TC02146

Appeal number: TC/2011/04314

INCOME TAX – National Insurance Contributions – Class 1A – Benefit of the use of a car – Whether taxpayer's home an office – Whether a pool car within s.167 ITEPA

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEW IMAGE TRAINING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JILL GORT
ELIZABETH BRIDGE

Sitting in public at Bedford Square in London on 2 April 2012

Mr Scot Gilbert, Tax Advisor for the Appellant

Mr Peter Massey, Officer of Her Majesty's Revenue & Customs, instructed by the General Counsel for the Respondents

DECISION

1. This is an appeal under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 in respect of unpaid class 1A National Insurance Contributions ("NICS") totalling £8,019 for the period from 6 April 2004 to 5 April 2009. The contributions relate to the taxable benefit arising from the availability to Mr M Ellis of a car owned by New Image Training Ltd. It is also an appeal against penalties arising under Regulation 81(2)(b) Social Security Contributions Regulations 2001 in the amount of £1,203 for the failure to make returns of the contributions referred to above. The original decision was notified to the Appellant on 16 February 2011. That decision was upheld on a statutory review on 10 May 2011.

2. Prior to the hearing of the appeal Her Majesty's Revenue & Customs ("HMRC") acknowledged that the collection of National Insurance contributions was subject to the Limitation Act 1980 and that a debt could not be recovered through legal action in the courts after 6 years. It was therefore the case that HMRC were unable to recover the amount of £1,637 originally said to be due for the year 2004 to 2005 because they had not made a protective claim in the County Court before the time limit expired. HMRC were therefore were no longer able to pursue New Image Training for the amount of £1,637 in respect of that period, nor the corresponding penalty of £246, and therefore conceded that the appeal in respect of those two sums should be allowed.

3. In its notice of the appeal New Image Training raised various matters some of which are not justiciable before this Tribunal; these matters are those which relate to complaints made to HMRC and HMRC's refusal to deal with them. The relevant matters are as follows:-

> "The taxes that have already been paid or collected by this company (and not paid by many of my competitors) could not have been achieved without the use of a pool car.
>
> "The use of the word 'occupied' having no legal definition has been abused by HMRC referring to a military occupation context (attached) rather than current reality (Mr Sleight 10/5/2011) or Mrs Hale's several and varied demands none of which are legal requirements.
>
> "The extensive discussion regarding use of vehicle, the reasons for doing so and offer to supply evidence were not recorded by Mrs Hale on 9 June 2010 being recorded as 'unclear' by Mr Sleight in his review despite my personal invitation to him to clarify any points that needed further explanation".

At the hearing of the appeal more extensive reasons were advanced for allowing the appeal, principally that the car was only used for business purposes and that it was a pool car (see the Appellant's case below).

Background

4. The principal activity of New Image Training is that of training hairdressers. Its registered office at all relevant times was 19 Rutland Gardens, Rochford, Essex SS4 3AX. 19 Rutland Gardens was also the home of Mr M Ellis and Mrs B Ellis who are named as the Company Secretary and Director respectively. They are the sole owners of New Image Training. During the period relevant to this appeal neither Mr nor Mrs Ellis were paid a salary by New Image Training.

5. New Image Training was formed in 2002. In 2003 Mrs Ellis purchased a property at 4 South Street in Rochford. In 2005 she also purchased 4A South Street, Rochford, which was a flat above 4 South Street. The business of New Image Training was principally training hairdressers and providing courses to do this. The training in the main related to training colour consultants, and the training was undertaken by people employed by New Image Training to do it. Its main marketplace was in schools, colleges and hair salons and the individuals who undertook the training were thereby enabled to obtain a City & Guilds qualification. Between 2002 and 2006 the majority of this training was done either at schools or at salons in the cashment area of the business.

6. New Image Training reached an agreement with a major hair colour manufacturer, Paul Mitchell, to promote and use exclusively Paul Mitchell products which enabled New Image Training to buy the products from Paul Mitchell at a low price to sell on to hair dressing salons in the local area. As part of the agreement with Paul Mitchell their products had to be promoted at various events and locations around the South of England.

