[2015] UKFTT 0538 (TC)

TC04692

Appeal number: TC/2014/02786

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – Pt 3 ITEPA 2003 benefits code for cars and fuel – Class 1A NICs – whether cars made available by employer or, if not, by reason of employment – yes – whether provision of fuel a benefit – no: Apollo Fuels followed – NICs determination on wrong person – appeals dismissed in relation to cars and allowed in relation to fuel.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOUTHERN AERIAL (COMMUNICATIONS) LTD **Appellants**
MR TREVOR JONES
MRS SANDRA JONES

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SUSAN HEWETT OBE

Sitting in public at the Magistrates Court, Portsmouth on 14 October 2015

Mr Peter Dawson of Murray McIntosh O'Brien, Chartered Accountants, for the Appellants

Mrs Anne Rees, Presenting Officer, for the Respondents

DECISION

1. This was an appeal by Southern Aerial (Communications) Ltd ("the company") against determinations that the company was liable to pay National Insurance Contributions ("NICs") of Class 1A, and appeals by Mr and Mrs Jones ("the Joneses") against assessments made under 29 Taxes Management Act 1970 ("TMA") charging them to tax on earnings. (We refer to the company and the Joneses together as "the appellants"). The determinations and the assessments relate to the same matters, that is whether there were benefits chargeable on the Joneses in respect of cars and the fuel for those cars. They also covered other benefits in respect of which there is no appeal.

2. The amounts and years involved are:

Class 1A NICs: Mr & Mrs Jones

Tax Year	Car benefit NICs	Fuel benefit NICs
2007-08	4690	1253
2008-09	4860	1514
2009-10	4860	1514

Income Tax: Mr T Jones

Tax Year	Car benefit amount	Fuel benefit amount
2007-08	21887	4750
2008-09	23219	5915
2009-10	23219	5915

Income Tax: Mrs S Jones

Tax Year	Car benefit amount	Fuel benefit amount
2007-08	14754	5040
2008-09	14754	5915
2009-10	14754	5915

3. The issues for decision by the Tribunal were whether two BMW cars were made available to the Joneses (one car to each of them) by the company or, if not by the

company, by reason of their employment with the company, and whether fuel for the cars was provided to them by reason of their employment.

4. We decided that the determinations and assessments so far as they relate to the car benefits should be confirmed, but so far as they relate to the fuel benefits should be varied to exclude those benefits.

Evidence

5. We had a bundle of documents prepared by the Commissioners for Her Majesty's Revenue and Customs ("HMRC"). This consisted of the correspondence between the parties and the documents that had been attached to that correspondence. We also had the Appeal Form sent to the tribunal.

6. Oral evidence was given by Mr Trevor Jones, an appellant and a director of the appellant company, and by Mr Stephen Murray, a Chartered Accountant and senior partner of the firm which has advised the appellants. They were cross-examined by Mrs Rees and asked questions by the Tribunal.

Law

7. The charge to tax on car benefits is found in Chapter 6 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), and that Chapter forms part of what is called in that Act the "benefits code". Section 114 ITEPA relevantly provides:

> "114 Cars, vans and related benefits
>
> (1) This Chapter applies to a car … in relation to a particular tax year if in that year the car …—
>
> (a) is made available (without any transfer of the property in it) to an employee …,
>
> (b) is so made available by reason of the employment (see section 117), and
>
> (c) is available for the employee's or member's private use (see section 118).
>
> (2) Where this Chapter applies to a car …—
>
> (a) sections 120 to 148 provide for the cash equivalent of the benefit of the car to be treated as earnings,
>
> (b) sections 149 to 153 provide for the cash equivalent of the benefit of any fuel provided for the car to be treated as earnings, …'

8. Section 117 ITEPA says:

> "117 Meaning of car … made available by reason of employment

> For the purposes of this Chapter a car … made available by an employer to an employee … is to be regarded as made available by reason of the employment …"

It must be noted that this section is not, despite the sidenote, an exhaustive definition, but sets out an irrebuttable presumption.

9. Section 118 ITEPA provides:

> "118 Availability for private use
>
> (1) For the purposes of this Chapter a car or van made available in a tax year to an employee or a member of the employee's family or household is to be treated as available for the employee's or member's private use unless in that year—
>
> (a) the terms on which it is made available prohibit such use, and
>
> (b) it is not so used.
>
> (2) In this Chapter "private use", in relation to a car or van made available to an employee or a member of the employee's family or household, means any use other than for the employee's business travel (see section 171(1))."

It is not in dispute that if the cars were available to the Joneses by reason of their employment each was available for their respective private use within the meaning in 118 ITEPA.

10. Section 120 ITEPA then relevantly provides:

> "120 Benefit of car treated as earnings
>
> If this Chapter applies to a car in relation to a particular tax year, the cash equivalent of the benefit of the car is to be treated as earnings from the employment for that year."

There is no dispute as to the amount of the cash equivalent, which is set out in the second column of the second two tables in paragraph 2 of this decision.

