[2022] UKFTT 00006 (TC)

TC 08359

NICs – Payments of car allowances to employees for making a private vehicle available for business use – earnings? – yes so subject to NICs - does the disregard in paragraph 7A of Part VIII of Schedule 3 to the Social Security (Contribution) Regulations 2001 (the Regulations) apply? - Qualifying Amounts – must the Qualifying Amounts be Relevant Motoring Expenditure – yes – were the cash amounts Relevant Motoring Expenditure? – yes – Laing v O'Rourke considered – do the disregards in paragraphs 3 and 9 of Part VIII of Schedule 3 to the Regulations apply? - no – appeal allowed to the extent of the agreed Qualifying Amounts

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/02029

BETWEEN

WILLMOTT DIXON HOLDINGS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted in public remotely by video on 8-10 November 2021 with written submissions received from the parties in December 2021

Rory Mullan QC counsel instructed by Innovation LLP for the Appellant

Akash Nawbatt QC and Joshua Carey counsel instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns National Insurance Contributions ("**NICs**") and more particularly the respondents' (or "**HMRC**") decision to refuse to refund class I NICs to the appellant (or "**Willmott Dixon**") for the period from 2004/2005 to May 2014. Willmott Dixon claims these refunds in respect of lump sum (albeit paid by instalments) car allowance payments (the "**car allowances**") paid to some of its employees during that period.

2. HMRC's position is that these car allowances are earnings within the meaning of section 3(1) Social Security Contributions and Benefits Act 1992 (the "**Act**"), and that none of the disregards in part VIII of Schedule 3 to the Social Security (Contributions) Regulations 2001/1004 (the "**Regulations**"), and in particular those in paragraphs 3, 7A, and 9, apply. Willmott Dixon's position is that the car allowances are not earnings, but if they are, then one or more of those disregards applies.

3. On 8 June 2021, the FTT released its decision in *Laing O'Rourke Services Ltd* [2021] UKFTT 0211 (**"LOR**"). In that decision, Judge Bowler had considered the NIC implications of car allowance payments made by LOR to its employees and in particular whether those payments were earnings, and if so, whether the Regulation 7A disregard applied. She held that the payments were earnings and that the disregard did not apply. LOR's claim for a refund of Class I NICs was therefore dismissed. At the hearing of this appeal, it became apparent that LOR had applied for permission to appeal against that decision. About a week after our hearing, I was told that Judge Bowler had given that permission. Shortly thereafter HMRC made an application that I should delay releasing my decision in this appeal until after the Upper Tribunal had released its decision in LOR. Mr Mullan provided detailed submissions as to why I should not do that, and I should release my decision notwithstanding. In the face of those submissions, HMRC withdrew their application.

4. I am grateful to Mr Mullan and to Mr Nawbatt for their clear and helpful submissions both written and oral which have helped me considerably, and I have taken their submissions into account (along with all of the evidence) even though, in reaching my conclusions I have not necessarily referred to each and every argument and item of evidence in detail.

THE LATE EVIDENCE

5. HMRC's skeleton argument, at paragraph 6, indicated that on 7 October 2021 the appellant had provided 96 pages of additional evidence (the "**96 pages**") which were to be found in the hearing bundle and that there had been no application to adduce this further evidence. HMRC invited me to exclude these documents from the evidence. It turned out that this had been sent by Innovation LLP to HMRC under cover of an email dated 7 October 2021, that email indicating that "Duncan Canney (one of the witnesses) found a laptop and we have identified these further documents which tend to corroborate his evidence and which we will be adding to the bundle. We are providing them to you now so that HMRC have plenty of time to consider them before the hearing."

6. On 2 November 2021 the appellant circulated a further and supplemental witness statement of Mr Graham Dundas (the "**supplemental witness statement**"). No formal application was made, at that time, for this supplemental witness statement to be admitted as

additional evidence. At the hearing, Mr Nawbatt formally opposed the introduction of the supplemental witness statement.

7. The first morning of the hearing, therefore, was largely taken up with submissions on these two evidential points. Having heard the submissions, I told the parties that the 96 pages and the supplemental witness statements could be admitted as new evidence in this appeal and gave brief reasons for that decision. I said that I would give fuller reasons in the decision notice and the parties submissions and my reasoning for allowing this evidence in are set out below.

8. Mr Nawbatt submitted that the correct approach to the admission of late evidence was that in Judge Redston's decision in ***Morrison Supermarkets Plc v HMRC*** [2021] UKFTT 0106 ("*Morrisons*"). There is no presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary. The correct approach is to apply the three stage process set out in ***Denton v White*** [2014] EWCA Civ 90 (see paragraph 35 of ***Wolf Rock (Cornwall) Ltd v Langhelle*** [2020] EWHC 2500).

9. This approach is as follows. Firstly to establish the length of the delay and whether it is serious and/or significant. Secondly to establish the reasons why the delay occurred. Finally to evaluate all the circumstances of the case, using a balancing exercise to assess the merits of the reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. In undertaking this evaluation, I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected. I would also add that the relevance of the evidence is something which is pertinent to this final evaluation.

10. As regards the 96 pages, Mr Nawbatt submits that these are seriously and significantly late given that the directions of December 2020 required the disclosure of documents in January 2021. As regards the supplemental witness statement, Mr Nawbatt made the same point. Those directions required witness statements to be exchanged in February 2020.

11. As for the reasons given for the late circulation of the 96 pages, the reasons given in the email of 7 October 2021 are woefully inadequate. It provides no indication as to the relevance of the additional documents, nor does it provide details of the circumstances in which the 96 pages were discovered. This late disclosure is, effectively, springing a surprise on HMRC who are being ambushed, and I should reject the admission of these 96 pages on these grounds, which are the same grounds as Judge Redston gave when deciding to reject the admission of late evidence in *Morrisons*. The balance of prejudice weighs in favour of HMRC.

12. Mr Nawbatt then turned to the supplemental witness statement. It seems that this statement is dealing with a single point; namely the extent to which car allowances were paid to employees who undertook no business mileage at all. Its genesis seems to have been a conversation between Mr Canney and Mr Dundas. And piecing together the information given in the appellant's supplementary bundle submitted in support of its application, his view was that there was no good reason for this supplemental witness statement and the information contained in it to have been supplied so shortly before the hearing. On 21 July 2021 HMRC had asked the appellant to provide it with a number of employees who undertook no business for all years within the claim. It was Mr Dundas himself who had told HMRC that there were such employees back in April 2018. And in response to an email from HMRC dated 14 October 2019, such response being towards the end of October 2019, Mr Dundas set out the numbers of those individuals for the years within the claim. If the supplemental witness statement revises those numbers, why, Mr Nawbatt asks rhetorically, were they provided only three of four days

before the hearing? The supplemental witness statement contains information which springs a surprise on HMRC and is another example of ambush. Furthermore, and perhaps more importantly, the underlying material on which the supplemental witness statement is based has not been exhibited. So it is impossible for Mr Nawbatt to test the information in the statement against the source material. And it is not possible for him to properly cross examine Mr Dundas on his statement without that source material. At the final evaluation stage, the balance of prejudice weighs in favour of excluding the supplemental witness statement.

13. Mr Mullan submitted that as far as the 96 pages were concerned, time should not start from the date of the original directions, but from the date on which Mr Canney's email account was reactivated in the summer of 2021. Mr Canney is not currently an employee of the appellant, but had given a witness statement and agreed to assist in trying to locate documents to which he may have had personal access. The 96 pages comprise that information and provide relevant contemporaneous documentation to which Mr Canney might wish to refer when giving evidence. This was a justifiable reason for the disclosure of these documents in October 2021 and they had not knowingly been in the appellant's possession earlier that year i.e. on the date on which those documents had been directed to be exchanged.

14. The appellant was mindful of its duty to assist the Tribunal to deal with cases fairly and justly. The provision of the 96 pages was to assist the Tribunal to further this overriding objective. The documents were served on HMRC in October 2021 yet HMRC made no objection to them being submitted late at that time. HMRC have had adequate time to analyse these documents and are not prejudiced by their disclosure in October 2021.

15. Mr Mullan further submitted that the emails passing between the parties/their representatives since July 2021 showed two things. Firstly that the information in the supplemental witness statement concerning the number of employees who were provided with car allowance but did no business miles was provided in response to HMRC's requests for that information. Time, therefore, should not run from the date of the original direction. Secondly, given that the number of employees who undertake no business miles is no part of the appellant's case, the purpose of providing this information was, as set out in those emails, to assist the Tribunal. It was only when Mr Dundas returned from holiday that he was able to discuss the figures previously submitted to HMRC with Mr Canney, who had indicated his strong suspicion that the numbers provided to HMRC were incorrect. And only then was it possible to interrogate the underlying information and to provide the supplemental witness statement. This was late in the day, but (Mr Mullan did not use this expression) the appellant was caught between a rock and a hard place. If it supplied the information late, it would be impugned, as HMRC have impugned it, for such late submission. If it did not supply the information, then both HMRC and the Tribunal would be labouring under an evidential misapprehension concerning the number of drivers who were given car allowance yet did no business miles. The appellant took the view that it was more important this evidential misapprehension was corrected, hence the reason for the supplemental witness statement. The substance of Mr Nawbatt's objection was that HMRC did not like the information set out in the supplemental witness statement, notwithstanding that, Mr Mullan re-emphasised, the appellant does not rely on any sort of numbers of people not business miles as part of its case. And this distinguishes the position from that in *Morrisons*, where the evidence sought to be admitted late was to be used in the applicant's case. For these reasons, at the final evaluation stage, the analysis favours admission of the supplemental witness statements and the 96 pages.

16. Turning first to the 96 pages. Notwithstanding Mr Mullan's submission that time should run from the date on which Mr Canney reactivated his email account, I find that the disclosure

of these documents in October 2021 was seriously and significantly late when tested against the directions for disclosure which required such documents to be disclosed in January 2021. However, I accept Mr Mullan's reasons for this late disclosure, namely that the appellant was not aware of the existence of these documents until Mr Canney reactivated his email account in the summer of 2021, and it was only then that he realised that this was source material on which his witness statement had, in part, been based. It is at the final evaluation stage, however, that I have most difficulty, given that I do not fully understand the relevance of this additional documentation in the context of the issues which are to be canvassed in more detail during the hearing. I fully appreciate that the appellant wishes to assist the Tribunal by providing all relevant material, and that the 96 pages are, in its view, relevant. In view of the overriding objective, it is my view that the documents should be admitted in evidence and that I should wait and see the use to which they are put by the appellant. I can then attribute such weight to the documents as is appropriate, and Mr Nawbatt can make submissions on that too. Furthermore, I do not believe that Mr Nawbatt has been seriously ambushed by these documents. He is an extremely experienced and highly competent advocate, and is thoroughly capable of cross-examining Mr Canney on these documents should they be relied upon in evidence in chief. For these reasons I have decided to admit these documents into evidence in this appeal.