7. A Lexus RX300 car, which was first registered on 1 March 2004, was kept at the address in Rutland Gardens. Another car which is not the subject of this appeal, and which it is acknowledged by HMRC is a company car, was kept at South Street.

The Issue

8. The following issues are to be determined by the Tribunal:

(i) Was 19 Rutland Gardens at all relevant times Mr Ellis' workplace?

(ii) Was the Lexus car available for private use, do the terms on which it is made available prohibit such use, and was it so used?

(iii) Was the car a "pool" car?

(iv) If so, did it satisfy all the conditions set out under section 167(3) of the Income Tax (Earnings & Pensions) Act 2003 ("ITEPA")?

The Legislation

9. The taxable benefit of cars "made available" to employees and company officers and their families is dealt with in sections 114 to 153 ITEPA.

10. ITEPA provide as follows:

> s.118(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 … is to be treated as available for the employee'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

11. The exemption for "pooled cars" is in section 167 ITEPA which provides as follows:

> Section 167(3). In relation to a particular tax year, a car is included in a car pool for the use of the employees of one or more employers if in that year –
>
> (a) the car was made available to and actually used by more than one of those employees,
>
> (b) the car was made available, in the case of each of those employees, by reason of the employee's employment,
>
> (c) the car was not ordinarily used by one of those employees to the exclusion of the others,
>
> (d) in the case of each of those employees, any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year, and
>
> (e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.

12. Section 339(1). In this part "workplace", in relation to an employment, means a place at which the employee's attendance is necessary in the performance of the duties of the employment.

13. Section 339(2). In this Part "permanent workplace", in relation to an employment, means a place which –

> (a) the employee regularly attends in the performance of the duties of the employment, and
>
> (b) is not a temporary workplace.
>
> This is subject to subsections (4) and (8)
>
> …

339(4) A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if –

(a) it forms the base from which those duties are performed, or
(b) the tasks to be carried out in the performance of those duties are allocated there.

339(5) A place is not regarded as a temporary workplace if the employee's attendance is –

(a) In the course of a period of continuous work at that place -

(i) lasting more than 24 months, or
(ii) comprising all or almost all of the period for which the employees is likely to hold the employment, or

(b) at a time when it is reasonable to assume that it will be in the course of such a period.

339(6) For the purposes of subsection (5), a period is a period of continuous work at a place if over the period the duties of the employment are performed to a significant extent at the place.

339(7) An actual or contemplated modification of the place at which duties are performed is to be disregarded for the purposes of subsections (5) and (6) if it does not, or would not, have any substantial effect on the employee's journey, or expenses of travelling,, to and from the place where they are performed.

339(8) An employee is treated as having a permanent workplace consisting of an area if –

(a) the duties of the employment are defined by reference to an area (whether or not they also require attendance at places outside it),
(b) in the performance of those duties the employee attends different places within the area,

(c) none of the places the employees attends in the performance of those duties is a permanent workplace,, and

(d) the area would be a permanent workplace if subsections (2), (3), (5), (6) and (7) referred to the area where they refer to a place.

14. Section 10 Social Security Contributions and Benefits Act 1992 applies the charge to Class 1A NICs on the amount of the benefit computed under the benefit rules in ITEPA.

15. Part 7 Social Security (Contributions) Regulations 2001 ("SSCR") provides for the return of benefits, payment of contributions due thereon and for penalties for the failure to make returns or for making returns late.

16. Section 8 Social Security Contributions (Transfer of Functions, etc) Act 1999 provides for HMRC to make appealable decisions in relation to NICs matters.

17. Regulation 10 Social Security Contributions (Decisions & Appeals) Regulations 1999 sets out that the burden of proof is on the appellant to displace a decision made by HMRC.

18. Section 100B Taxes Management Act 1997 sets out the Tribunal's powers in relation to penalties determined under Part 7 SSCR by virtue of Regulation 82 SSCR.