11. As to fuel, 149 ITEPA provides:

> "149 Benefit of car fuel treated as earnings
>
> (1) If in a tax year—
>
> (a) fuel is provided for a car by reason of an employee's employment, and □
>
> (b) that person is chargeable to tax in respect of the car by virtue of section □120, □
>
> the cash equivalent of the benefit of the fuel is to be treated as earnings from the employment for that year. □
>
> (2) The cash equivalent of the benefit of the fuel is calculated in accordance with sections 150 to 153. □

(3) Fuel is to be treated as provided for a car, in addition to any other way in which it may be provided, if—

(a) any liability in respect of the provision of fuel for the car is discharged, □

(b) a non-cash voucher or a credit-token is used to obtain fuel for the car, □

(c) a non-cash voucher or a credit-token is used to obtain money which is spent on fuel for the car, or □

(d) any sum is paid in respect of expenses incurred in providing fuel for the car." □

There is no dispute as to the amount of the cash equivalent, which is set out in the third column of the second two tables in paragraph 2 of this decision.

12. Section 151 ITEPA provides:

"151 Car fuel: nil cash equivalent

(1) The cash equivalent of the benefit of the fuel is nil if condition A or B is met.

(2) Condition A is met if in the tax year in question—

(a) the employee is required to make good to the person providing the fuel the whole of the expense incurred by that person in connection with the provision of the fuel for the employee's private use, and

(b) the employee does make good that expense.

(3) Condition B is met if in the tax year in question the fuel is made available only for business travel (see section 171(1))."

13. Sections 10 and 10ZA of the Social Security Contributions and Benefits Act 1992 ("SSCBA") relevantly provide:

10 Class 1A contributions: benefits in kind etc

(1) Where—

(a) for any tax year an earner is chargeable to income tax under ITEPA 2003 on an amount of general earnings received by him from any employment ("the relevant employment"),

(b) the relevant employment is both—

(i) employed earner's employment, and

(ii) an employment, other than an excluded employment, within the meaning of the benefits code (see Chapter 2 of Part 3 of ITEPA 2003),

(c) the whole or a part of the general earnings falls, for the purposes of Class 1 contributions, to be left out of

account in the computation of the earnings paid to or for the benefit of the earner,

a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of the general earnings as falls to be so left out of account.

(2) Subject to section 10ZA below, a Class 1A contribution for any tax year shall be payable by—

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

(b) if paragraph (a) above does not apply, the person who, if the general earnings in respect of which the Class 1A contribution is payable were earnings in respect of which Class 1 contributions would be payable, would be liable to pay the secondary Class 1 contribution.

…

10ZA Liability of third party provider of benefits in kind

(1) This section applies, where—

(a) a Class 1A contribution is payable for any tax year in respect of the whole or any part of general earnings received by an earner;

(b) the general earnings, in so far as they are ones in respect of which such a contribution is payable, consist in a benefit provided for the earner or a member of his family or household;

(c) the person providing the benefit is a person other than the person ("the relevant employer") by whom, but for this section, the Class 1A contribution would be payable in accordance with section 10(2) above; and

(d) the provision of the benefit by that other person has not been arranged or facilitated by the relevant employer.

…

(3) Subject to subsection (4) below, the liability to pay any Class 1A contribution in respect of—

(a) the benefit provided to the earner, and

(b) any further benefit treated as so provided in accordance with subsection (2) above,

shall fall on the person providing the benefit, instead of on the relevant employer.

…"

There is no dispute that, by virtue of s 10, if there is a charge to tax on the Joneses under Chapter 6 Part 3 of ITEPA there is a charge to Class 1A NICs.

14. We were referred to three authorities on the subject of benefits, two of which related to car benefits. The bundle of authorities contained a further case which we have read.

15. In the joint cases *Wicks v Firth (HM Inspector of Taxes)* and *Johnson v Firth (HM Inspector of Taxes)* 56 TC 318 ("the *Firth* cases") the Court of Appeal was dealing with the meaning of the term "by reason of the employment" in what is now Chapter 10 of Part 3 ITEPA. The alleged benefit, a scholarship for the son of an employee of ICI, had been paid by a trust which was funded exclusively by ICI. The appellants drew our attention to the judgment of Lord Denning MR where he said:

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

The emboldening in the text (apart from the opening words) is by us and highlights the particular passage that the appellants stressed.

16. HMRC preferred the judgment of Oliver LJ where he said:

> "As it seems to me, the obvious intention of this legislation - presumably in an attempt to produce fairness between taxpayers - is to impose tax on the value of those otherwise untaxed advantages which the employee enjoys because he is employed, advantages which may not even accrue to him directly but which, because of their receipt by a member of his household, benefit him by relieving him of an expense which he might otherwise expect to bear out of his own resources. These are, in many cases, by definition, benefits which could not in any ordinary sense be attributed to a reward for the employee's services - for instance the use of a car for the private purposes of a

> member of the employee's family or an interest-free loan to one of his relatives - and to restrict the operation of the section in the way suggested by Mr. Aaronson would, in my judgment, virtually deprive it of any operation at all in the case of benefits other than those provided to the employee himself. Speaking only for myself I do not in the case of this legislation, find the philosophical distinction between a 'causa causans' and a 'causa sine qua non' helpful. I see no reason why a benefit 'derived' from the employment (to use the words of the chapter title) necessarily has to be invested with an intention on the part of the employer to remunerate the employee for the performance of his duties. **One is directed to see whether the benefit is provided by reason of the employment and in the context of these provisions that, in my judgment, involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it."**

The emboldening in the text is by us and highlights the particular passage that HMRC stressed.

17. The car benefits cases were decisions of this Tribunal, *Stanford Management Services Ltd & others v HMRC* [2010] UKFTT 98 (TC) ("*Stanford*") (Judge Radford and Mr Perrin) and *DJ Cooper and others v HMRC* [2012] UKFTT 439 (TC) ("*Cooper*") a decision of Judge Sadler and Mrs de Albuquerque.