17. As far as the supplemental witness statement is concerned, the position is more nuanced as regards lateness. It is true, as Mr Nawbatt submits, that when compared to the directions for exchange of witness statements, the supplemental witness statement has been submitted very late. However, as has been made clear above, that statement was submitted to provide information which had been sought by HMRC in July 2021. Mr Nawbatt makes the point that lateness should perhaps be tested against that date, and I think that is a good point, notwithstanding that it would clearly take time to conjure a full response, which is what, Mr Mullan submits, has happened in this case. Once Mr Canney had put Mr Dundas on notice that the figures which he had previously submitted to HMRC, looked wrong, it took some time (and holiday intervened) to interrogate the underlying source material and to compile more accurate figures which, Mr Dundas suggests, are contained in the supplemental witness statement. This is a justifiable reason for the lateness. At the final evaluation stage, I take into account the fact that Mr Mullan's submission is that this evidence is, somewhat oddly, not being relied upon by the appellant. And I wholly accept that if this is the case (and again I was in a somewhat difficult position in testing the relevance of the information in the supplemental witness statement given that I had not heard the issues fully argued at that time) this distinguishes the appellant's position in this appeal from the appellant's position in *Morrisons*. I also accept that in this context, having been asked for information by HMRC, and having seen that the information previously provided was incorrect, it was wholly proper for the appellant to seek to correct that information for the benefit of the Tribunal and for HMRC, and furthers the overriding objective. Mr Mullan's point is that it is a bit harsh on the appellant in seeking to assist the Tribunal, to be criticised for doing so, or indeed to be criticised for providing an information which was sought by HMRC. And I accept this submission. It is my view that it is only once the issues in this case have been fully aired that I can consider the relevance of the information in the supplemental witness statement. And at that time I can consider what, if any, weight to give that evidence given that, as Mr Nawbatt perfectly properly contends, it is difficult to interrogate the conclusions which Mr Dundas has come to in his supplemental witness statement given that none of the source material has been disclosed. It is my view that the overriding objective will be furthered by allowing the supplemental witness statement to be tendered in evidence, but then to consider the use to which it is put, at the hearing, and in light

of that, attribute the appropriate weight to that information. It is my decision therefore that the supplemental witness statement may be admitted in evidence.

18. Finally, I would add that it is disappointing that a professionally represented appellant did not make a formal application to the Tribunal at the time they were circulating the evidence, to make a formal application for its late submission. Such an application, together with reasons for it, would have considerably shortened the time that we spent on the first morning dealing with this matter, and would probably have meant that there would have been no need for Mr Mullan's reply to be dealt with by written submissions after the hearing had finished.

THE LEGISLATION

19. I have set out the relevant legislation in the appendix to this decision.

EVIDENCE AND FACTS

20. I was provided with a bundle containing a considerable number of documents. I was also provided with witness statements for the three witnesses of fact who gave evidence on behalf of the appellant, namely; Duncan Canney, Nicholas Gibb and Graham Dundas. As has already been seen from the discussion regarding the supplementary witness statement, Mr Dundas had also submitted a second witness statement. I was also provided with the supplementary bundle in respect of the late evidence.

Background

21. From the foregoing evidence I find that the background facts are as follows:

(1) Between 29 March 2011 and 15 October 2015, the appellant made a number of claims for repayment of Class I NICs relating to the years 2004/2005 up to and including 2014. These claims were in respect of car allowance payments paid to employees. Those employees were also paid a mileage allowance for business travel.

(2) On 23 October 2017 HMRC wrote to the appellant and gave their decision on these claims. The decision was that the refunds claimed were not due. One of the reasons given was that the car allowance covered the acquisition of the car which was not considered as being for the use of the car.

(3) Further correspondence between the parties ensued, the appellant seeking clarification about whether HMRC had formally determined the claim and identifying the amount being claimed, HMRC responding that the claim had not been formally determined but would be prepared to consider further evidence. Following that, on 19 April 2018, Mr Dundas, on behalf of the appellant wrote to HMRC confirming its view that it was entitled to repayment of the Class I NICs. In that letter he responds to key arguments raised by HMRC in their letter of 23 October 2017when refusing the claim. In response to HMRC's argument that the car allowance seeks to cover the acquisition of the car and so cannot be RME, Mr Dundas states that the allowance is not capital in nature, something which should not be concluded from the reference to "acquisition of the car (by whatever means the employee wishes)", and supports that assertion by the fact that "a. Employees invariably own their own car when taking the allowance". And "b. Employees will often keep the same car for many years." He also goes on

to say that the allowance is paid monthly, and not as a lump sum and many employees lease a car rather than own it.

(4) On 12 December 2018 HMRC wrote to the appellant setting out the decision and the reasons why they were not prepared to accept the claim. They recorded that the vehicle and car allowance policy stated that the allowance covers the acquisition of the car (by whatever means the employee wishes) maintenance, and comprehensive insurance and all other running costs except fuel. In HMRC's view therefore the payments were made, at least in part, to fund the purchase of the vehicle, and since that is not for the use of a vehicle, it does not qualify as relevant motoring expenditure ("**RME**").

(5) HMRC also noted that the payments did not vary according to mileage. And that in the sample of the employees whose circumstances have been considered by HMRC, the individual employees had received the same allowance notwithstanding considerable variations in their business mileage. And that business mileage was inconsistent with the grades allocated to the employees and their respective allowances.

(6) On 14 October 2019, HMRC sent an email to Mr Dundas. At paragraph 5 of that email, it refers to Mr Dundas' letter to HMRC of 19 April 2018, in which, the email records, "you mentioned that a significant proportion of individuals do little or no business mileage. For each year of the claim, could you confirm the number of individuals who received a car allowance but did not undertake any business mileage." In response to that question, Mr Dundas set out a table of the numbers of those individuals between 2004/2005 and 2013-2014. In the first of those years, Mr Dundas could not identify any such individuals, and in the last of those years, there were none because a salary sacrifice scheme had been introduced. But for the intervening years, the numbers ranged from 58 to 342. Mr Dundas went on to indicate that approximately 80% of drivers claimed business mileage and set out, too, an extract from the appellant's car policy that "an employee who chooses to receive a car allowance must ensure that the vehicle that they use for business-related driving is roadworthy, properly taxed, properly insured for business usage and properly maintained……." In Mr Dundas' view, the allowance covers both business usage and personal usage of a private vehicle and in his view those payments qualify as RME.

(7) On 19 May 2020 HMRC wrote to the appellant enclosing 15 NIC "Notices of Decision" under Section 8 of the Act. The appellant appealed against those notices by way of a letter dated 8 June 2020 which also set out in considerable detail its grounds of appeal.

(8) An appendix to that letter identifies the 15 employees in respect of whom the 15 decision notices had been issued. It also accepts that the car allowances are subject to NICs but relief is due up to the limitations imposed by the Qualifying Amount. It goes on to say that "we are very pleased that HMRC has agreed the QA figures with us for almost all of the years claim and would like to thank HMRC."

(9) On 23 June 2020 the Tribunal acknowledged receipt of the appellant's notice of appeal dated 10 June 2020 which had been assigned to proceed under the complex category.

The group car policy

22. The group car policy is set out in a number of documents. Broadly speaking these documents are in virtually identical terms but they contain minor changes, version on version. In January 2000, shortly after the group car policy had been introduced, the documents state that "the Group Car Policy has been formulated with the intention of giving all employees the

widest possible choice of vehicles whilst retaining fairness and parity across the Group. It is to be adopted by all Willmott Dixon business units. The implementation of the Policy is the responsibility of the Managing Director of the business unit concerned. All employees eligible to receive a company car or car allowance will be allocated a Grade, which will determine the choice available to them. The Grade will be based upon the job title and, where a position has not been previously graded, it will be agreed between the Managing Director and the Group Chief Executive. Once allocated a Grade an employee can choose to receive either a company car or car allowance. A company car can be chosen at any time. The car allowance can be chosen when the employee first becomes eligible to receive a company car, or when the lease agreement on the present company car comes to an end.

23. The section on car allowances then goes on to state that "an employee who chooses to receive a car allowance must ensure that a four wheeled car, which is reliable and fit for the purpose of performing his/her business duties, is available to him/her at all times." It goes on to say that the employee will be paid the car allowance monthly in arrears, and sets out a table which identifies the allowance per month increasing with the grades given to an employee, those grades ranging from 1 (allowance of £200 per month) to grade 8 (£550 per month). The payments are expressed to be subject to deductions for tax and NICs "in the normal way". The policy then goes on to deal with fuel costs and indicates that the company will reimburse employees at a standard rate per mile (irrespective of engine size) for the fuel used for all business travel and for travel between home and work. To receive this, a monthly mileage form needs to be completed by the employee, authorised by a Managing Director and submitted to the finance department by a certain date each month. It goes on to say that the business mileage payments will be paid tax-free but the home to work payments will be subject to PAYE.

24. In the car policy for Espace, a group company, version 31 January 2005, an employee who decides to take a company car is advised that the company will pay a taxable car allowance to an employee who wishes to select a vehicle from a lower grade than that to which he/she is entitled, when his/her existing car is due for renewal, or when choosing a car for the first time. That payment was described by the witnesses as a "make up payment", and the policy was that the payment will be made monthly, with salary, from the date of delivery of the new vehicle, and that the payment, once fixed, would not vary for any reason during the period that the vehicle is allocated to the employee. It gives an example. If a company car driver was entitled to a grade 5 car (and the applicable grade rate was £640) but decided instead to select a car from the grade 3 choice list (for which the applicable grade rate was £565) then they would receive an allowance of £75 per month. And where a company car driver becomes entitled to a higher grade vehicle than that to which the driver is currently allocated, the company would pay a taxable car allowance to the employee amounting to the difference between the grade rate to which he/she is entitled at the grade rate in which the currently allocated car fell when first selected by the employee.

25. Later versions of the car policy show that "for receipt of a car allowance, the individual must have use of private car, van or motorcycle for use on company business and possess a full, current driving licence, valid in the UK; the vehicle must be safe and in a roadworthy condition……" Furthermore, the vehicle (car, van or motorcycle) must be maintained in a safe condition and serviced in accordance with manufacturers requirements. Routine safety checks and regular inspections of the vehicle for obvious defects must be carried out and any defects

rectified. Users must insure for business-related driving, ensure that the vehicles are properly taxed and insured on a fully comprehensive basis and have a valid and current MOT certificate.

26. A document dated October 2012 entitled "Willmott Dixon group car car allowance and make up pay rates" sets out the annual car allowances by grade, those grades running from 1 to 9, as well as a table setting out the annual make up payments by entitlement grade. This shows, for example, that an employee with an entitlement grade 4 who drove a grade 1 car, would be entitled to an annual make up payment of £2,500, and to a make up payment of £1,500 if he/she drove a grade 2 car.

The oral evidence

Mr Canney

27. Mr Canney provided a witness statement which he adopted, without any significant alteration, as his evidence in chief. That evidence was as follows:

(1) He was the former Chief Finance Officer of the appellant for whom he worked for approximately 30 years until his retirement in 2016. He was responsible for all of the financial affairs of the appellant including taxation and payroll, the centralised group finance team, and for recommending car and mileage policies to the board.

(2) The appellant is a privately owned national construction and property company with projects and customers all over England and Wales. Its work is primarily in the public sector delivering buildings such as schools, health centres, residential properties and universities.