19. The Tribunal was referred to the cases of:

Yum Yum Ltd v HMRC [2010] UKFTT 331 (TC)

Kirkwood v Evans (74 TC481)

Miners v Atkinson (68 TC629)

Regina v Allen (74 TC263)

Mr Paul Mellor v HMRC [2011] UKFTT 29 (TC)

Gilbert (HM Inspector of Taxes) v Hemsley 55 TC/419

Industrial Doors (Scotland) Ltd [2010] TC00571

The Evidence

20. We were provided with three bundles of documents, and speaking notes supplied by Mr Gilbert on behalf of New Image Training Ltd. Mr Ellis, Company Secretary of New Image Training Ltd, gave oral evidence to the Tribunal.

21. We find the following facts.

22. In addition to the three bed-roomed house at 19 Rutland Gardens in which Mr & Mrs Ellis lived, there was a shed in the garden which measured some 24' x 10'. That shed was used by Mr Ellis to store the records and correspondence relating to the business of New Image Training. He also kept a computer there and there was a telephone line dedicated to New Image Training Ltd.

23. Mr Ellis handled all the relevant correspondence and dealt with all the bills relating to New Image Training. This work was done in the shed at 19 Rutland Gardens. Mrs Ellis was dyslexic and did not deal with any of the paperwork.

24. 4A South Street was purchased in September 2005 in order to give Mr & Mrs Ellis control over the whole building. It was at the time a flat which was run down

residential accommodation. The salon itself was at 4 South Street, it was only the flat above which was 4A. The entrance to the shop was on the main street, whereas the entrance to 4A is at a driveway down the side of the property. There was only one filing cabinet in 4A and this was used by the bookkeeper who had taken over some of Mr Ellis's responsibilities in about 2007. The records were kept there from that date. Between 2006 and 2009 the two front rooms at 4 South Street were habitable, these rooms became training rooms. There were desks for the pupils to sit at, bookshelves and a computer for online training and printing. Mr Ellis himself never had a desk or office facilities at 4 or 4A South Street.

25. The Lexus car was used to tow a trailer which contained the items which New Image Training used to display at the various events it went to and also the products it sold. A Lexus car was chosen because it created a certain image which assisted the company and also it was powerful enough to tow the trailer. This car and the trailer were kept at 19 Rutland Gardens.

26. New Image Training owned a Smart car (which was subsequently exchanged for a Toyota) which was kept at South Street. There was never any issue with HMRC as to NIC contributions being payable on that car. An insurance policy covered both the Lexus and the Smart car, however that policy was made out in the names of both New Image Hair Ltd, a company also owned by Mr and Mrs Ellis, and New Image Training. The persons or classes of persons entitled to drive included any person who is driving to the policyholder's order or with the policyholder's permission, provided that that person held a licence to drive a vehicle and was not disqualified from holding or obtaining such a licence. The limitations as to use included use for social, domestic and pleasure purposes as well as use for the policyholders' business. The exclusions were for use for the carriage of passengers for hire or reward, use in any competition, trial, etc and use for drawing a greater number of trailers than is permitted by law. Those terms and conditions applied throughout the relevant period.

27. The Lexus car was sold to Mr Ellis personally in 2009. The car had only covered about 5,000 miles in the year prior to its initial purchase, and it was said to have covered about 11,000 miles per annum when it was being used between 2004 and 2009.

28. In addition to 19 Rutland Gardens being the registered office of New Image Training, it was also the registered office of two other companies, namely, New Image Rochford Ltd and New Image Hair Ltd until that last company was closed in 2007. Although before 2007 all the records were kept at Rutland Gardens, none of the staff other than Mr Ellis ever worked there. No meetings were ever held there. When the bookkeeper came to look at the books, Mr Ellis would take those books to South Street and that was where all necessary meeting were held, including any visits from HMRC. Health and safety checks had been carried out at South Street but none had been carried out at Rutland Gardens. There was no evidence of any planning permission for business use having been granted in respect of 19 Rutland Gardens. In addition to the property at South Street, Mr & Mrs Ellis had a hair salon in Benfleet. It was not made clear whether that salon was owned by New Image Training or by Mr & Mrs Ellis.