18. We have set out the details of *Stanford* and *Cooper* in the discussion part of this decision where we consider their relevance to our case.

19. The case included in the bundle but not mentioned was *HMRC v Apollo Fuels Ltd & others* [2014] UKUT 95 (TCC) ("*Apollo Fuels*"). In this case the employing company had leased the cars to the employees who paid a market hire fee. One of the issues was whether any property in the cars had been passed to the employees by reason of the lease. Overturning the First-tier Tribunal's decision, Rose J held that no proprietary interest passed to the lessees, so they could not escape a charge to tax merely by invoking the words in parenthesis in s 114(1)(a) ITEPA. (The appellants succeeded on other grounds, one of which is relevant to the fuel issue and which we discuss below).

Background Facts

20. From the documents and the oral evidence of Mr Jones and Mr Murray we find the following facts, none of which was in dispute.

21. The company was founded in 1981 and has been operating, despite its name, in providing security systems such as closed circuit TV networks. The one ordinary share in the company is owned by Mr Jones, who also owns 25 of the B shares, the other 70 B shares being owned by Mrs Jones. Despite the different shareholdings the company pays dividends in equal amounts to Mr and Mrs Jones. Both are directors and they are the only directors.

22. In 2002, on the advice of Mr Murray, a partnership was formed, the SAT Design Partnership ("SAT"), in which Mr and Mrs Jones were equal partners.

23. In March/April 2007 the company entered into a hire purchase ("HP") contract with BMW Financial Services (GB) Ltd ("the BMW company") of which the subject matter was a BMW X3 Convertible registered HN07 CMY. Under the contract the customer (which in this case is the company) was obliged to pay a deposit directly to the car dealer and then was obliged to pay to the company 35 monthly instalments of £750 followed by a final balloon payment of £18,794.50 to include the "purchase fee". The customer was not permitted to sell or otherwise part with the car without the consent of the BMW company, and as with all HP contracts the hirer did not become the owner of the car until all the payments had been made. The company was obliged to take out comprehensive insurance on the car and was limited as to the mileage it could incur in any year, subject to extra payments being required. The contract was signed on behalf of the company by Mr Jones. This car was used Mrs Jones.

24. On the same day the BMW company entered into a contract of indemnity with Mr Jones acting personally. He guaranteed the company's obligations under the HP contract.

25. In April/May 2007 the company entered into an HP contract with Black Horse Ltd, the subject matter of which was a BMW 650i Convertible registered T14REV (to be read we assume as "TREV", Mr Jones given name being Trevor). Under the contract the customer (which in this case is the company) was obliged to pay a deposit directly to the car dealer (as is shown on the invoice from the dealer for T14REV) and then to the finance company 35 monthly instalments of £979.51 followed by a final payment of £25507.00 to include the "purchase fee" (referred to by Mr Murray as a balloon payment). The customer was not permitted to sell or otherwise part with the car or allow "any other person" to obtain rights over it. As is always the case with HP contracts, the customer/hirer did not become the owner of the car until all the payments (including the balloon payment) had been made. The contract limits the consumer protection available if the contract was entered into by the customer in the course of a business. The company was obliged by the contract to take out comprehensive insurance on the car. The contract was signed on behalf of the company by Mr Jones. This car was used Mr Jones.

26. On the same day Black Horse Ltd entered into a contract of indemnity with Mr Jones acting personally. Under that contract he guaranteed the company's obligations under the HP contract.

27. There is no reference to the cars or to the rights and obligations under the HP contracts in the statutory (unaudited) accounts of the company for the years ended 30 April 2008 or 2011 (the years for which accounts were in evidence) or, we were told, in any other relevant year. The monthly payments under the two HP contracts and the final purchase amounts were paid by the company by transfer from its own bank account. The cars were insured by Allianz in the company's policy which included

the vans used by company staff, and Allianz were paid by the company from its own bank account.

28. The amount of the monthly payments were not shown in the company's profit or loss account (in relation to the "interest" element) nor did they reduce the balance sheet amounts of liabilities. They were instead charged in the company's accounting records to an account of the company with SAT. For the year ended 30 April 2008 the only other entries in that account were cash transfers to SAT. Accordingly the insurance for the cars was not charged to the SAT account.

29. SAT had its own bank account. From three bank statements for months in 2007, the only statements in the bundle, it could be seen that SAT had a credit card. Mr Jones said that this was used to pay for fuel and other running costs for the BMW cars.

30. In the company's accounts for the year ended 30 April 2011 under "Related Party Transactions" there was shown an entry "At the balance sheet date the amount due from SAT Design Partnership was £42,026 and the previous year end comparative was £76,039". This was explained by Mr Murray as relating to the company's transferring money to SAT to enable personal credit card bills incurred by the Joneses to be met. It had nothing to do with the car arrangements.

31. SAT's tax return for 2007-08 shows in the profit and loss account entries for hire purchase interest £6,643 and motor expenses £2,404 adding up to £9,047 out of a total of £10,865. SAT made a substantial profit with fees receivable (£35,000) being nearly three and a half times greater than expenses.