(3) The appellant has a wide range of job roles including site managers, construction managers, operations managers, technicians, supervisors, local regional and national managers and directors, all of whom he described as "job need drivers" which he went on to describe as those who might do anywhere between 10,000 to more than 30,000 business miles per year. In addition there were other staff who he viewed as "essential drivers" which he went on to describe as those who were generally expected to do a minimum of 2,500 business miles per year. This is his view and is not company policy. Company cars were provided to employees who were expected to do more than 2,500 business miles or where it was normal in the industry to provide a company car with their role.

(4) Under the appellant's HR policy, grades are allocated to certain job roles (normally the higher the roll within the company's hierarchy the higher the employees grade). Employees will typically be promoted to higher graded roles over time.

(5) In the 1990's the appellant engaged a contractor to manage its fleet of company cars which reduced some of the administrative burden, but company car management still involved considerable cost to the appellant.

(6) The car allowance was first brought in as an alternative to the company car scheme in 1999 to provide an alternative option for employees who were not office bound and who would otherwise be entitled to a company car. The purpose of the new scheme was to allow employees to "secure" a personal car which they would then use on company business; in other words, its purpose was to enable employees to use a personal car in lieu of using a company car. If an employee opted for the car allowance that employee would incur significant expenses which would otherwise be borne by the appellant when providing a company car, including

maintenance, insurance, servicing. The purpose of the car allowance was to help cover these costs.

(7) He led the project to introduce the car allowance and then reviewing subsequent revisions to it. His intention was to pay an employee just enough to save the appellant money. That amount was about £1,000 per year if a driver drove about 10,000 business miles a year which was about average.

(8) He and his colleagues spent a lot of time calculating the amounts at which to set the car allowance, and were conscious when they were doing this of the impact that it might have on the employees. They looked at every cost associated with running a company car, and also the costs of running a car provided by the employee (for example insurance, private financing, maintenance as well as personal and corporation tax). He worked closely with Mr Dundas when compiling and then testing these calculations.

(9) They took into account that drivers feedback was that they wanted greater choice and that the car allowance alternative would give drivers that choice. And that a car which a driver of a particular grade might want, might not have been either on their car list nor within their grade. It would also reduce internal workload and administration as well as financial risk which was passed on to the employees. They were also going to pay a business mileage rate to employees undertaking business miles on top of the car allowance payment. The car allowance was intended to cover all ongoing costs such as MOT, servicing, insurance, as well as depreciation and interest and this was achieved by including monthly costs of a personal contract purchase or "**PCP**" arrangement (i.e. a private or personal financing contract which an employee might use to fund the acquisition of the vehicle).

(10) They always expected the drivers to have a suitable car and this was reflected in the group policy. Drivers were free to switch back to a company car should they wish to do so. They were free to decide what car to drive provided they complied with the company car policy. They did not monitor how and when the driver spends the car allowance. In his view, it was highly likely, having considered the figures, an employee would have to spend the entire car allowance, and probably a bit more, on acquiring and running a suitable vehicle.

(11) Their modelling included a wide range of different calculations and was based on extensive research. He recognised that there might be the odd winner and loser but believed that the method was fair consistent and reasonable. They tried to ensure that any driver who did approximately 10,000 business miles per year would be no worse off by taking the car allowance when compared with the cost to them of taking a company car. His objective was also to ensure that the company would save on costs, sometimes as much as £1,000 per year.

(12) Their calculations showed that employees doing low business mileage would be better off taking a company car than taking the car allowance. These calculations also assumed that employees would claim all the personal tax relief to which they were entitled.

(13) The methodology from inception up until the date of his retirement remained largely unchanged, although the level of the car allowance was reviewed periodically to ensure that it was still fair and appropriate.

(14) One of the issues with paying employees for use of a personal car on the basis of a rate per business miles which took into account running costs and depreciation, (for example 40p per mile) compared to the car allowance was that the appellant would lose control over costs

which would have been risky for the company who always tried to de-risk costs because of the low net profitability associated with the business.

(15) He expected employees on average to spend the whole car allowance in securing a suitable alternative car to a company car to use on business travel as well as home to work travel. The car allowance is not linked to salary, does not rise with salary increases and is non-pensionable. Payment of the amount is conditional on the employee proving they have a valid driving licence and business insurance. It covers not just the costs of the personal car being available but also all its running costs.

28. In cross examination Mr Canney added:

(1) His only knowledge of the HR grading system came from an email he was sent in 1998 by the Chief Executive which contained a spreadsheet which set out a list of roles and grades. He had no personal knowledge of how the roles were graded. He could not help the Tribunal to understand how HR decided what grades were allocated to what roles.

(2) He did not agree with the comments made by Mr Dundas in his letter to HMRC of 19 April 2018 that employees invariably already owned their own car when taking the allowance. Whilst that might have been the case once the scheme had been in place for some years, initially, when employees were looking to switch from the company car scheme, they would have to acquire their own car. The allowance would go towards an employee acquiring or leasing a car in lieu of their company car.

(3) The car allowance was intended to be a contribution towards the cost of an employee providing a car and the employee was free to spend the cash as they wished.

(4) The appellant took tax advice at the time at which it introduced the car allowance scheme. His understanding was that the allowances would be subject to tax and NICs.

(5) No analysis was done of the actual or expected mileage of the employees in each grade although he did have a good knowledge of the mileage done by the drivers. He accepted that there would have been a significant variation in the mileages done in the 1990s between the company car drivers although they averaged about 10,000 miles. That figure was based on his long experience of doing P11D's before the car allowance was introduced.

(6) No reviews of the mileages done by the employees had been undertaken for the years under appeal.

(7) The Group car policies were drafted by the Group Chief Executive given the importance of company cars to the Group.

(8) There was no requirement that an employee owned or leased the vehicle, it just needed to be available for the employee's use. The car allowance was a carefully calculated cash sum which contributed towards the cost of an employee providing a car. Business insurance had to be in place. The appellant undertook no review as to how employees actually spent the allowance as long as the vehicle was roadworthy. And as long as they use the funds to purchase the vehicle, an employee could choose a vehicle which suited their personal circumstances.

29. In re-examination Mr Canney explained that had someone used an unsuitable vehicle, they would have been taken to task, and employees using a car owned or registered in his or her parents or spouses name was not an issue.

Mr Gibb

30. Mr Gibb provided a witness statement which he adopted, without any alteration, as his evidence in chief. That evidence was as follows:

(1) Mr Gibb is currently a Deputy Managing Director of the appellant for whom he has worked since 1994. In his current role he is responsible for overseeing the pre-construction phases of construction projects. His role with the appellant has always required him to undertake a large amount of business mileage. He needs to visit business customers, inspect sites and attend regular meetings at client offices. He could not do his job without a car. Even when he is taking a train to London he needs to commute to the station.

(2) He is paid a fixed pence per mile to compensate for fuel, and this covers both business mileage and commute mileage, the latter being fully taxed. These mileage payments are in addition to the monthly car allowance which is meant to cover the costs of running a car for business purposes such as insurance, service, wear and tear, tyres, windscreens, road tax, MOT etc.

(3) It suits his lifestyle to take the car allowance rather than have a company car, and he started taking the car allowance in around 2003/2004. His current car allowance figure is £9,500 per year. His two most recent cars have been bought under PCP arrangements, but prior to that, he bought his cars outright. His best estimate is that each private car costs about £10,000 per year and on top of that there are all the usual running costs. He has spent the whole of his car allowance and more on having and running his own car. Even if you add the tax relief he gets back from HMRC each year, the car allowance is not enough to fully run and use his own car for the whole year.

31. In cross examination Mr Gibb added that he had not been involved in the design or administration of the car allowance policy and was giving evidence in his capacity as someone who received the car allowance. His travel has reduced during the Covid pandemic yet the car allowance has stayed the same. He acknowledged that the mileage payments reimburse him for the mileage he actually does and while there are no limitations on what he spends the car allowance on, the appellant has a requirement that he must be able to provide a suitable vehicle for his work which is fit for that purpose.

Mr Dundas

32. Mr Dundas provided two witness statements which he adopted, without any alteration, as his evidence in chief. That evidence was as follows:

(1) He is currently the Chief Financial Officer of the appellant for whom he has worked for approximately 23 years in various finance roles. He was promoted to his current role in 2018 and is responsible for all the financial affairs of the appellant including tax and payroll. The Group has a policy of accepting only a low level of tax risk and does not partake in tax avoidance schemes or engage in any form of aggressive tax planning. The appellant's governance and compliance framework which underpins its tax strategy is based on the

intention to pay the right amount of tax at the right time in accordance with the relevant legislation.

(2) The appellant's business requires that many people need a car to perform their duties. It typically has more than 130 ongoing building projects at any one time covering all of England and Wales.

(3) The purpose of the car allowance is to provide an alternative to the company car scheme. Under the car allowance scheme, employees otherwise eligible for a company car can instead opt for a car allowance which is designed to cover the costs of them using their own vehicle instead of a company car. Roles that are expected to travel on business are assigned a grade which provides the choice of a company car or a car allowance. Employees who are not expected to travel on business are not assigned a car grade and therefore do not have the option of taking a company car or car allowance. The primary reason for providing a company car or car allowance is so that a car can be used on company business. To receive the allowance employees must have a suitable vehicle and a valid driving licence and staff without a car or driving licence are not entitled to receive a car allowance. The difference between providing a company car and a car allowance for use of a personal car is that for the company car the appellant is directly responsible for all running and maintenance costs whereas those costs become the burden of an employee who takes the car allowance.

(4) The appellant adopts a sustainable travel policy and actively encourages staff to consider minimising the carbon emissions of their vehicles. One of the factors which influenced the car allowance policy was to ensure that the appellant does not directly or inadvertently incentivise higher business mileage or unnecessary carbon emissions. And this is why the company does not offer an amount based on mileage and why it does not pay the higher HMRC approved mileage rates for cars over two litres in engine size.

(5) The purpose of the car allowance has always been to provide a fairer alternative to the company car scheme in such a way that it saves the appellant money. It was designed in such a way that an employee should be in a broadly equivalent financial position to selecting a company car but he believed the cost to the company in providing the allowance is on average £1,000 cheaper to the business than providing a company car. There has never been a profit element or premium built into the scheme to incentivise people to move away from the company car scheme.

(6) The appellant has offered a car allowance to those staff who would otherwise be entitled to a company car, i.e. drivers who are expected to complete at least 2,500 business miles a year. Employees who are part of the core team (amounting to approximately 300 people) are not expected to undertake regular travel in the performance of their duties and they are not assigned a grade and so are not provided with either a company car or car allowance. There were however a number of drivers who received a car allowance for parts of a tax period who also received no payment for business mileage in the corresponding period. This seemed odd to him given that drivers are only allocated a grade when business mileage was expected in the performance of their duties.