29. No mileage records were kept in respect of either the Lexus or the Smart car. There was no written prohibition on private use. There was no record kept of who used either car when. The only records we saw which were of any relevance were records of the hours worked by the various employees of the company, and whether that work had been in-house or at the various schools where the training was done. Those records were well maintained and were made out on a weekly basis and in addition contained records of the wages paid to the various employees in respect of both their in-house employment and their employment at the schools. Mr Ellis relied on the Lexus car's ability to record the specific mileage on a particular journey in order to bill the particular client on whose behalf the journey had been undertaken. There were, however, no written records available to show this, such as bills of the mileage that was charged.

30. We were informed by Mr Ellis that private use was prohibited. It was prohibited by Mr Ellis himself and he relied on the staff who drove the car from time to time not so to use it. In all the years in which the Lexus was kept at Rutland Gardens Mr Ellis informed us it has never been used privately, and that he had prohibited private use; he had applied the prohibition to himself, his wife and all the staff. There was, however, no evidence beyond the oral evidence of Mr Ellis as to this. Mr Ellis himself did use the car to travel between Rutland Gardens and South Street. The question of whether this constitutes private use depends upon whether or not Rutland Gardens is Mr Ellis' place of business or merely his home address, which is a matter we will turn to later.

31. When the employees were using the Lexus, we were told that they would usually come to Rutland Gardens in their own cars although they would sometimes come by public transport. There was no evidence that the employees were paid mileage in respect of their own cars when they were so used. However, there was equally no evidence of how much use was made of the Smart car by employees.

32. Mrs Ellis had had a Mini which in April 2005 was changed to the Lexus and Mr Ellis had a BMW car. However, we were also told that Mrs Ellis never drove the Lexus. The Lexus was used some three to four days per week. When it was used for business purposes and a client was to be charged, this was recorded on the fuel receipts, however no fuel receipts were produced.

33. After the formation of New Image Training in 2002 the courses it ran were held at various schools, colleges and hair salons. It was only from 2006 that 4A South Street started being used, it having been purchased in late September 2005. We were shown documents such as a bill from the accountants and a bill from the Albatross Travel Group, both of which were dated 2005, and which were addressed to 19 Rutland Gardens. However, the travel group bill is made out to Mr Martin Ellis personally, and not to the company. The company did use the address of 19 Rutland Gardens on its headed paper, and we were shown an invoice dated 30 June 2005 on that paper showing the customer as New Image Rochford at 4 South Street. We were shown correspondence from HMRC dated 9 November 2011 addressed to New Image Training at 19 Rutland Gardens and also from the Office for National Statistics to that address. Bank statements from the Co-operative Bank were addressed to Mr M Ellis

at Rutland Gardens and in 2007 they show the account title as "New Image Hair Ltd t/a Ellis". It appeared that this account was used to pay for the Lexus by direct debit. The number of that account is 70048173 00. There is a separate Co-operative Bank statement also addressed to Mr Ellis at Rutland Gardens in respect of which the account title is "New Image Training Ltd" and the account number is 70048047 00. The documents relating to that account are also for 2007. That account in a statement for January 2007 shows a transfer in of £500 from "New Image Hair LIM". Whilst these documents were in the bundles, we were not taken to these bank accounts by either of the parties. It appears that the Lexus car was being paid for by the company known as New Image Hair Ltd t/a Ellis. Also in the documents there was an invoice dated 8 May 2009 which gives the invoice address as "Ellis's" at Rutland Gardens and the delivery address as similarly "Ellis's" but at 4 South Street. The bill from the Albatross Travel Group, which was billed directly to Mr Ellis at 19 Rutland Gardens and was dated 26 October 2004, was said to be in respect of a training events day in Norwich. The utility bills for 4A South Street were issued to New Image Training at Rutland Gardens. We were also shown an invoice from Reed Employment Plc to New Image Training at Rutland Gardens and we were told that there were many other examples of this type of invoice. We were shown a telephone bill in the name of Mr Martin Ellis which was addressed to him at Rutland Gardens. We were told that this bill referred to the line installed in the shed which was his business office and there was a note from a compliance officer of HMRC where she notes that she was told that that number was his business office number. However, the account is in Mr Ellis's name, not that of New Image Training.