32. For tax purposes there were private use adjustments to the entries for motor expenses and HP interest of 20%. In its 2007-08 partnership tax return SAT claimed capital allowances on the cars, though these were restricted to £3000 each by virtue of s 75(1) Capital Allowances Act 2001. In that return SAT did show a substantial balancing allowance on a BMW Coupé sold in that year, sufficient to create a modest loss which was available to set sideways against the Joneses' income tax liabilities.

Further findings of fact

33. The facts we have found above are those not in dispute. There were some matters which were put to Mr Jones in cross-examination and in questions from the Tribunal which we now deal with.

Formation of the partnership

34. Mr Jones was asked by the Tribunal about the reason for the formation of the partnership. His evidence was that the partnership was formed to "hive off" the designs which he prepared for the company, so that in the event of misfortune to the company he and Mrs Jones would have some valuable assets with which to recreate a business. The designs took the form of schematics of, we presume, the electrical

layout of the proposed installations. Mr Jones said that no design rights had been registered.

35. In most cases the designs were integrated into the physical installation carried out by the company, but in some cases Mr Jones said that prospective clients who had commissioned designs might not accept the company proposals and so not become clients but would still pay for the designs (we should add that we had no evidence about how often this happened in the relevant periods). All payments in respect of designs were made by clients (or prospective clients) to the company, not the partnership. Mr Jones agreed that the designs were integral to the company's business.

36. The partnership was rewarded by a fee paid (or becoming due) on an annual basis. Mr Jones and Mr Murray would discuss an appropriate level of fee which varied from year to year (we were shown from the accounts of SAT and the working papers of the company that the fee for 2006-07 was £49,500 but for 2007-08 it was £35,000). The fee also covered a small amount of administrative work which Mrs Jones did for the company. Mr Jones would estimate his time spent on design work, but he did not say what hourly rate for his labour was involved if indeed one was. Further we note that there was a substantial balance on the partnership account with the company in 2007, and Mr Murray confirmed that this was a cumulative amount which had been growing since 2002.

37. In cross-examination Mrs Rees referred Mr Jones to HMRC's notes of the first Employer Compliance meeting with him (at which no advisers were present) and specifically to a passage in those notes which stated that he had told the officers that the partnership had been set up in 2002 to hold cars as a result of a previous Employer Compliance check. Mr Jones said that that was not the reason – it was to hive off the designs, but he did not demur when it was pointed out to him that the SAT tax return shows the partnership selling a BMW Coupé in 2007 at a substantial loss. Mr Jones pointed out that he had not agreed the notes but he did agree that he had been sent a copy of them for comment if he wished.

38. We find no reason to think that the HMRC officers had not accurately recorded what Mr Jones had told them. On the balance of probabilities we find that the arrangements were set up primarily to hold cars for the Joneses outside the company with a view to avoiding income tax under car benefits code in ITEPA and Class 1A NICs. Since the partnership had to be shown to have some business, the hiving off of the designs to it was done to provide that business activity. We note from the documents in our bundle that Mr Murray's firm had sent "evidence from Black Horse Ltd showing that Mr Trevor Jones was the indemnifier for the car T14REV which was the previous car". That evidence showed the car as a BMW Coupé registered in September 2004 as T14REV and the customer in the main agreement as the company. This in our view is further proof that what Mr Jones told the Employer Compliance officers about the purpose of the setting up of the partnership was correct.

Entering into the HP contracts in 2007

39. Mrs Rees asked Mr Jones about the reasons for the company entering into the HP contracts in 2007. Mr Jones said that the finance companies insisted that they contract with the company given its track record of profitability. He was indifferent as to whether it was a company transaction or a personal one, but it was made clear to him that the rates for a company deal were better. Mr Murray had said as much in his evidence in chief, and he had added that in his view based on many years' experience of helping clients to finance businesses it was much more difficult for a partnership to do a finance deal at an acceptable cost as they were not transparent: with a company the financier could always get accounts information, so were happier with a company.

40. We find on this point that Mr and Mrs Jones might well have preferred to do the deal in the partnership, but that it made commercial sense for the deal to be done by the company, and we accept that the finance companies were not willing to do the transactions with the partnership. But we also have no evidence of, and make no finding about, what the finance companies knew or were told about the arrangements made between the Joneses, the company and SAT.

Use of the cars

41. The Tribunal had noted that HMRC had requested details of the annual mileage of each car in the 2008 and 2009 periods and a breakdown between company, partnership and personal use, but that had never been supplied. We therefore asked Mr Jones to recall, as best he could, what the figures and breakdown were.

42. Mr Jones estimated from the total mileage and age of the cars that they did about 7500 and 10000 miles each year respectively. He accepted that some company use was made of them. He had visited sites for example. His main use was in driving from home (which is where he carried out the partnership's business of design work) to the company's office, but he also used the car in relation to the design work such as in visiting clients to present designs. When pressed for a percentage split he at first said 50:50 (business to personal) but later characterised his main use as personal and he said that the same went for Mrs Jones.

43. In relation to the use of the cars we find that Mr Jones at least used his car for business purposes and that for the most part in view of what had been said in evidence about the business of the company and the partnership it would be artificial to try to split the business use between company and partnership. We find that there was some business use by Mrs Jones and again we consider it artificial to make any split between company and partnership. We also find that the reason that Mr Jones used the car to drive to the company's offices was that by doing so he would be able to work on the company's business at its premises.