(7) He explained that a number of reasons were identified for this, including drivers on long-term sickness, those who are not employed for a full year, business mileage been claimed in one tax year in respect of mileage undertaken in a different tax year. When the data is re-examined and excludes this group of drivers, the number of drivers receiving a car allowance whose do not claim business mileage in any given year is only 3% of the total number of

allowance recipients (on average). This can be reduced further to take into account employees who claimed no business mileage in one year but who did claim business mileage in a different tax year during the period. His team had contacted those drivers who claimed no business mileage in a given year to ascertain why no claim was made, and reasons for this were given as being family stresses or illness, taking a train to a temporary project rather than driving, missing claim deadlines and poor personal financial administration.

(8) The car allowance needs take into account depreciation, is not linked to salary and is not a lump sum as compensation for giving up a company car. Staff driving their own cars incur expenditure and the car allowance is paid in equal monthly instalments to compensate for that expenditure. An employee on a company car scheme can switch to the car allowance scheme and vice versa. Drivers on a higher grade may cover similar annual distances to someone on a junior grade but still receive a higher car allowance, and this is because they typically drive more expensive cars as befits their grade and status and those cars cost more to run.

(9) He undertook extensive research and calculations to establish the amount of car allowance. He worked alongside Mr Canney. The car allowance was calculated so as to reflect the costs which an employee operating a personal car would actually incur. The appellant also wanted to ensure that it would not cost more than it was already paying by providing a company car. A very large amount of detailed data went into the development of the car allowance which involved a lengthy exercise, complex spreadsheets, and multiple grade/mileage scenarios being modelled.

(10) He provided a number of worked examples, reflected in the underlying documentary evidence, to show a variety of circumstances where changes to the business, personal, and commute mileage mix would make a considerable difference to the financial benefits of taking a car allowance when compared to taking a company car. These underlying documents were always based on a total anticipated annual mileage of 25,000 and when analysed, the data showed that the breakeven point for an employee, when compared to a company car, was around 10,000 business miles per year.

(11) Reimbursing employees through a business mileage rate per mile of, for example, 40 or 45p per mile was against their sustainability policy and would have been quite a lot more expensive for the company and riskier as it would be uncapped.

(12) The appellant has no preference as to whether an employee rents a car, leases one, buys one on hire purchase or credit sale or purchases it outright out of their own funds. The car allowance was intended to be a contribution to running costs. But the appellant does not dictate how the allowance should be spent, merely that the employee has available and uses a suitable vehicle when required to do so for business purposes.

33. In cross examination Mr Dundas added:

(1) At time of his letter to HMRC of 19 April 2018, he had been taking professional tax advice from Innovation LLP for about five years in relation to the claim. He accepted that in that letter, the statement that "employees invariably already own their own car when taking the allowance" was wrong, and acknowledged that although his normal policy was to have gone through letters which were sent out in his name with a considerable degree of scrutiny, he had failed to do so in this case. He also accepted that the statement "for employees who do little or no business mileage, of which there is a significant proportion, the whole of the car allowance is to be spent on private motoring." was also incorrect. He also accepted that the same was true of the information which had been sent to HMRC in October 2019 in response to HMRC's

email to him 14 October 2019 which suggested that 20% of employees receiving the car allowance had not claimed business mileage

(2) The 2,500 business mileage expectation was not included in any policy document nor is it recorded in any contemporaneous documentation.

(3) An analysis of the spreadsheet which identifies Class I NICs paid in error in relation to car allowances for 2004/2005 show that only 56% of car allowance recipients drove more than 2,500 miles. He had undertaken no detailed analysis of these figures nor was he able to say what proportion of those doing more than 2,500 business miles did 10,000 business miles.

(4) Nor had he nor anyone at the appellant reviewed the assumption that the breakeven point would be about 10,000 miles. The actual business miles driven by those receiving the car allowance were not analysed at the time, although it would have been possible to do so by interrogating the business mileage fuel payment claims. Nor had there been any analysis of the private mileage undertaken by those receiving the car allowance.

(5) No analysis had been carried out to see whether employees with different roles but who had the same grade did different numbers of business miles.

(6) The car make up payment is not a car allowance and appears in an employee's payslip. But it is however based on the grades which are allocated to employees which form part of the company car regime. It compensates an employee for trading down i.e. using vehicle in a lower band from that to which an employee was entitled by virtue of their grade.

(7) He accepted that one employee whose personal circumstances he knew of would be getting a greater car allowance because of her grade than someone with a lower grade but who would be doing many more business miles. He further accepted, in respect of that second employee who was consistently doing less than the 10,000 business mile average assumption, that he/she would be receiving more in car allowance than someone with a lower grade who did more business miles, and that the employees allowance stays constant irrespective of the number of business miles undertaken.

34. In re-examination Mr Dundas said:

(1) He respected his statement of truth at the end of his witness statements. There was no such statement in the letters sent to HMRC. He has always enjoyed, as has the appellant, a good relationship with HMRC.

(2) The relevance of the 2,500 and 10,000 business mileage was that before 2002, HMRC had three bands to determine benefit in kind charges and the vast majority of people fell into the "less than 2,500" mile band. No formal review of business mileage had been carried out by

the company, as there was no reason to do this until the claim was made for recovery of the Class I NICs.

(3) He re-emphasised that the core team was not expected to travel and thus did not have a grade. The allowance was based on popular vehicles and precise calculations on what it would cost an employee to run those vehicles.

(4) The purpose of an employee making a business mileage claim was to secure reimbursement of fuel costs.

FINDINGS OF FACT

35. From the foregoing evidence I make the following findings of fact:

(1) The car allowance was paid to an employee based on a grade which was allocated to that employee. Generally speaking, the more senior an employee, the higher the grade.

(2) The amount of car allowance paid to an employee did not depend on the number of business miles driven by an employee. The grade allocated to an employee did not depend on the number of business miles driven by that employee. An employee with a higher grade who did fewer business miles than an employee with a lower grade was paid a higher car allowance.

(3) The business mileage payments were intended to reimburse an employee for the fuel costs of actual business miles driven.

(4) An employee who was entitled to a car allowance at a certain grade (say grade 5) could choose to select a car from a lower grade choice list (say grade 3) and be reimbursed the difference in the car allowance for those grades.

(5) Some individuals who drove no business miles were awarded a grade.

(6) Allowances were paid even when an employee was ill (including long-term sick) or their business miles reduced because, for example, of the Covid pandemic.

(7) The purpose of the car allowance was to ensure that an employee had a properly insured, maintained and reliable motor vehicle available which that employee could use for performing his or her duties as an employee; in other words for business use. An employee who received the car allowance was obliged to have (or ensured that he/she had) a fit and proper vehicle available to him/her for the purpose of performing his/ her business duties. That obligation was enshrined in the employee's contract of employment.

(8) There was no obligation or direction however, on an employee as to how he/she should spend the car allowance. Whilst Willmott Dixon anticipated that an employee who had no satisfactory vehicle would spend the allowance, in part, on acquiring one, there was no contractual obligation to do so. Similarly, once an employee was in possession of a satisfactory vehicle, then Willmott Dixon anticipated that the allowance would be paid on the financing, maintenance and costs of insurance, in other words the ongoing costs of owning a vehicle. But again, there was no contractual or other obligation to do so. The employee was free to decide

on what he/she spent the car allowance, and it could be spent on something wholly unrelated to the vehicle or its use for business travel.

(9) There were winners and losers. Some employees receiving the car allowance would receive more than the costs of running the car. Others would receive less. Willmott Dixon undertook no analysis to identify these winners and losers.

(10) The car allowance passed the burden of acquiring and maintaining a vehicle onto the employee.

(11) Willmott Dixon undertook a rigorous analysis of the underlying data and set the level of the allowances on the basis that an employee who did 10,000 business miles per year would be in the same financial position whether they opted for the car allowance, or chose a company car.

(12) An employee receiving a company car could choose whether to continue to take the company car or to switch into the car allowance scheme.

(13) The car allowance scheme could save Willmott Dixon up to £1,000 per employee.

(14) The overall scheme was not intended to secure a tax benefit for Willmott Dixon. It was also commensurate with its sustainable travel policy.

THE LEGISLATION

36. I have set out the relevant legislation in Appendix 1. Definitions in that Appendix have the same meanings in the body of this Decision.

THE ISSUES

37. These are neatly summed up in HMRC's skeleton argument.

> (1) The first issue is whether the car allowances are earnings within the meaning of section 3(1) of the Act. If they are not, then HMRC accepts that the appeal must succeed**.**
>
> (2) If they are earnings, then the second issue is whether the disregard in paragraph 7A (the "**paragraph 7A disregard"**) of Schedule 3 to the Regulations ("**Schedule 3")** applies so that no NICs are due in respect of the Qualifying Amount **("QA"**) calculated in accordance with Regulation 22A(4).
>
> (3) If the QA does not have to be relevant motoring expenditure ("**RME**"), then HMRC accept that the appeal succeeds. If, on the other hand, it does, then the question is whether, on the facts, the car allowances are RME. If not, the appeal fails.
>
> (4) If the paragraph 7A disregard does not apply, do the allowances fall within paragraphs 3 or 9 of Schedule 3 (the "**paragraph 3 disregard**" and the "**paragraph 9 disregard**" respectively). If so, the appeal succeeds.

38. My understanding is that the appellant accepts that save to the extent that an amount is QA, then, if the excess is earnings, it is subject to NICs. I further understand that the parties have agreed, subject to my decision on the legal principles, the amount of QA, and it is that amount, namely £1,470,056.72, which has been claimed by the appellant in this appeal, and which HMRC has rejected (the "**agreed QA**")

Earnings?

39. Mr Mullan took me through a number of authorities dealing with this point whilst Mr Nawbatt took me to just one, *Cheshire Employer and Skills Development Ltd v Revenue and Customs Commissioners* [2012] EWCA Civ 1429 ("*Cheshire*"). Having reviewed the cases, and despite Mr Mullan's protestations to the contrary, it is my view that Cheshire sets out the relevant principles and I am bound by it. I have set out the relevant extract in Appendix 2, but the essential principles are summarised at paragraph 55 of the decision which I set out below:

> "[55] Both sides accept the analysis of Walton J in that case. What emerges from his judgment are the sensible propositions that, in a case where an employer establishes a general scheme for reimbursement of employees' travelling expenditure, then in determining whether the allowances are to be treated as the taxable earnings of the employees because they involve a profit element or they are to be ignored because they are reimbursement of expenditure: (1) a broad brush approach is necessary in view of the practical constraints of devising a scheme that can apply to a number of different employees and is administratively workable; (2) the test is not whether the allowance produces a mathematical equivalence with the expenditure; (3) rather, the question is whether the scheme was constructed in a genuine endeavour to produce an equivalence between the allowance and the expenditure and to apply with approximately equal justice to all within its scope."

40. When these principles are applied the findings of fact that I have reached above, in my judgment the car allowances are to be treated as taxable earnings (and therefore subject to NICs subject to the paragraph 7A disregard) and are not a reimbursement of expenditure.

41. To be reimbursement of expenditure, the allowances need to "fill a hole" in an employee's emoluments which has been created by that employee incurring expenditure on an employer's business. This is pretty simple when considering a single employee but more complicated, as is recognised in the foregoing extract from *Cheshire*, when there are a large number of employees. But there still needs to be an equivalence between the allowance and the expenditure.