34. Business rates were not paid for the use of the shed at Rutland Gardens. When the property there was sold some time after the relevant date, the full capital gains tax exemption for a private residence was applied to the property.

The Respondent's Case

35. It was HMRC's case that the provision of the car to Mr Ellis included it being available for his private use, this was primarily based on the fact that it was available for, and was actually used, in travel between Rutland Gardens, which was Mr Ellis's home, and South Street, his place of work.

36. Mr Massey submitted that although Mr Ellis is the named Company Secretary, he was in reality responsible for its direction and operations, and he relied on the fact that only Mr Ellis ever dealt with HMRC. Even if Mr Ellis were not a Director, ITEPA provides for the benefit charges not only to employees but also, in certain circumstances, to benefits provided to an employee's family. Accordingly, even if Mr Ellis were not a Director, then the benefits legislation could still apply to the company by virtue of the car being made available to him as a family member.

37. The company owned the Lexus car and, since it was available for use by Mr Ellis for private purposes, a benefit arose under ITEPA. The computed amount of the benefit was in excess of the amount of the limit for exclusion for lower paid employees in Part 7 of ITEPA and therefore the exclusion did not apply.

38. Mr Massey submitted that the schedule D cases relied on by Mr Gilbert on behalf of the company were irrelevant for deciding the place of business in this case. 4A South Street was the company's place of business, not Rutland Gardens. The fact that Mr Ellis chose to work in a shed was a decision he was entitled to make, but the work could have been done elsewhere.

39. With regard to the pool car exemption, again HMRC relied on there being no documents to show the actual use of the car, and it was submitted that it was probable that incidental private use was made of the car. In the case of *Yum Yum* Judge Charles Hellier had considered the provisions of section 167 of ITEPA. In particular in respect of section 167(3)(e) (erroneously referred to in the judgment as 167(3)(d)) the court had considered the proper meaning of the word "occupation". It was stated in that case:

> "31. We see no reason to suppose that the draftsman of section 167 had in mind any different meaning of occupation from that developed in earlier case law. We draw the conclusion that "occupation" for the purposes of section 167 is a state of affairs which exist when a person:-
>
> (i) has physical possession of land – and we take a person to have physical possession of land when he actually uses it for such purposes as he sees fit (subject to any requirement imposed upon him by any agreement relating to the land or restriction to which the land is subject);
>
> (ii) controls the use of that land;
>
> (iii) has the power of excluding (by trespass action) other persons from the benefit he enjoys in the land; and
>
> (iv) has some form of right to some enjoyment of the land."

The Judge then went on to state that there was no evidence to suggest that it was the Appellant (in that case a company) rather than Mr Yeow (the director of the Appellant company to whom the car was provided) which had possession or control of Mr Yeow's house or any power to exclude persons from it, and concluded that the company did not occupy Mr Yeow's house and accordingly the exception in (e) did not apply.

40. Mr Massey queried whose occupation was paramount and pointed to the fact that two other companies were also registered at Rutland Gardens as well as it being a private residence. It was submitted that the occupation of Mr & Mrs Ellis was paramount, not that of the company and therefore the appeal would fail the pool car provisions. In the circumstances the National Insurance contributions were due and owing and the penalties automatically followed.

The Appellant's Case

41. On behalf of the company Mr Gilbert submitted that 19 Rutland Gardens was Mr Ellis's permanent workplace, as defined by section 339(2) ITEPA 2003. Although under the terms of the legislation at section 118(1) ITEPA 2003 the car was available to Mr Ellis, the provisions of section 118(1)(a) and (b) were met in that the terms on which the car was available prohibited private use, and it was not used for private use.