The fuel

44. There was some dispute about how the fuel was paid for. HMRC said in submissions that the company credit card had been used to pay for the fuel. We were not satisfied that any evidence to that effect had been given and we allowed Mr Jones

to give further evidence, which we accept, that fuel was paid for by use of SAT's credit card (reference to which was in the partnership's bank statements in the bundle).

Submissions

45. For the appellants Mr Dawson argued that:

(1) SAT was a bona fide operation. Its intellectual property, the designs, were valuable and available for use by the company for a fee. The cars were acquired five years after the partnership was set up suggesting that the establishment of the partnership was not a device to avoid a charge to tax and NICs on benefits.

(2) in the material periods the company was not the owner of the cars as by virtue of the HP agreements it could only possibly become the owner when the balloon payments had been made, and that was after the tax year 2009-10. In fact it was the appellants' position that when the cars were paid for ownership was immediately transferred to the partnership.

(3) the costs of the hire payments were undoubtedly paid from the company's bank account. But those payments were simultaneously debited in the company's books not to expenses of the company or to its liabilities but to the account with SAT. SAT then met the cost by netting off the payments so debited when the annual charge for use of the designs and Mrs Jones' administrative services was set up. In those circumstances it was unrealistic to say that the company made the cars available.

(4) the "by reason of employment" condition in s 114 ITEPA was not met. He referred to Lord Denning's judgement where he said "It is sufficient if the employment was an operative cause - in the sense that it was a condition of the benefit being granted" and said that in this case there was no such cause and no such condition.

(5) he distinguished *Stanford* on the basis that there had been no personal guarantee and the directors were acting in a private capacity in being reimbursed.

(6) even if the Tribunal was against the appellants on the car benefit, the fuel position was different as it was clear that the company had nothing to do with the provision of fuel and did not meet the cost of it in any way.

46. For HMRC Mrs Rees argued that:

(1) for the charge to tax and NICs on benefits from cars to apply there were three conditions to be met as set out in s 114 ITEPA: making the car available (no matter by whom as the section was silent); a lack of transfer of property in the car to the employee and that the making available was by reason of the employment. The last condition was the subject of an irrebuttable presumption that the making available was by reason of the employment where it was the

employer which made the car available (s 117 ITEPA). In her submission all three conditions were met.

(2) there was no dispute that the cars were made available to each of Mr and Mrs Jones. There was now no dispute that no property in the cars had passed to the Joneses as the property in the cars remained with the finance companies throughout the period.

(3) in her submission the employer, the company, was clearly the person making the cars available. It was the company which entered into the HP contracts, took delivery of the cars and allowed the Joneses to use them. It was the company that made the HP payments out of its bank account. As a result it was the employer which made the cars available so they are presumed to have been made available by reason of the employment of the Joneses as directors.

(4) by reference to *Stanford* HMRC say that the recharge to the partnership does not make any difference.

(5) in the alternative, if we were to find that it was the partnership that made the cars available, then it is necessary to consider the "by reason of employment test". Mrs Rees cited the judgment of Oliver J in the *Firth* cases that the test "involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?'" She also prayed in aid *Cooper* where the facts were very similar to those in this case in that there was a separate partnership (which the Tribunal accepted was a bona fide operation). In *Cooper* however it was the partnership which had contracted for and provided the cars directly but despite that the Tribunal still found that the making available of the cars was by reason of the employment, citing Lord Denning's judgment in the *Firth* cases.

(6) ownership of the cars, treatment in accounts and the identity of the registered keeper are irrelevant.

47. The submissions of HMRC apply equally to the fuel as to the cars themselves. Mrs Rees also submitted that the provisions relating to capital contributions and to payments for private use, both of which would, if appropriate, reduce the amount of the charge, did not apply. As the appellants did not argue to the contrary before us we have not considered these points further.

Discussion

The making available of the cars

48. There is no dispute between the parties as to whether the cars were made available to the Joneses in the tax year 2007-08 and the subsequent years in question in these appeals. The cars were for the sole use of the Joneses (as distinct from any other employees) and they must have held the keys to them and were free, subject to any restriction in the HP agreements such as to mileage, to do what they wished with them. That being so, we turn to s 114 ITEPA which charges tax on the cash equivalent of the benefit of the availability of a car.

49. Section 114(1) ITEPA contains an agentless passive: it says "if the car is made available" to an employee without saying who might be the person making it available. If a car is made available, as it is here, then there are two further conditions to be met before a charge can be imposed. The making available must be without a transfer of any property in "it" which must mean the car. And the car must be made available "by reason of the employment" of that employee.

50. It is well established (see eg the first sentence in the quotation at paragraph 12 above from Lord Denning's judgment in the *Firth* cases) that to show that something is obtained "by reason of an employment" requires a looser nexus with the employment than the term "from an employment", which is used in relation to what used to be called "emoluments", now "earnings" such as salary or "perks" etc paid in money or money's worth. In particular it does not matter that the payer is a third party, and s 114(1) recognises this by being unspecific as to the identity of the person making the car available.

51. Section 117 ITEPA provides a gloss on "by reason of the employment" (but it is a gloss, not a definition, as the sidenote to s 117 implies). There is an irrebuttable presumption that if an employer (other than an individual, which is not the case here) makes a car available to an employee then that car is so made available by reason of the employment of that employee. This section does not of course help with what is the more likely case where the nexus with the employment is less easy to establish, the third party case, but it does prevent arguments.

52. Our first enquiry therefore is to consider whether under the arrangements as we have found them to be, it is the company that made the cars available to the Joneses, so that s 117 has effect. That it did is the submission of HMRC.