42. The amount of car allowance paid to a particular employee does not depend on the number of business miles driven by that employee. It depends on the grade awarded to that employee which in turn depends on seniority rather than the number of business miles driven. It does not fill a hole in that employee's emoluments which arises because that employee has incurred business travel. Its admitted purpose is to ensure that an employee has a serviceable motor vehicle for use on Willmott Dixon's business. It is not to reimburse the expenses actually incurred in that use. That reimbursement is effected to some extent by the mileage payments which reimburse an employee for the fuel costs of the business miles actually driven.

43. It is possible for a driver with a higher grade to "trade down" and choose a lower grade vehicle and be paid the difference between a car allowance for the lower grade and the car allowance for higher grade to which he or she is entitled. To my mind this is incompatible with any suggestion that the allowance is payable as a reimbursement for expenditure which an employee incurs on Willmott Dixon's business.

44. Furthermore, the car allowance is paid, via the grade system, to individuals who do very few business miles (indeed some of whom do no business miles) and is paid to those who are ill, on maternity leave, or whose business miles are reduced by, for example, the Covid pandemic. Again, this is inconsistent with reimbursement for actual expenditure incurred by

an employee on an employer's business.

45. Whilst there is clearly a link between the payment of the car allowance on one hand, and the provision of a serviceable vehicle for use on Willmott Dixon business, on the other, to my mind the issue as to whether the allowances are earnings depends on the allowances being reimbursement for actual use rather than simply being for the employee having, available for use, that serviceable vehicle.

46. I accept that Willmott Dixon have adopted a broad brush approach which is acceptable, as a matter of principle, as set out in the extract from *Cheshire* above. And the scheme must be administratively workable so that it can apply to a number of different employees. And I further accept, given my findings of fact, that the car allowance scheme is a rational scheme which was the result of a considerable intellectual effort on the part of Willmott Dixon. However it does not seem to me that there was a genuine endeavour to produce an equivalence between the car allowance and the expenditure. There was an endeavour to produce an equivalence for those driving 10,000 business miles a year between taking a company car on the one hand and opting for the car allowance on the other. But once the allowances had been calculated to compute that equivalence, little or no analysis was then undertaken to see whether different employees who opted to take the car allowances were winners or losers. Mr Gibb, who gave evidence, clearly stated that it cost him a great deal more to provide a car for use on company business than he was paid by way of the car allowance. He could be described as a loser. But that might depend on the nature of the car that he chose and the number of miles he drove in any particular year. And his status as winner or loser might change year on year. And given the fact that Willmott Dixon has undertaken no analysis as to the extent of the winners or losers, it is difficult for me to be certain as to the extent of those winners. But the relevance of this, of course, is that those winners will be receiving an element of bounty. And if that is the case, then it is another reason why the allowances are earnings. Whilst there might be people like Mr Gibbs who opt for the car allowance alternative because they wish, for personal reasons, to have a "better" car than would be the case if they took the company car, albeit that they were worse off financially in doing so, I strongly suspect that there were other employees who opted for the car allowance alternative who had a somewhat less sophisticated vehicle available for use on Willmott Dixon business, and for whom the car allowance more than covered the acquisition and/or ongoing running costs. The fact that there are these winners and losers shows to me that the scheme was not instituted in a genuine endeavour to produce an equivalence between the allowance and the expenditure.

47. Mr Mullan put his case that the allowances are not earnings in three alternative ways. Firstly that the car allowance was a fair bargain between Willmott Dixon and the employees for the provision of a car to be used in the latter's business. He bases this submission on two authorities, *Hochstrasser v Mayes* (referred to in the extract from *Cheshire* in Appendix 2) and *Wilson v Clayton* [2005] STC 157. I am afraid I cannot see this principle from those cases. Simply because there is a fair bargain between an employer and an employee does not in my mind mean that payments made in respect of that bargain are automatically taken outside the concept of earnings. This would mean that any wages which reflect that fair bargain would be deemed not to be wages, and this is clearly a nonsense. The same is true for payment of a benefit in kind. Mr Mullan suggests that the fair bargain analysis means it is not necessary to show that an employee incurs costs equivalent to the allowance. I disagree. As mentioned above, reimbursement of expenditure is taken out of the definition of earnings since it is designed to fill a hole in an employee's emoluments for expenditure incurred on an employer's business. If the employee cannot justify that he/she has incurred expenditure in such circumstances, then it cannot be reimbursement. And as such cannot be a fair bargain. It is a

bargain which benefits only the employee. To be a fair bargain it must be reimbursement of expenditure actually incurred. And that is not the case with the car allowances for the reasons I have given above.

48. Mr Mullan's second alternative was the car allowances were reimbursement of expenses calculated on a broad-brush approach. But that is just one limb of the threefold test set out in paragraph 55 of *Cheshire*. It is, as it were, the administrative limb. But in my view the more important, and principled limb of the threefold test is that which states that there must be an equivalence between the allowance and the expenditure. And in the case of the car allowances, there is no such equivalence for the reasons given above.

49. Finally, even if the car allowances were generous for certain staff, it is only the profit element that could properly be regarded as earnings. I can see merit in this argument, but his difficulty is that the scheme does not align the amount of car allowance with the amount of business use, nor did Willmott Dixon undertake any sort of contemporaneous audit to see who and to what extent employees made a profit, and adjust the allowance accordingly. They were not concerned about whether an employee made a profit or not. They passed to the employee the decision as to whether or not it was financially advantageous to take a car allowance, the only proviso being that the employee had access to a serviceable motor vehicle for business use. Willmott Dixon accepted that there were winners and losers. So the payment of the car allowances, as a commercial strategy, inevitably involved a profit element and, in my view, this means that the entire system of car allowances is earnings even if in any particular case, an employee made no profit.

50. And so for all of the foregoing reasons, it is my view that the car allowances are earnings for the purposes of section 3 of the Act.

The paragraph 7A disregard

51. I now turn to the second issue on which a great deal of intellectual capital was expended both before and during the hearing and in Mr Mullan's closing written submissions. To my mind, for the reasons given below, the matter is a relatively simple question of statutory interpretation and the application of the relevant legislation to the facts that I have found. I trust that in doing this neither Mr Mullan, nor Mr Nawbatt, feel that I am doing them a disservice since they both made many subtle, nuanced, and intellectually cogent arguments that to which I do not refer.

52. I am also conscious that the 7A disregard was considered in considerable detail by Judge Bowler in LOR. There are many similarities in LOR to the facts and issues in this appeal. And those issues will be considered by the Upper Tribunal. In LOR, Judge Bowler decided that payments similar to the car allowance payments in this appeal were earnings; those payments were not RME and as a consequence could not be QA and so the 7A disregard could not apply.

53. I am alive to the principle of comity, and that I should follow the reasoning adopted by Judge Bowler when reaching those conclusions unless I consider that reasoning to be wrong.

54. I have reached the same conclusion as Judge Bowler that in order to be QA, the allowances must be RME. But I have reached a different conclusion from her in that it is my judgment that the allowances in this appeal are RME, and consequently can be QA and so the paragraph 7A disregard applies.

55. There are therefore three elements to this analysis. The first is whether, as a matter of

legal principle, in order to be QA, a payment must also be RME. That is a matter of pure law.

56. The second element is that if I find that to be QA a payment must also be RME, whether, on the facts of this case, the car allowances are RME.

57. The third element is that if I find that to be the case, the amount of QA to which the appellant is entitled. As I have said earlier in this decision, it is my understanding that this amount has been agreed between the parties and is the agreed QA.

Must QA be RME?

58. Unlike LOR where the appellant in that case made a spirited attempt to show that QA did not need to be RME, the focus of Mr Mullan's submissions was that he accepted that QA needs to be RME. But on the facts of this case it was.

59. In my view the reasons given by Judge Bowler at [166] – [172] of LOR (notwithstanding the irrelevant error in [168] regarding the date the provision was inserted) are correct and I adopt them in this appeal. It is my view that QA must be RME.

60. Mr Mullan made extensive submissions as to the parallels between the income tax legislation and the NIC legislation. It was his view that these parallels supported his interpretation of the paragraph 7A disregard. One of these submissions was that Parliament intended to align the tax treatment of payments such as the car allowances with their treatment for NIC purposes. He provided Hansard extracts as well as an extract from the explanatory notes dealing with the 2002 Regulations which introduced the paragraph 7A disregard into Schedule 3. Those extracts do not advance his cause to any great extent. The explanatory notes indicate that the purpose of the 7A disregard is to reflect "so far as is practicable the treatment of such payments for tax purposes". And the Hansard extract indicates that "we intend to align the amounts liable to tax and national insurance as far as proves practicable" (emphasis added).

61. The truth of the matter is that the income tax system and the system for NICs are not seamlessly aligned and are not the same. Judge Bowler undertook a detailed and forensic analysis of the parallels between the income tax system and the NIC rules in [186] – [206] of LOR. I accept her reasoning and gratefully adopt it. It is clear that whilst there was an intention (I suspect there still is) to broadly align the NIC and income tax regimes, there are differences in the detail.

62. And it is to that detail in the NIC legislation to which I now turn.

Are the car allowances RME?

63. The paragraph 7A disregard is expressed very simply as follows:

> "QUALIFYING AMOUNTS OF RELEVANT MOTORING EXPENDITURE
>
> **7A** To the extent that it would otherwise be earnings, the qualifying amount calculated in accordance with regulation 22A (4)."

64. The relevant provisions of Regulation 22A are:

> **"22A Amounts to be treated as earnings in connection with the use of qualifying vehicles other than cycles**

(1) To the extent that it would not otherwise be earnings, the amount specified in paragraph (2) shall be so treated.

(2) The amount is that produced by the formula -

RME – QA

Here—

RME is the aggregate of relevant motoring expenditure within the meaning of paragraph (3) in the earnings period; and

QA is the qualifying amount calculated in accordance with paragraph (4).

(3) A payment is relevant motoring expenditure if—

(a) it is a mileage allowance payment within the meaning of section 229(2) of ITEPA 2003; or

(b) it would be such a payment but for the fact that it is paid to another for the benefit of the employee; or

(c) it is any other form of payment, except a payment in kind, made by or on behalf of the employer, and made to, or for the benefit of, the employee in respect of the use by the employee of a qualifying vehicle…. (emphasis added).

(4) The qualifying amount is the product of the formula—

M x R

Here—

M is the sum of—

(a) the number of miles of business travel undertaken, at or before the time when the payment is made—

(i) in respect of which the payment is made, and

(ii) in respect of which no other payment has been made; and

(b) the number of miles of business travel undertaken-

(i) since the last payment of relevant motoring expenditure was made, or, if there has been no such payment, since the employment began, and

(ii) for which no payment has been, or is to be, made;

and R is the rate applicable to the vehicle in question, at the time when the payment is made, in accordance with section 230(2) of ITEPA 2003 and, if more than one rate is applicable to the class of vehicle in question, is the higher or highest of those rates."

65. A "qualifying vehicle" is defined by reference to section 235 of ITEPA which in turn describes them in terms of simple description (cars, vans, and motorcycles), and does not contain any qualification as regards use.