42. It was New Image Training's case that it occupied 19 Rutland Gardens. Additionally the vehicle was a pool vehicle as its use and availability fulfilled all of the conditions set out in ITEPA section 167(3). The evidence showed that the car was made available and used by more than one employee; the car was made available by reason of employment; the car was not normally used by one employee with the exclusion of others; any private use was incidental to other use; and the car was not normally kept overnight or in the vicinity of any residential premises where any of the employees were residing, except whilst being kept overnight on premises occupied by the person making the car available to them.

43. The evidence relied on in respect of Rutland Gardens being the company's base was that at Rutland Gardens there was a fully furnished office with its own dedicated phone line. Until 2008 it was the place where all the business records were stored, it was the address on the notepaper and was the place where all financial aspects of the business were undertaken. It therefore was the financial and head office of the business.

44. New Image Training further relied on the fact that until September 2005 4A South Street was not in the ownership of Mr & Mrs Ellis. The only place the business could have been based between 2002 and 2006 was 19 Rutland Gardens.

45. We were referred to HMRC's guidance on what constitutes a permanent workplace, in particular EIM 32065 which states:

> "A place at which an employee works is a permanent workplace if he or she attends it regularly for the performance of the duties of the employment. It is usually clear whether or not a place is an employee's permanent workplace (and, therefore, whether a journey to that place is ordinary commuting). It is possible for an employee to have more than one permanent workplace at the same time, see EIM32140. The cost of travel to a permanent workplace is not deductible under section 338 ITEPA 2003, see EIM32055.
>
> "A workplace is not a permanent workplace if it is a temporary workplace. A temporary workplace is somewhere the employee goes only to perform a task of limited duration or for a temporary purpose. The cost of travel to a temporary workplace is deductible".

46. We were also referred to EIM 32140, with regard to s.339(2) ITEPA provides:

> "Someone who has two or more employments, or is in an employment that requires regular attendance at more than one workplace, may have more than one permanent workplace at the same time.
>
> "Each case must be decided on its own facts and most employees will only have one permanent workplace at any one time.
>
> "Factors that point to a workplace being a second permanent workplace include:
>
> - The employee regularly performs a significant part of his duties there
> - People would expect to be able to contact the employee at the second workplace
> - The employee has an office, or desk, and support services at the second workplace that he or she regularly was."

47. We were referred to the case of *Mellor v HMRC* in which case it was decided that an individual's home was his business base and that costs of travel were allowable in a situation which, Mr Gilbert submitted, was less clear-cut with regard to its facts and the duties performed at the house than apply in the present case. The general principle established in that case was that if the centre of the business was a man's home, and if the business activities were conducted at his home, then the business is based at his home.

EIM 32140, with regard to s.339(2) ITEPA provides:

> "Someone who has two or more employments, or is in an employment that requires regular attendance at more than one workplace, may have more than one permanent workplace at the same time.
>
> "Each case must be decided on its own facts and most employees will only have one permanent workplace at any one time.

Factors that point to a workplace being a second permanent workplace include:

- The employee regularly performs a significant part of his duties there
- People would expect to be able to contact the employee at the second workplace
- The employee has an office, or desk, and support services at the second workplace that he or she regularly was."

48. It was part of the Appellant's case that, HMRC having accepted that the Smart car and subsequently the Toyota which was acquired for the same purpose, were not available for private use, and there was no assessable benefit on any individual made in respect of those vehicles, HMRC should have accepted the evidence with regard to the Lexus. Both the Lexus and the Smart car, and subsequently the Toyota, were

treated in the same manner with regard to the prohibition on private use, the only difference being that the Lexus was normally kept at 19 Rutland Gardens whereas the other vehicle was kept at 4A South Street.

49. We were referred to the cases of *Gilbert v Hemsley* and *Industrial Doors* for cases where it was held that a verbal prohibition on private use was sufficient for the tribunal to be satisfied that the vehicles were not available for private use and were not so used.