53. The appellants urged us to consider the substance of the matter which they said was that it was the Joneses themselves who had borne the cost of hiring the cars through the recharging mechanism, and they pointed to the absence of any reference to the cars in the accounts of the company, and conversely the deductions and capital allowances claims made by the partnership in its tax return. From that they say it follows that it was the partnership, not the company, that was making the cars available.

54. We accept that by the arrangements the Joneses as partners in SAT were attempting to show that they were in the same economic position in substance vis-à-vis Black Horse Ltd and the BMW company ("the finance companies") as the company contractually and formally was. The Joneses, through the partnership, were in a loose sense bearing the cost of the monthly HP payments.

55. But however commercial the arrangements might be we do not think they can override the effect of the HP contracts, in the absence of evidence that those contracts are not to be taken at face value because they were shams or entered into as nominee or agent for someone else. As it was the company that entered into the HP contracts, it was the company to whom the cars were delivered by the dealers and it was the company which was the only person in a position legally to make the cars available to

its directors, and during the currency of the HP agreements that continued to be the case throughout the tax years involved. We therefore hold that s 117 applies and that the "by reason of employment" test is presumed passed.

56. In effect the appellants were asking us to consider that they should be taxed on the basis of the transactions that they would have liked to have entered into but, they say, for the requirements of the finance companies. To accept that is to accept taxation by economic equivalence and that is not a doctrine that applies in the United Kingdom.

57. We are fortified in our view by *Stanford*. In that case as in this the employing company entered into a contract with the finance company because it was said to be cheaper that way; the company paid the lease payments and debited the amounts to the directors' loan accounts and the leases and payments were not in the company's accounts. The appellants argued that there was a nominee agreement, or that the substance was that the appellants had leased the cars and paid for them being the registered keepers, and that as the directors had paid the costs it was nonsense that there should be a tax liability.

58. Despite this the Tribunal in that case found that there was no evidence of a nominee agreement and that even if there had been that would have made no difference. It was the company which provided the cars to the employees, and the appeal failed.

59. In this case there are some differences from *Stanford*. In *Stanford* there was, as the appellants point out, no personal guarantee. It is true that the Tribunal in *Stanford* thought that this was an important point. But we cannot entirely understand why. It is entirely a matter for the finance company whether it seeks a personal guarantee or any other form of security. We also note that the transaction was a lease not HP and there was no other entity that could have provided the cars. We do not think either of these points makes any difference.

60. The next question is whether any property in the cars was transferred by the company to the Joneses. The "property" in the cars in the sense of ownership did not belong to the company but to the finance companies. That is made abundantly clear by the HP contracts. The most that the company could transfer to the Joneses was the company's rights (and obligations) under the HP contracts. The contracts forbade that (outright in the case of the 650i and only with consent in the case of the X3), and we had no evidence that the company had in fact transferred the benefits of the HP contracts whether with consent or not. The making available in this case was an informal arrangement which at most transferred a possessory or a contractual right to use the car and did not transfer any proprietary right whether in the car or just the rights under the HP contract. In *Apollo Fuels* Rose J came to the same view in relation to leases, but there of course the lessor did have a proprietary interest in the car which it could have transferred. Here in an HP contract the company had no such interest: that interest remained throughout the relevant period with the finance companies.

61. In our view then there was no transfer of property in the cars when the cars were made available, or if it is relevant, at any later stage. We have said more on this point than it probably deserves as the appellants did not really contest HMRC's argument here. But the documents show that it had been a live issue, which is presumably why HMRC listed *Apollo Fuels* in their authorities.

62. Our conclusion then is that the cars were made available by the company, and therefore made available by reason of employment (s 117 ITEPA), without any property in the cars passing to the appellants, so that s 114 ITEPA applies and the appeals must fail, so far as relates to the cars themselves (we deal with fuel below). But in case we are wrong about s 117, and since the alternative approach on the basis that s 117 did not apply was the submission of the appellant, was fully argued by HMRC and is also potentially relevant to the fuel charge, we deal with it now.

63. In this part of the discussion we assume, contrary to what we have held, that it was the partnership that made the cars available to the Joneses. This is the appellants' submission. HMRC submits that in that case the situation is the same as in *Cooper*.

64. In *Cooper* there was, as in this case, a partnership in which the directors were partners, and this was a partnership which provided administrative services to the company. The partnership had entered into an HP contract for the cars and paid all the expenses directly. It charged a management fee to the company which covered all its expenses including the car expenses. The question in *Cooper* was whether, these being the facts, the vehicles that the partnership made available to the directors of the company were made available "by reason of the employment", being their employment (or office) as directors of the company.

65. The Tribunal in *Cooper* held that the cars were so provided. Relying partly on the dictum of Lord Denning MR in the *Firth* cases that it need only be shown that the employment was one of the causes, not necessarily even the dominant one, of the benefit being provided, they held that the cars would not have been provided by the partnership had the Coopers not been directors of the company. In coming to its decision the Tribunal was clearly influenced by the speech of Lord Templeman in the House of Lords in the same cases. This speech was, as the Tribunal in *Cooper* says, *obiter* on this subject as the House only had to adjudicate on a different point. What the Tribunal in *Cooper* took from Lord Templeman (at [43]) was that:

> "… in deciding whether or not a third party provides or makes available a benefit "by reason of the employment", it is necessary to have regard to all the circumstances, including "the relationship, rights and expectations of the employer, the employee and the third party respectively".

