only directors of the Company were Mr D J Cooper and Mr P D Cooper, so that they were in a position to direct the Company to enter into these arrangements on these terms with CMS. Taking the arrangements in their entirety, and having regard to the relationships between the parties, the Company was, at the least, complicit in the provision of the cars and the car fuel to the Individual Appellants.

47. If we apply the test set out by Lord Denning, whether the fact of employment was one of the causes of the benefit being provided, we have to conclude in this case that this was so, on any realistic view of the arrangements entered into. CMS would not have existed, commercially, but for the Company, its only customer. There was no commercial rationale for CMS to provide cars to its partners, the Individual Appellants, since they took no part in the daily running of the business of CMS. There was no commercial rationale for the Company to pay CMS a fee of an amount sufficient to enable CMS to recoup the capital costs of the cars and the car fuel it provided to its partners. The Individual Appellants were the partners of CMS, but they were also the directors of the Company or (in the case of two of them) family members of one of those directors. The benefit of the cars and the car fuel was provided by CMS, but we are compelled to conclude that it would not have been so provided were Mr D J Cooper and Mr P D Cooper not directors of the Company. The fact of their employment was one of the causes - and we would say the dominant cause - of the benefit being provided by CMS to the Individual Appellants.

48. In setting out his case before us Mr Wilson invited us to consider the question posed by Oliver L J in *Wicks v Firth*: "what is it that enables the person concerned to enjoy the benefit?". In Mr Wilson's submission the answer was, "being a partner in CMS". That, in our view, is too simplistic - just as, in *Wicks v Firth* itself it would have been too simplistic to give the answer, "being a beneficiary of the scholarship

trust". Looking at the circumstances, relationships, rights and expectations of the parties, as Lord Templeman encourages us to do, the answer has to be, "being a director (or the close relative of a director) of the Company".

49. Mr Wilson argued that we should construe the relevant benefit in kind provisions in a way which avoided a double charge to tax on the Individual Appellants, and he cited the authority of the *Vestey* case referred to above.

50. First we have to say that he did not demonstrate to us that there was an element of a double charge to tax should we conclude that the Individual Appellants (or, rather, Mr D J Cooper and Mr P D Cooper) are liable under the benefit in kind provisions of ITEPA 2003: the extent to which the Individual Appellants are taxable on the same element in the form of an income tax charge on their profits from CMS is not at all clear where, as appears to be the case, the partnership assessment includes capital allowances for the capital expenditure on the cars.

51. In any event, we do not consider that the circumstances here are within - or even touch - the scope of the principle in the *Vestey* case. There the issue was whether a particular provision should be construed so as to confer on the Inland Revenue a wide discretion which could result in their lawfully taxing each of a range of trust beneficiaries and other individuals on the same amount of deemed income. In the present case, if there is an element of double taxation, it arises not by reason of any discretionary powers conferred upon the Commissioners, or by reason of any ambiguity in the terms of the relevant provisions, but because the parties concerned have voluntarily chosen, upon advice, to arrange their affairs in a particular way. They have to live with the consequence of that.

52. We therefore conclude that the cars in question were made available, and the car fuel benefit provided, to each of the Individual Appellants by reason of the employment of, as the case may be, Mr D J Cooper and Mr P D Cooper by the Company.

53. Mr Wilson next argued that if there is an income tax charge under the ITEPA 2003 provisions, then it should be reduced, or eliminated, by reason of what he described as the "offset" provisions of sections 132 and 144 ITEPA 2003, referred to above (and the corresponding provision to reduce the cash equivalent for car fuel benefit). Although he did not take us to specific numbers, Mr Wilson's general point was that the Individual Appellants had made contributions, or paid sums for private use, by retaining in the partnership, and not withdrawing, their profit shares.

54. Leaving aside the point that Mr Wilson failed to show exactly what it was claimed had been contributed, and how that worked to reduce the taxable cash equivalent in the case of each Individual Appellant, his case fails on first principles. Profits may have been left undrawn in CMS, but in no sense is that a payment made by the Individual Appellant either to CMS or to the Company - it is capital in the CMS partnership capital account to which the Individual Appellant is entitled, and which he may draw out, either on demand or on such other terms as may be agreed by the partners - and ultimately on the winding-up of the partnership. In no sense is it

a contribution or payment which the Individual Appellant is "required to pay" for the use of the car (see section 144 ITEPA 2003) or the means whereby the Individual Appellant is "required to make good" the expense of the provision of car fuel (see section 151 ITEPA 2003).

55. We therefore conclude that there is no basis for reducing the cash equivalent of the benefits received by the Individual Appellants or otherwise reducing the income tax charge for which Mr D J Cooper and Mr P D Cooper are liable by virtue of the cars being made available, and the car fuel provided, to them (and, in the case of Mr D J Cooper, to members of his family).

56. We dismiss the appeal in the case of Mr D J Cooper and Mr P D Cooper and also in the case of the Company.

57. As mentioned, we were asked to give our decision as to the principle in this case, leaving it to the parties to agree the figures for the tax assessed to give effect to our decision. If the parties are unable to agree the figures either party has permission to apply to the Tribunal to determine the tax assessed.

Right to apply for permission to appeal

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

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 2 July 2012

Authorities referred to in skeletons and not referred to in the decision:

Christensen (HM Inspector of Taxes) v Vasili [2004] EWHC Ch) 476

Frank Hudson Transport Ltd v HMRC [2010] UKFTT 503 (TC)

Richardson (HM Inspector of Taxes) v Worrall; Westall v McDonald (HM Inspector of Taxes) [1985] STC 693