50. With regard to the question of whether or not the Lexus was a pool car and came within the exemption provided by s.167(3) of ITEPA, it was submitted that the test in the case of *Yum Yum* relied on by the commissioners was not binding on this Tribunal and was to be considered as a guidance only. We were asked to distinguish it on its facts. The test used in *Yum Yum* was whether the occupation would constitute rateable occupation. This was taken by Mr Gilbert to mean one should examine whether the rating authority would impose business rates on the premises or part of them which was used for business if the rating authority was aware of the occupation, which it was acknowledged in the present case that it was not. The guidance from the valuation office was cited to us in which an example was given of a similarly converted property where a garage was converted with a separate telephone and a computer installed and various other matters. It was conceded by Mr Gilbert that business rates would have been due on the shed which Mr Ellis used had the company known or realised that this was the case. In the case of *Yum Yum* there were no separate facilities and therefore the occupation of part of the property by the business would not, using the valuation office's guidance, have constituted occupation for the charging of business rates. It was conceded that the test was not whether the valuation office had been notified of the matter, or rates paid, but the test was whether the use would be charged to rates if they had been so notified.

51. It was accepted by Mr Gilbert that occupancy can be a different test from that of where a business is based, but it was submitted that where the business is based should be considered as part of that test.

Reasons for Decision

52. New Image Training's business was training hairdressers and providing courses to do this. This training was carried out in the early years in the schools, colleges and hair salons visited by the various employees of the company. Subsequently, in about 2006, a lot of that training was carried out at premises in South Street. At no time was any of the training of hairdressers or the provision of courses supplied from Rutland Gardens.

53. Notwithstanding the above, the first question for the Tribunal is whether Rutland Gardens constituted Mr Ellis' workplace at all times between 2004 when the car was purchased and 2009 when it was sold. Mr Ellis was the Company Secretary and it is clear from the evidence before us that many of the documents relevant to the financial administration of the company were sent to him at Rutland Gardens. There was a telephone installed there and a computer. As to whether or not these technically

belonged to the business, that is not a matter which we have to decide, although the evidence would appear to indicate that they did not, Mr Ellis undoubtedly used both the telephone and the computer to conduct business on behalf of New Image Training. We had no evidence as to the amount of time spent by Mr Ellis on behalf of the company at Rutland Gardens as opposed to when he was away from home, either in South Street or elsewhere acting on their behalf.

54. We take account of the fact that no business rates were ever applied to the shed at Rutland Gardens and when it was sold in late 2011 the property was treated as the residence of Mr & Mrs Ellis and full capital gains tax exemption was applied. In addition, we take account of the fact that no other employee of the company ever worked there, no business meetings were ever held there and the shed was solely used by Mr Ellis, however none of these matters necessarily lead to the conclusion that the shed was not his workplace. Equally it does not follow from the fact that we find that Mr Ellis did some work at Rutland Gardens that his use of the car between there and South Street was not taxable as private use of the vehicle.

55. In considering the first question, namely whether Rutland Gardens constituted Mr Ellis's workplace between 2004 and 2009, we think it necessary to look first of all at the period from 2004 until 2005 when 4A South Street was purchased. Although HMRC have had to abandon a claim in respect of that period as it was made out of time, it is nonetheless relevant to our decision. At that time 4 South Street, as described above, provided two training rooms for the hairdressers. The business records, the Lexus car and the trailer containing the hair products were all kept at Rutland Gardens. We find as a fact that it was not possible during this period for the work that Mr Ellis carried out to be done other than at Rutland Gardens, and that there was no place other than Rutland Gardens for parking the Lexus and the trailer which it was used to tow. The shed used by Mr Ellis at Rutland Gardens contained a computer, a dedicated telephone line and the company's records, there was no space for the computer and the records at No.4 at this time. Although no meetings were held at the shed, no one other than Mr Ellis used it. It is relevant also to consider the purpose to which the Lexus was mainly put in this period, namely to tow the trailer to various trade fairs, and the fact that during this period there was, contrary to Mr Massey's submission, nowhere else where Mr Ellis could have carried out the work he performed on behalf of the company. Insofar as the question raised in the case of *Yum Yum* of whether the local rating authority would impose business rate on the premises if it were aware of the use to which Mr Ellis put it, we are not in a position to decide, but on the basis of the evidence before us at this time we consider it more likely than not that they would have imposed them. On the basis of the above matters we conclude that in this first period Rutland Gardens was Mr Ellis's place of work.