In relation to the facts in Cooper the Tribunal says:

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

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

66. CMS, the partnership in *Cooper* in the equivalent position to SAT in this case seems to have been a more substantial undertaking than SAT. According to the decision (at [22(4)]) CMS' financial position was:

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

67. On the other hand they also noted that the partners took no part in the running of the partnership and that its activities were purely administrative, whereas SAT's main activity was personal to one of the partners, Mr Jones.

68. But despite the substantial business and assets of the partnership in *Cooper* the Tribunal held, adopting Lord Templeman's approach, the cars were nevertheless provided by reason of employment, and that Lord Denning's test was passed too. We think it is reasonable to suppose that they would also have held Oliver LJ's test to be passed, especially with its suggestion that fact finding Tribunals should not make "too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it."

69. The partnership's position in *Cooper* seems to us to give the appellants there a stronger case for the "by reason of employment" condition not to be met than the position of SAT. In particular in *Cooper* the cars were undoubtedly acquired by the partnership, having been leased or in one case bought from independent suppliers, and the partnership was found to have paid the hire costs from its own resources.

70. *Cooper* is not binding on us. But as it is a careful and fully reasoned decision by a very experienced Tribunal judge (who was the author of the leading work on the taxation of asset finance transactions such as those in this case) we would only differ from it if we think it plainly wrong or the facts are totally different so as to make any comparison impossible or very difficult. We do not think either of these things, but we do not say the factual position is exactly equivalent. We have however found that SAT "even if legally independent of the Company, was, as a commercial matter, wholly dependent upon the Company" (*Cooper* at [44] cited above). We also found that SAT had no sources of income other than from the company: even where Mr Jones provided designs without obtaining the installation work, the client was invoiced by the company and it is clear that SAT's business involved providing services to the company as was the case in *Cooper*. As we have said *Cooper* is in many ways a stronger case for its appellants than this one, but we need to consider

independently of *Cooper* whether the various statements made in the *Firth* cases apply here.

71. Following Lord Templeman's guidance we have considered all the circumstances and in particular "the relationship, rights and expectations of the employer, the employee and the third party respectively". The relationship between the employer and third party (SAT) is one of total dependency of the latter on the former. The right to do with the cars what it wishes to do rests with the employer, and in relation to both the employer and the third party they are creatures of the Joneses who have the power to make whatever arrangements they wish. We also take into account here, again following Lord Templeman, that we have found that the arrangements were set up for the purpose of avoiding the car benefits charge, though we do not consider that that tax avoidance purpose determines the matter.

72. And given that the obvious answer to Oliver LJ's question "what is it that enables the person concerned to enjoy the benefit?' is, without being too sophisticated, the company's contract with the finance companies, then even if, contrary to our primary conclusion, SAT is the entity making the cars available, we hold that that was done by reason of the Joneses' employments as directors of the company. We add that we do not think that we would come to a different answer if we took Lord Denning's approach. Mr Dawson for the appellants stressed the reference to the need for the existence of a "condition", saying that there was no such condition here laid down by the employer. But we think that is too legalistic an approach, and at odds with the judgement of Oliver LJ and the speech of Lord Templeman. Lord Denning MR was in the passage we have cited dealing with the facts of the *Firth* cases which involve a trust where the legal relations between the employer (then one of the largest employers in the country), the employee and the third party need to be much more formal than in this case.

73. We therefore hold, that as in *Cooper*, the cars were made available to the Joneses by reason of their employment with the company.

The provision of fuel

74. We turn finally to the provision of fuel. The question here is not how physically the fuel is provided but how it was paid for. If an employer or other person making the car available is also responsible for ensuring that the car is fuelled and pays for the fuel using its own resources, for example by a contract with a filling station, then clearly fuel is provided for a car in a way which does not involve the employee in any payment transaction. That can be seen as a paradigm case of providing a fuel benefit. But in many cases the arrangements will be different. It is the employee who will be in a position to know a car needs to be refuelled and will be involved in paying for it. Section 149(3) ITEPA prevents an employee arguing that because they themselves were involved in the payment transaction there is no benefit. It covers a variety of ways in which fuel might be paid for by the employee.

75. In this case fuel is paid for by use of the partnership's credit card. This is, using the quaint terminology of Part 3 of ITEPA, a credit-token and so that case falls within

s 149(3)(b) ITEPA which deems it to amount to provision for the purposes of s 149(1). Section 149 is silent as to who has to do the providing: the only test is whether the fuel is provided by reason of the employment (s 149(1)(a) ITEPA). (It should be noted that the three s 114 tests which we have considered above apply only to the car itself: provision of fuel is only mentioned in s 114 because it is a condition of s 149 applying that s 114(1) applies to the car).

76. But s 149 is also silent as to who needs to be responsible for discharging debts incurred as a result of using the credit-token. We assume that in most cases the credit-token will be a company credit card or charge card, with the employer being billed by the card company. The appellants make the point that here there is no such company involvement in any part of the fuel transactions. The liability to pay for the fuel and to pay the credit card bills and charges falls on the Joneses (albeit in partnership), not on their employer.