66. So the focus of the enquiry is whether the car allowances were made by Willmott Dixon "in respect of the use by the employee of a qualifying vehicle".

67. In [222] of LOR, Judge Bowler took the view that this expression meant use (and I think by this she meant actual use) and not expected use or potential use or availability for use. And at [223] on the facts of LOR she said that the payments made by LOR were not only not made in respect of business use; they were not made in respect of use at all given that they were entirely determined by reference to the grade of the employee regardless of the extent of use of their car.

68. I respectfully disagree with Judge Bowler on the first of these points. I say this for the following reasons.

69. Regulation 22 A contains both a charging provision (RME) and a relieving provision (QA).

70. RME comprises three limbs, the first of which (subparagraph (a)) is a specific charging provision which deals with mileage allowance payments.). It brings within the charge to NICs mileage allowance payments which might not otherwise be so included, and which are thus deemed to be earnings for NIC purposes. Subparagraph (b) relates directly to subparagraph (a).

71. Mr Mullan submits that regulation 22 A is a charging provision and should be construed broadly. I agree that paragraph (3) is a charging provision and deems RME to be earnings. But subparagraph (c) is not a free-standing charging provision and must be read in the context of sub paragraphs (a) and (b). Subparagraph (a) refers to payments made to *".....the employee in respect of the use by the employee of a qualifying vehicle."* To my mind this can only refer to the employee and the use referred to in section 229 (2) ITEPA, referred to in subparagraph (a), and which states "*mileage allowance payments are amounts…… paid to an employee for expenses related to the employee's use of such a vehicle for business travel…."*. Whilst it might have been clearer if it had referred to, for example, "such" use or "such" employee, I think the use of the word "the" provides sufficient link between subparagraph (a) and subparagraph (c) to justify my conclusion that the subparagraph should be considered as part of the same charging provision, and that subparagraph (c) must be read in the context of the two preceding subparagraphs and cannot be seen as totally independent and free standing charging provision. The consequence of this, of course, is that it does not charge payments for private travel an interpretation suggested by Mr Mullan, since that is outside the ambit of section 229 (2) ITEPA. Furthermore, the three limbs of charge were introduced at the same time.

72. Mr Mullan made no serious attempt to suggest that the car allowances fell within the ambit of subparagraph (a). His main thrust was that they fell within subparagraph (c). Had he chosen to do so, it is my view that the car allowances fall outside the provisions of subparagraph (a) in that whilst they might relate to the employee's use of a vehicle for business they are not paid to an employee "for expenses" which so relate. Clearly, on the one hand, the employees incur expenses on business travel. And equally clearly an employee is paid the car allowance on the other. But there is no obligation on an employee to use the car allowance (or an amount equivalent to it, in whole or in part) for any particular purpose, let alone to pay expenses incurred for the use of the vehicle on business travel. Indeed, to the contrary; the evidence clearly shows that an employee who was paid the car allowance was entirely free to spend it

on whatever he or she wanted. It could be blown on a luxury cruise around the Greek islands. And the expenses incurred by the employee would simply have been a cost which the employee would have borne out of his or her own pocket. There is no payment for expenses by dint of the car allowances and thus in my view the car allowances fall outside the ambit of subparagraph (a).

73. But subparagraph (c) is couched in different language from subparagraph (a) Firstly, subparagraph (c) clearly distinguishes payments made thereunder from those in subparagraph (a) by the words "*it is any other form of payment*". Secondly, subparagraph (c) does not refer to payments "*for expenses*". It simply refers to a payment. Finally, the payment must be "*in respect of the use*" and not "*related to the employees use"*. Mr Mullan suggests that these differences are significant, and I agree.

74. Mr Nawbatt takes the view that if subparagraph (c) is given a wide meaning, there is no need for subparagraph (a). The mileage allowance payments referred to in that subparagraph would be swept up within subparagraph (c). I appreciate this argument, but to my mind the drafting of those subparagraphs is equally consistent with the draughtsman considering a specific circumstance in which the deeming provision should bite, but then, out of a surfeit of caution, broadening the net to ensure that any other payments made by an employer to an employee which are incurred in respect of the use by an employee of a vehicle for business use, is within the scope of deemed earnings and thus NICs.

75. The phrase "in respect of" should be given a very wide meaning, as should the word "use". Use is not restricted to actual use and had that been Parliament's intention, in my view it would have used the word in the legislation.

76. I say this for two main reasons. Firstly, Parliament, and the parliamentary draughtsman would be aware of the breadth of the concept of "earnings" for the purposes of section 3(1) of the Act and would have wanted to ensure that the deeming provision in subparagraph (c) was broadened from the specific charge for mileage allowance payments. And that it should bring within charge not just actual use but also potential, future, or availability for use. Secondly it would seem odd to me to include only payments for actual business use within subparagraph (c) and then, effectively, take those out of the NIC net for actual business travel by dint of those payments falling within the definition of QA. Whilst actual business use falls within the ambit of subparagraph (c), so too, does other business use. Actual business use is simply a subset of the more general concept of business use used in subparagraph (c), and it is that subset which is taken out of charge to the extent that it comprises QA. However it leaves the other subsets of business use within the charge to NICs.

77. Contrary to Judge Bowler's view, my view is that use includes expected use potential use or availability for business use. Provided an employer can show that a payment was made and in consideration for that payment an employee was obliged to provide a vehicle for business use, then it falls within the ambit of subparagraph (c). It is a payment in respect of the use by that employee of a qualifying vehicle.

78. This interpretation is consistent with what I perceived to be the overall scheme of the legislation. Earnings is construed very broadly and is then supplemented by the RME deeming provision. This is a charging provision, and so casts the NIC wide. However it is then cut down by the concept of QA which applies to both earnings and deemed earnings. QA has to be RME. And in the context of this appeal it is, because it is made in respect of the use by an employee of a qualifying vehicle. This payment could be earnings under section 3(1) of the Act or deemed

earnings under Regulation 22A (2) and (3). QA is where the actual use of the vehicles becomes relevant since it takes out of the NIC net expenditure which has been actually incurred by an employee on business travel.

79. And that, it seems to me, is the crux of it. It is a rational and sensible system which charges a wideish variety of payments but then cuts them down where it can be shown that the employee has undertaken actual business travel. This is entirely consistent with the principles set out in *Cheshire* to which I have referred above.

80. When applying this principle to the facts in this case as I have found them, it is my view that the circumstances in which the car allowance payments were made brings them within the ambit of subparagraph (c). I have found that in consideration for the car allowance payments, employees were obliged ("must") have ensured that a reliable motor vehicle which was fit for the purpose of performing business duties was available to the employee at all times; and that the individual "must" have use of a private car for use on company business. There is a clear and direct nexus between the payment on the one hand and the use by the employee of his/ her private vehicle, on the other.

81. I totally appreciate, as I have found as a fact, that the way in which these payments were made and the amounts of the payments were based not on actual business use but on grades, and those grades, in turn, did not reflect actual business use but seniority. A similar arrangement was in place in LOR and this was another reason why Judge Bowler thought that similar payments in that case to the car allowances in this, were not made in respect of use. I respectfully disagree. For all the reasons I have enunciated at [41]-[49] above when considering whether the car allowances are earnings, the fact that there is no correlation between the allowances on the one hand and actual business mileage on the other, is fatal to Mr Mullan's submissions that the car allowances are not earnings under section 3(1) of the Act. But they are not fatal to his submissions that they fall within subparagraph (c). All he has to do is show that the car allowances are payments in respect of the use by the employee of a qualifying vehicle, and to my mind, on the facts, he has done that, irrespective of the fact that the way in which the payments were made depended not on actual mileage but on the grading system. The evidence shows that in order to receive the allowances an employee was obliged to have a private vehicle available for business use. This falls within the ambit of subparagraph (c). There is a clear (albeit indirect) nexus between the payments and business use.

82. Mr Nawbatt submitted that one of the reasons for the car allowance payment was to enable an employee to acquire a suitable vehicle in the first place and that if subparagraph (c) extended to that, one would have expected the subparagraph to read "…… provision and use….." I accept that, on the evidence, Willmott Dixon expected those who received the car allowance, and who did not have a suitable car available, to have acquired one. But it is clear on the evidence that the payments were made for the use of the private vehicle for business purposes. That is sufficient to bring it within the ambit of subparagraph (c) irrespective of whether the allowance was spent on the provision of a vehicle in the first place.

What is the amount of QA?

83. As I have said earlier in this decision, it is my understanding that the parties have agreed the amount of QA in the amount of the agreed QA. If I am wrong on this, and the amount of QA still needs to be calculated, then I have no doubt that the parties will, following the release of this decision, approach the Tribunal with a request for directions relating to the approach which should be adopted towards the quantification of QA in this appeal which I will be happy

to give.

The paragraph 3 disregard

84. The relevant parts of paragraph 3 are set out below:

> "TRAVELLING EXPENSES GENERAL
>
> **3** A payment of, or a contribution towards, travelling expenses which the holder of an office or employment is obliged to incur and pay as the holder of that office or employment.
>
> For the purposes of this paragraph
>
> (a) travelling expenses means
>
> (i) amounts necessarily expended on travelling in the performance of the duties of the office or employment; or
>
> (ii) other expenses of travelling which are attributable to the necessary attendance at any place of the holder of the office or employment in the performance of the duties of the office or employment and are not expenses of ordinary commuting or private travel (within the meaning of section 338 of ITEPA 2003 (travel for necessary attendance);….."

85. Mr Mullan submits that by dint of the contractual arrangements pursuant to which an employee had to make available a serviceable vehicle for business use, the costs incurred on fulfilling that obligation are costs which the employee was obliged to incur. Employees were also obliged to travel business miles and to do so they necessarily incurred costs on that travelling and the car allowance was a contribution towards those costs.

86. Mr Nawbatt submits that there is no obligation on an employee to incur necessarily expended amounts on business travel. There is no evidence to suggest that the employees were required to travel any business mileage. The allowance depended on the grade of the employee irrespective of the number of business miles which he/she might do. The allowance simply obliged an employee to make available a serviceable vehicle for business travel. The costs of that are thrown onto the employee by the car allowance scheme and include the costs of financing the original purchase (if any) and the ongoing running costs. These are not costs which an employee is obliged to incur as an employee. Nor are they amounts necessarily expended on travelling in the performance of an employee's duties.

87. In HMRC's statement of case, they alleged that paragraph 3 is subject to paragraph 1A of Part VIII of Schedule 3. This assertion is not repeated in Mr Nawbatt's skeleton. I cannot see on the face of the legislation that paragraph 3 is so limited, nor was a copy of paragraph 1A provided in the authorities bundle. I was provided with what I thought was a comprehensive version of Schedule VIII, and there is no paragraph 1A in that version. I have therefore disregarded the points made in respect of the application of paragraph 1A made in HMRC's statement of case.