56. Before considering the situation from 2005 onwards we will turn to the second question, namely whether the Lexus car was available for private use. With respect to that matter, there is no written evidence of any prohibition on such use, and indeed we were told there was no written instruction to that effect. The insurance document makes the car available for private use, but so it does for the Smart car also owned by New Image Training, whose usage and status have not been challenged by HMRC. We heard from Mr Ellis that he was aware that the Lexus should not be used privately

and that he banned such usage, and it never was so used. This is a matter on which we accept his evidence. We bear in mind the decision of Vinelott J in the case of *Gilbert v Hemsley* in which he upheld a decision of the General Commissioners who had accepted Mr Hemsley's evidence that he had not used the car for domestic purposes in a situation where Mr Hemsley had been told that he "was not expected" to use a vehicle provided by his employer for private use, and that it had not been so used. In that case it was held that:-

> (1) The [General]Commissioners had applied the proper test and having heard the evidence must have been satisfied that on the special facts of the case H's home was his working base, that he was travelling in the performance of his duties whether he went from home to the premises or to his site or to collect workmen and to take them to and from work.
>
> (2) The [General] Commissioners had not misconstrued section 72(6)(a) [Finance Act 1976] or failed to appreciate that what was required was a contractual prohibition of private use of the car. Though this may have been an inference from the fact and not a primary finding it was a conclusion to which the Commissioners were entitled to come."

57. Turning to the period from 2005 onwards, when 4A South Street was purchased, clearly during this period there was space for the records, the computer and for a telephone line and Mr Ellis's desk at those premises, and therefore the issue is whether or not what had been Mr Ellis's workplace, namely Rutland Gardens, ceased to be so upon acquisition of 4A. New Image Training had made no effort to establish whether or not it, or the other companies registered at Rutland Gardens, were liable for business rates, nor had the premises been checked out to ensure that there were no Health and Safety issues with regard to its use, but this had been done with regard to 4A. It is clear that 4A could have been a permanent workplace for Mr Ellis, and indeed was one. We must, however, decide whether or not Rutland Gardens continued to be a permanent workplace at this time, given that section 339 ITEPA provides that it is possible for an employee to have more than one permanent workplace at the same time, see also EIM 32065 and EIM 32140 of HMRC's guidance (as set out above). We take particular account of the fact that New Image Training is a small business that does not have great resources. For Mr Ellis to have transferred his computer, his telephone line and the other office paraphernalia to 4A would have constituted some expense, it is clear that people expected to contact Mr Ellis in his role as an employee of New Image Training after 2005 at the telephone number in the shed, and there is evidence that HMRC contacted him there; he continued to have a desk and support services in the shed and to perform a significant part of his duties there. In all the circumstances we do not consider that it was reasonable to expect Mr Ellis to transfer his office equipment from Rutland Gardens to 4A, and therefore consider that Rutland Gardens remained his workplace after 2005, and that 4A became a second workplace.

58. Because we find on the balance of probabilities that Rutland Gardens was Mr Ellis place of work and we also find that the Lexus car was only use by him for business purposes, we do not need to consider the question of whether or not it was a

pool car. However, with regard to the case of *Yum Yum*, on which Mr Massey relied, a case which was principally concerned with the question of whether or not the car in that case was a pool car, we find that case can be distinguished from the present one on the basis that it was found by the Tribunal there that it was "likely that" there was private use of the car. In the event of this matter going further however, we find that the conditions of section 167(3) of ITEPA are satisfied, albeit the finding is made on the basis of Mr Ellis's oral evidence as set out above only, and the car was used as a pool car. In the circumstances and for all the above reasons this appeal is allowed.

59. 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.

JILL GORT
TRIBUNAL JUDGE

RELEASE DATE: 13 July 2012