77. We have considered whether this makes any difference to the analysis we must perform. We think it does, and we think so because of our reading of *Apollo Fuels*, a case which HMRC included in their bundle although not citing it in support of their arguments. In that case Rose J considered an argument that where employees paid a market price for the facility which had been given to them (in that case the ability to use a car leased from the employer) there was no "benefit" in economic terms and that there was an overriding requirement that the benefits code in Part 3 ITEPA required there to be an actual benefit to the employee. At [64] she said:

> "I agree with the respondents that the use of the word 'benefit' in the benefits code is an indicator that what is intended to be caught is something which benefits the employee and that there is no such 'benefit' if the employee has paid the market rate for the asset which is provided. It is true that the way that the benefit is calculated under the current provisions (taking into account the list price and the level of CO_2 emissions) reflects other policy considerations. But that cannot, in my judgment, affect the more fundamental point of whether there is a benefit to which those current provisions should be applied."

Since there is no evidence in this case that the cost of the fuel was not borne by the Joneses we cannot see that there is any benefit to them that could fall within s 149 ITEPA.

78. That is sufficient to decide the fuel issue in the appellants' favour. We do not therefore need to consider whether fuel was provided by reason of the Joneses' employment. Lest we are wrong about the *Apollo Fuels* "lack of benefit" point and because we have addressed the issue in relation to the cars we have considered it in relation to fuel as well.

79. As we have held that the cars were made available by reason of employment in considering HMRC's alternative argument (paragraphs 63 to 73 of this decision) we can only logically hold that the fuel is not so provided if there is a relevant difference in the arrangements or the law. The difference that the appellants point to is of course that the fuel costs were met by the partnership when it paid its credit card bills from

its own bank account. Is this enough to allow us to decide that the fuel was not provided by reason of the employment? We are sure that Mr and Mrs Jones would find it difficult to understand that where there is no suggestion that the employing company had anything to do with bearing the cost of the fuel they might still be taxed on the "benefit" of having it provided by, essentially, themselves. We cannot however see any reason why our decision that the cars were made available by reason of employment should be any different when it comes to the provision of fuel. We have not held that the availability of the cars was by reason of employment *because* the company met the costs of the HP payments. Our decision would have been the same had we regarded SAT as having met those costs to the exclusion of the company (and that of course was the case in *Cooper*). This is because we have examined, as Lord Templeman says we should, all the circumstances of the relationships between the parties and we have given a simple answer to Oliver LJ's simple question without a sophisticated analysis of the rights and expectations of the parties

80. We do however think it would be odd that in a case where the employees have paid for the fuel without any recompense or recoupment from the employer, even if they paid for it via the mechanism of a 50:50 partnership, there should be a tax charge (ignoring for the moment the *Apollo Fuels* point). We have therefore considered s 151 ITEPA. That provides that the tax charge for fuel is nil if one of two conditions is met. Condition B, that there is no private mileage for which fuel was supplied, is not met – Mr Jones admitted there was. Condition A requires that the employee "makes good" (as ITEPA again rather quaintly puts it) the expense of the fuel to the person providing the fuel. In this case that person is SAT, so the Condition is that the Joneses make the partnership good. As the Joneses are the partnership for all practical purposes this is getting into the realms of the metaphysical.

81. We have identified two reasons why we might possibly find in the appellants' favour here. Firstly, we take from Vinelott J's reaction to General Commissioners' findings about a requirements that private use of a car must be "prohibited" in *Gilbert (HM Inspector of Taxes) v Hemsley* 55 TC 419 that in the case of a small business, let alone a husband and wife one, a Tribunal should not be concerned with legal niceties at the expense of common sense. Second, in enacting s 151 ITEPA Parliament clearly did not contemplate circumstances where the fuel costs are met by a partnership which is not the employer concerned and which is an equal partnership between the two employees concerned and so it could be said that a "creative" interpretation is required. However to find for the appellants for these reasons might, in fact undoubtedly would, be to give to s 151 an interpretation which could well be said to be "strained", and some might say strained beyond breaking point. Others might consider that a strained interpretation would be "necessary to avoid absurd or perverse consequences" (see eg *Shahid (Appellant) v Scottish Ministers (Respondent)* [2015] UKSC 58). But since it was not argued before us we are not in the end going to express a definitive view.

82. Finally in relation to fuel we consider that had we not found for the appellants on the *Apollo Fuels* "lack of benefit" basis, we would have found that, for Class 1A NICs purposes alone, the appellants succeed. This is because s 10ZA SSCBA puts

the liability on the person who provided the fuel, in this case SAT. But it is the company which is the person on whom the determination has been made.

Decisions

83. In accordance with s 50(6)(c) TMA we hold that Mr and Mrs Jones are overcharged by the assessments on them under s 29 TMA, and we reduce them by the following amounts:

Mr Jones	
2007-08	£4,750
2008-09	£5,915
2009-10	£5,915
Mrs Jones	
2007-08	£5,040
2008-09	£5,915
2009-10	£5,915

84. We have set out our decisions in the rather awkward way we have because we were not supplied with details of the total amounts of benefits, including the ones not under appeal, and in particular we were not supplied with the calculations that would have accompanied the notices of the s 29 TMA assessments. We think that the way we have expressed the decisions meets the requirements of s 50(8) TMA.

85. In accordance with regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) we hold that the decisions of HMRC made under s 8 Social Security Contributions (Transfers of Functions, etc) Act 1999 should be varied to reduce the amount of Class 1A NICs by the following amounts:

2007-08	£1,253
2008-09	£1,514
2009-10	£1,514

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

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 28 OCTOBER 2015