88. However, even without it, I agree with Mr Nawbatt's submissions. I have found as a fact that there is no relationship between the amount of car allowance paid to an employee, and the number of business miles undertaken by that employee. Nor is there any correlation between

the grade which an employee is granted (on which the amount of car allowances is based) and the number of business miles travelled by an employee. In my judgment paragraph 3 applies to contributions towards travelling expenses which are amounts necessarily and actually spent on business travel. The business mileage payments compensate an employee for the amount of fuel costs actually incurred on such travel. Payment of the car allowance enables an employee to acquire and/or maintain a serviceable vehicle. But there is no obligation on an employee to put the car allowance to either use. The employee can spend it on whatever he or she wishes. That is clear from the evidence and I and have found it as a fact. To my mind there must be a specific link between the contribution on the one hand and the use of that contribution to reimburse the employee for travel expenses which he/she must necessarily incur on business travel on the other. And that link must be present at the time the payments were made, rather than, with the benefit of hindsight, becoming apparent following an analysis of the actual business miles undertaken by that employee some years later (as has happened in this case with the 15 samples employees). There is no such link, nor is there any contemporaneous evidence of the amount of business travel undertaken by the 15 sample employees during the years under appeal. There is simply a payment of the car allowance on the one hand, and business travel incurred on the other. Whilst the appellant anticipated that the employees would spend the allowance on acquiring and maintaining a vehicle, the employee was not obliged to. To my mind this is fatal to the appellant's submission that paragraph 3 applies and in my view the car allowances do not fall within the paragraph 3 disregard

The paragraph 9 disregard

89. The paragraph 9 disregard is set out below:

> "SPECIFIC AND DISTINCT PAYMENTS OF, OR TOWARDS, EXPENSES ACTUALLY INCURRED
>
> **9**
>
> (1) For the avoidance of doubt, these shall be disregarded any specific and distinct payment of, or contribution towards, expenses which an employed earner actually incurs in carrying out his employment. This is subject to the following qualification.
>
> (2) Sub-paragraph (1) does not authorise the disregard of any amount by way of relevant motoring expenditure, within the meaning of paragraph (3) of regulation 22A, in excess of that permitted by the formula in paragraph (4) of that regulation."

90. Mr Mullan submitted that the allowances were specific contributions towards expenses which an employee incurs since they were intended to cover the costs which an employee actually incurs. It was also likely, given the obligation on an employee to provide a serviceable vehicle for business use, that in many cases the expenses actually incurred by an employee would be considerably greater than the amount reimbursed by the car allowance. He also saw no reason why, if the contributions were greater than the expenses actually incurred, that should not be the case. In either case the expenses which an employee had actually incurred were being reimbursed.

91. Mr Nawbatt submitted however that the car allowance payments are round sum allowances and so they cannot be specific or distinct. Nor can they be said to be contributions made towards expenses which an employee actually incurs. There are certain employees who receive an allowance yet drive no business miles. Furthermore, given that the car allowances are intended to cover the running costs of the vehicle and those are not specific to an

employment and would have been incurred whether the vehicle was used for business use or not, the payments cannot be said to be a contribution towards expenses which an employee actually incurs in carrying out his employment.

92. In my judgment, whilst the car allowances might be payments or contributions which are distinct in the sense that they can be readily identifiable from an employee's payslip and distinguishable from that employee's general salary, they are not specific payments of expenses which an employee actually incurs; nor are they specific contributions towards expenses which an employee actually incurs, in either case in carrying out his employment.

93. At the risk of labouring the point, the car allowances are paid in consideration of an employee making a serviceable vehicle available for business use. But there is no obligation for the employee to use it for that purpose. And whilst it might be anticipated, as Mr Mullan submits, that some of the allowance will be spent on the costs incurred by an employee in undertaking business travel, the allowance is not specific to those costs. Furthermore, as I have mentioned above, there is no evidence that at the time of making the payments, Willmott Dixon had any idea as to the level of business travel undertaken by any of the sample 15 employees. To my mind paragraph 9 operates on the assumption that an employee either has, or anticipates incurring, actual expenses in carrying out his employment. His employer then pays him a specific amount to compensate for those actual expenses. This is a wholly different situation from the car allowance arrangements where payments are made in consideration not of an employee having incurred or who anticipates incurring, specific expenses in carrying out his employment, but are made in consideration of an employee making available a serviceable vehicle for business travel. In my judgment the paragraph 9 disregard does not apply to the car allowances.

CONCLUSION

94. Drawing the various strands together, in my judgment:

(1) The car allowances are earnings within the meaning of section 3(1) of the Act;

(2) To be QA for the purposes of the paragraph 7A disregard, QA must be RME.

(3) The car allowances are RME.

(4) The paragraph 7A disregard applies to the extent of the agreed QA.

(5) The car allowances fall outside the ambit of the paragraph 3 and paragraph 9 disregards.

DECISION

95. I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE
Release date: 04 JANUARY 2022

APPENDIX 1

The Law

1. <u>Social Security Contributions and Benefits Act 1992</u>

3. Earnings and earner

(1) In this Part of this Act and Parts II to V below

(a) earnings includes any remuneration or profit derived from an employment; and

(b) earner shall be construed accordingly.

(2) For the purposes of this Part of this Act and of Parts II to V below other than those of Schedule 8

(a) the amount of a person's earnings for any period; or

(b) the amount of his earnings to be treated as comprised in any payment made to him or for his benefit,

shall be calculated or estimated in such manner and on such basis as may be prescribed [by regulations made by the Treasury with the concurrence of the Secretary of State.

(2A) Regulations made for the purposes of subsection (2) above may provide that, where a payment is made or a benefit provided to or for the benefit of two or more earners, a proportion (determined in such manner as may be prescribed) of the amount or value of the payment or benefit shall be attributed to each earner.

(3) Regulations made for the purposes of subsection (2) above may prescribe that payments of a particular class or description made or falling to be made to or by a person shall, to such extent as may be prescribed, be disregarded or, as the case may be, be deducted from the amount of that person's earnings.

(4) Subsection (5) below applies to regulations made for the purposes of subsection (2) above which make special provision with respect to the earnings periods of directors and former directors of companies.

(5) Regulations to which this subsection applies may make provision

(a) for enabling companies, and directors and former directors of companies, to pay on account of any earnings-related contributions that may become payable by them such amounts as would be payable by way of such contributions if the special provision had not been made; and

(b) for requiring any payments made in accordance with the regulations to be treated, for prescribed purposes, as if they were the contributions on account of which they were made.

2. Social Security (Contributions) Regulations 2001

22 Amounts to be treated as earnings

(1) For the purposes of section 3 of the Act (earnings), the amounts specified in paragraphs (2) to (11) shall be treated as remuneration derived from an employed earner's employment.

(2) The amount specified in this paragraph is the amount of any payment by a company to or for the benefit of any of its directors if

(a) apart from this regulation the payment would, when made, not be earnings for the purposes of the Act; and

(b) the payment is made on account of or by way of an advance on a sum which would be earnings for those purposes.

(3) The amount specified in this paragraph is the amount equal to the cash equivalent in respect of car fuel which is treated as earnings from the employment of the earner for income tax purposes by virtue of section 149 of ITEPA 2003.

(4) The amount specified in this paragraph is the amount which is treated as earnings from the employment of the employed earner by virtue of section 222(2) of ITEPA 2003.

(5) The amount specified in this paragraph is the amount which counts as employment income of the employed earner under Chapter 2 of Part 7 of ITEPA 2003 computed in accordance with section 428 of ITEPA 2003 in respect of conditional shares or interests in conditional shares acquired before 16th April 2003.

References in this paragraph and paragraph (6) to ITEPA 2003 are to that Act as originally enacted.

(6) The amount specified in this paragraph is the amount which counts as employment income of the employed earner by virtue of Chapter 4 of Part 7 of ITEPA 2003 (shares: post-acquisition charges) in respect of shares or interests in shares acquired before 16th April 2003.

(7) The amounts specified in this paragraph are those

(a) which count as employment income of the employed earner in relation to employment-related securities (within the meaning given by section 421B(8) of ITEPA 2003); and

(b) to which section 698 of ITEPA 2003 (PAYE: special charges on employment-related securities) applies.

References in this paragraph and paragraphs (9) and (10) to ITEPA 2003 are to that Act as amended.

(8) The amount specified in this paragraph is the amount

(a) which counts as employment income of the employed earner by virtue of section 500 to 508 of ITEPA 2003; and

(b) in respect of which income tax is recoverable in accordance with PAYE regulations.

(9) The amount specified in this paragraph is any amount

(a) which, by reason of the operation of Schedule 2 to the Finance (No 2) Act 2005, counts as employment income of the employed earner under any of Chapters 2 to 4 of Part 7 of ITEPA 2003; and

(b) where the relevant date for that income determined under section 698(6) of ITEPA 2003 (whether or not the PAYE Regulations apply to that income) is on or after 2nd December 2004 and before 20th July 2005.

(10) The amount specified in this paragraph is any amount

(a) which by virtue of the operation of section 92 of the Finance Act 2006 counts as employment income of the employed earner under any of Chapters 2 to 4 of Part 7 of ITEPA 2003; and

(b) where the relevant date for that income determined under section 698(6) of ITEPA 2003 (whether or not the PAYE Regulations apply to that income) is on or after 2nd December 2004 and before 19th July 2006.

(11) The amount specified in this paragraph is the amount treated as earnings from the employment by virtue of section 226A of ITEPA 2003 (amount treated as earnings).

22A Amounts to be treated as earnings in connection with the use of qualifying vehicles other than cycles

(1) To the extent that it would not otherwise be earnings, the amount specified in paragraph (2) shall be so treated.

(2) The amount is that produced by the formula -

RME – QA

Here—

RME is the aggregate of relevant motoring expenditure within the meaning of paragraph (3) in the earnings period; and

QA is the qualifying amount calculated in accordance with paragraph (4).

(3) A payment is relevant motoring expenditure if—

(a) it is a mileage allowance payment within the meaning of section 229(2) of ITEPA 2003; or

(b) it would be such a payment but for the fact that it is paid to another for the benefit of the employee; or

(c) it is any other form of payment, except a payment in kind, made by or on behalf of the employer, and made to, or for the benefit of, the employee in respect of the use by the employee of a qualifying vehicle…

(4) The qualifying amount is the product of the formula—

M x R

Here—

M is the sum of—

(a) the number of miles of business travel undertaken, at or before the time when the payment is made—

(i) in respect of which the payment is made, and

(ii) in respect of which no other payment has been made; and

(b) the number of miles of business travel undertaken-

(i) since the last payment of relevant motoring expenditure was made, or, if there has been no such payment, since the employment began, and

(ii) for which no payment has been, or is to be, made;

and R is the rate applicable to the vehicle in question, at the time when the payment is made, in accordance with section 230(2) of ITEPA 2003 and, if more than one rate is applicable to the class of vehicle in question, is the higher or highest of those rates.

25 Payments to be disregarded in the calculation of earnings for the purposes of earnings-related contributions

Schedule 3 specifies payments which are to be disregarded in the calculation of earnings from employed earner's employment for the purpose of earnings-related contributions.

Schedule 3

PART I INTRODUCTORY

INTRODUCTION

1

(1) This Schedule contains provisions about payments which are to be disregarded in the calculation of earnings for the purposes of earnings-related contributions.

(2) Part II contains provisions about the treatment of payments in kind.

(3) Part III and IV specifies payments by way of assets which are not to be disregarded by virtue of paragraph 1 of Part II.

(4) Part V specifies non-cash vouchers which are to be disregarded by virtue of paragraph 1 of Part II.

(5) In computing earnings there are also to be disregarded

(a) the pensions and pension contributions specified in Part VI;

(b) the payments in respect of training and similar courses specified in Part VII;

(c) the travelling, relocation and overseas expenses specified in Part VIII;

(d) the incentives by way of securities specified in Part IX; and

(e) the miscellaneous payments specified in Part X.

PART VIII TRAVELLING, RELOCATION AND OTHER EXPENSES AND ALLOWANCES OF THE EMPLOYMENT

TRAVELLING, RELOCATION AND INCIDENTAL EXPENSES DISREGARDED

1 The travelling, relocation and other expenses and allowances mentioned in this Part are disregarded in the calculation of an employed earner's earnings.

TRAVELLING EXPENSES GENERAL

3 A payment of, or a contribution towards, travelling expenses which the holder of an office or employment is obliged to incur and pay as the holder of that office or employment.

For the purposes of this paragraph

(a) travelling expenses means

(i) amounts necessarily expended on travelling in the performance of the duties of the office or employment; or

(ii) other expenses of travelling which are attributable to the necessary attendance at any place of the holder of the office or employment in the performance of the duties of the office or employment and are not expenses of ordinary commuting or private travel (within the meaning of section 338 of ITEPA 2003 (travel for necessary attendance);

(b) section 339 of ITEPA 2003 (meaning of workplace and permanent workplace) shall apply as it applies for the purposes of section 338 of that Act.

(c) expenses of travel by the holder of an office or employment between two places at which he performs the duties of different offices or employments under or with companies in the same group are treated as necessarily expended in the performance of the duties which he is to perform at his destination; and

(d) for purpose of sub-paragraph (*c*) companies are to be taken to be members of the same group if and only if

(i) one is a 51 per cent subsidiary of the other; or

(ii) both are 51 per cent subsidiaries of a third company within the meaning of section 838(1)(a) of the Taxes Act (subsidiaries).

QUALIFYING AMOUNTS OF RELEVANT MOTORING EXPENDITURE

7A To the extent that it would otherwise be earnings, the qualifying amount calculated in accordance with regulation 22A(4).

SPECIFIC AND DISTINCT PAYMENTS OF, OR TOWARDS, EXPENSES ACTUALLY INCURRED

9

(1) For the avoidance of doubt, these shall be disregarded any specific and distinct payment of, or contribution towards, expenses which an employed earner actually incurs in carrying out his employment. This is subject to the following qualification.

(2) Sub-paragraph (1) does not authorise the disregard of any amount by way of relevant motoring expenditure, within the meaning of paragraph (3) of regulation 22A, in excess of that permitted by the formula in paragraph (4) of that regulation.

3. Income Tax (Earnings and Pensions) Act 2003 ("ITEPA")

62 Earnings

(1) This section explains what is meant by earnings in the employment income Parts.

(2) In those Parts earnings, in relation to an employment, means

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) money's worth means something that is

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

229 Mileage allowance payments

(1) No liability to income tax arises in respect of approved mileage allowance payments for a vehicle to which this Chapter applies (see section 235).

(2) Mileage allowance payments are amounts, other than passenger payments (see section 233), paid to an employee for expenses related to the employee's use of such a vehicle for business travel (see section 236(1)).

(3) Mileage allowance payments are approved if, or to the extent that, for a tax year, the total amount of all such payments made to the employee for the kind of vehicle in question does not exceed the approved amount for such payments applicable to that kind of vehicle (see section 230).

(4) Subsection (1) does not apply if

(a) the employee is a passenger in the vehicle, or

(b) the vehicle is a company vehicle (see section236(2)).

APPENDIX 2

Cheshire Employer and Skills Development Ltd v Revenue and Customs Commissioners **[2012] EWCA Civ 1429**

"[50] The ordinary principles for establishing whether an allowance for expenses is part of an employee's earnings are well established. They are not in dispute. It is common ground that, so far as relevant to the issues in the present case, they are the same for income tax and NIC: *cf Kuehne + Nagel Drinks Logistics Ltd v Revenue and Customs Comrs* [2012] EWCA Civ 34, [2012] STC 840 in which (as recorded at [2]) the parties were similarly agreed on that point (and, per contra, the convertibility and defeasibility principles of income tax considered in *Forde and McHugh Ltd v Revenue and Customs Comrs* [2012] EWCA Civ 692, [2012] STC 1872, [2013] ICR 467). In *Hochstrasser (Inspector of Taxes) v Mayes* (1957) 38 TC 673 at 685, [1959] Ch 22 at 33 Upjohn J said: 'In my judgment the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.'

[51] That passage was approved by Viscount Simonds at (1959) 38 TC 673 at 705, [1960] AC 376 at 388, on appeal to the House of Lords. Lord Radcliffe, who concurred with Viscount Simonds, said (1959) 38 TC 673 at 707, [1960] AC 376 at 391–392:

> '… while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee … The money was not paid to him as wages.'

[52] Those passages were cited and applied by *Lord Guest in Pook (Inspector of Taxes) v Owen (1969)* 45 TC 571, [1970] AC 244 in which the House of Lords held that sums paid to a medical practitioner for travelling expenses between his residence and a hospital where he held part-time appointments as an obstetrician and an anaesthetist were not part of his emoluments for income tax. Lord Guest said (45 TC 571 at 589, [1970] AC 244 at 255–256):

> 'The facts in that case [viz *Hochstrasser v Mayes]* were widely different from the present, but if the proper test is whether the sum is a reward for services, then, in my view, the travelling allowances paid to Dr. Owen are not emoluments. To say that Dr. Owen is to that extent "better off" is not to the point. The allowances were used to fill a hole in his emoluments by his expenditure on travel. The allowances were made for the convenience of the employee to allow him to do his work at the hospital from a suitably adjacent area. In my view, the travelling allowances were not emoluments.'

[53] Lord Pearce said (45 TC 571 at 592, [1970] AC 244 at 259):

> ' "Emoluments" are charged. These are defined as including "all salaries, fees, wages, perquisites and profits whatsoever." The reimbursements of actual expenses are clearly not intended by "salaries", "fees", "wages" or "profits". It is contended that they are "perquisites". The normal meaning of the word denotes something that benefits a man

by going to his own pocket. It would be a wholly misleading description of an office to say that it had very large perquisites merely because the holder had to disburse very large sums out of his own pocket and subsequently received a reimbursement or partial reimbursement of these sums. If a school teacher takes children out for a school treat, paying for them out of his (or her) own pocket, and is later wholly or partially reimbursed by the school, nobody would describe him (or her) as enjoying a perquisite. In my view, "perquisite" has a known normal meaning, namely, a personal advantage, which would not apply to a mere reimbursement of necessary disbursements. There is nothing in the section to give it a different meaning. Indeed, the other words of the section confirm the view that some element of personal profit is intended.'

[54] The authorities were reviewed by Walton J in *Donnelly (Inspector of Taxes) v Williamson* [1982] STC 88, 54 TC 636. In that case the taxpayer, a teacher employed by Birmingham Education Authority, received a mileage allowance for travelling by car to attend certain out of school functions which did not form part of the duties which she was obliged to perform by the terms of her contract of employment. The payments were made under a scheme introduced by the council to reimburse teachers for expenses incurred in travelling to out of school functions. She appealed against assessments to income tax on the allowance. Walton J dismissed the Crown's appeal from the decision of the General Commissioners allowing the taxpayer's appeal from the assessments. Having referred to the relevant authorities, Walton J said as follows, [1982] STC 88 at 97–98, 54 TC 636 at 646–647:

'Therefore, the question under this head of the case simply is, as I see it, whether the allowance here in question was intended as a genuine estimate of the cost to the taxpayer of undertaking the journeys she did in fact undertake, or whether, on the other hand, it included an element of bounty. I observe that it was in fact contended on behalf of the Crown before the commissioners that there was a profit element in the allowance. This the commissioners expressly negatived. Was there evidence on which they could properly do so? In my judgment, there was. They had evidence before them of Mr Rimell, who was involved in the negotiations on rates of mileage allowance for car users, and, having regard to the submissions of the inspector, it is quite obvious that he must have been closely questioned as to the composition of these rates. And he must therefore have satisfied the commissioners that there was no element of bounty built into such rates. This, is, I think, a matter where it is necessary to paint with a broad brush, otherwise the possible distinctions would become totally unrealistic. Thus, for example, the rates are clearly all built on an assumed cost of a gallon of petrol, or of a replacement tyre. If the recipient of the allowance should be successful in finding a petrol station selling petrol at a cut price, or a new tyre at a cut price, so that he or she in fact makes a few pence profit out of the journey, is one to say that the consequence is that there is an element of bounty in the allowance? The answer is, in my judgment, in the negative, when constructing such allowances, the aim is to produce a formula which will apply with approximately equal justice to all within its scope. (Compare, in another field, a "genuine pre-estimate of damage".) It takes no account of the fact that one person must perforce buy some petrol at the maximum price while another may be lucky enough to get some a bit cheaper, and so forth. The test therefore is, I think, not whether the allowance produced mathematical equivalence with the expenditure, but whether it was constructed in a genuine endeavour to do just that.

Of course, this is only the second limb of the taxpayers' defence, but if it were to fail, then I think that it is obvious that, even so, the only matter which could be properly called an "emolument" would be the benefit element in the allowance, the non-benefit element

being properly protected by the undeniable principle of Pook (Inspector of Taxes) v Owen. No attempt was apparently made before the commissioners, and no real attempt was made before me, to isolate what this element might be thought to be. And I think for the best of all possible reasons—namely that it is quite impossible to identify that which truly has no existence.'

[55] Both sides accept the analysis of Walton J in that case. What emerges from his judgment are the sensible propositions that, in a case where an employer establishes a general scheme for reimbursement of employees' travelling expenditure, then in determining whether the allowances are to be treated as the taxable earnings of the employees because they involve a profit element or they are to be ignored because they are reimbursement of expenditure: (1) a broad brush approach is necessary in view of the practical constraints of devising a scheme that can apply to a number of different employees and is administratively workable; (2) the test is not whether the allowance produces a mathematical equivalence with the expenditure; (3) rather, the question is whether the scheme was constructed in a genuine endeavour to produce an equivalence between the allowance and the expenditure and to apply with approximately equal justice to all within its scope.

[56] As I have said, HMRC's case is that the FTT failed to address the Donnelly test and, had it done so, the FTT could only properly have come to the conclusion that the payments failed the test. I do not agree. As I have said earlier, neither side cited Donnelly to the FTT. Nor did HMRC advance before the FTT an argument that, even if the lump sum payments were not part of the employees' salaries, they nevertheless were earnings for NIC purposes because they involved an element of bounty or profit for the employee. It is hardly surprising, therefore, that the FTT's decision does not mention *Donnelly* and is not worded so as expressly to address the argument now being run by HMRC based on that case."