TC02821

Appeal number: TC/2011/03795

Appeal against car and fuel benefit charges – Whether vehicle was a pool car (ITEPA s 167) – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEREK MUNDEN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR NIGEL COLLARD

Sitting in public in Brighton on 30 July 2013

Mr P Clarke of Clarke & Co for the Appellant

Mrs R Oliver, Inspector of Taxes, for the Respondents

DECISION

Introduction

1. This is an appeal against closure notices and revenue assessments made by HMRC in respect of the Appellant's tax liability for tax years 2003-04, 2004-05, 2005-06 and 2006-07. These were made following an HMRC employer compliance review of Securi-door (North East) Ltd ("Securi-door" or "the company"), a company of which the Appellant was an employee (and for periods a shareholder and director), and of which his wife, Mrs Ryan-Munden, was also a director and employee. That company has since ceased trading.

2. In this appeal, the Appellant disputes the closure notices and revenue assessments to the extent that they render him liable to tax on car and fuel benefits in respect of a Porsche 911 vehicle ("the Porsche" or "the vehicle"). The Appellant's case is that he is not liable to tax on car and fuel benefits because the vehicle was at all material times a pool car within the meaning of s 167 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). The HMRC case is that the Appellant has not established that it was a pool car.

3. The relevant amounts of car and fuel benefits, and the tax thereon to which the Appellant has been found by HMRC to be liable, are set out in a table at page B54 of the bundle. The tax totals approximately £38,000 for the four years in question. The Appellant has not in this appeal sought to dispute the figures in that table, in the event that the car is not a pool car.

The applicable law

4. Section 114 ITEPA provides that Chapter 6 of Part 3 ITEPA applies to a car or a van in relation to a particular tax year if in that year the car or van is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household, is so made available by reason of the employment, and is available for the employee's or member's private use. Where s 114 applies, provisions of Chapter 6 provide for the cash equivalent of the benefit of the car to be treated as earnings, and for the cash equivalent of the benefit of any fuel provided for the car to be treated as earnings.

5. Section 118 ITEPA provides as follows:

> (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)).

6. Section 167 ITEPA, entitled "Pooled cars", provides as follows:

> (1) This section applies to a car in relation to a particular tax year if for that year the car has been included in a car pool for the use of the employees of one or more employers.
>
> (2) For that tax year the car—
>
> (a) is to be treated under section 114(1) (cars to which this Chapter applies) as not having been available for the private use of any of the employees concerned, and
>
> (b) is not to be treated in relation to the employees concerned as an employment-related benefit within the meaning of Chapter 10 of this Part (taxable benefits: residual liability to charge) (see section 201).
>
> (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.

The hearing

7. At the hearing, the Appellant was represented by Mr Clarke, who was accompanied by the Appellant, Mrs Ryan-Munden (the Appellant's wife), and Mr R Hall and Mr A Murray. HMRC were represented by Mrs Oliver, who was accompanied by HMRC officer Mr V Hodgson.

8. At the beginning of the hearing, Mrs Oliver produced a witness statement of Mr Hodgson, which had not been included in the hearing bundle. Mr Clarke from the outset objected vigorously that HMRC should not be entitled to rely on the witness statement, and should not be entitled to call Mr Hodgson as a witness. Mr Clarke said that he had seen the witness statement for the first time on the morning of the hearing in the waiting room when it had been given to him by Mrs Oliver, and maintained that the Appellant had thereby been ambushed. In the course of the hearing, it emerged

that HMRC had correspondence on file that indicated that the witness statement had been sent to Mr Clarke under cover of a letter from HMRC dated 24 October 2012 (at which time the hearing of the appeal had been anticipated for 27 November 2012). That letter also stated that HMRC proposed to call Mr Hodgson as a witness. Mr Clarke maintained that he had never received that letter or the witness statement, and maintained his objection.

9. The following further matters subsequently emerged. There was one paragraph in Mr Hodgson's witness statement that contained information that was not otherwise in the bundle, relating to statements that had been made to Mr Hodgson by former employees of Securi-door on 15 January 2008. Mrs Oliver indicated at the hearing that she would not rely on that paragraph, and it has been disregarded completely for purposes of this appeal. All of the other information in the statement was contained in material already in the bundle, in particular, in notes of meetings that Mr Hodgson had had with the Appellant (bundle, pages A1-A9). Mrs Oliver confirmed also that in her examination-in-chief of Mr Hodgson, she would do no more than ask him to adopt his witness statement. Thus, in effect, Mr Hodgson was simply giving evidence to confirm on oath certain aspects of the evidence that were already in the bundle and to make himself available for cross-examination.

10. The Tribunal was of the view that in the circumstances, the Appellant had not been ambushed, even if he or Mr Clarke had never received the HMRC letter dated 24 October 2012 with the witness statement. The Tribunal offered Mr Clarke a short adjournment to speak to his client if necessary about the giving of evidence by Mr Hodgson, but Mr Clarke indicated that this was unnecessary. The Tribunal indicated that it was a matter for the Appellant whether or not to maintain the objection to Mr Hodgson giving evidence, but the Tribunal pointed out that it would seem to be in the Appellant's interest to cross-examine Mr Hodgson if the Appellant took issue with anything that Mr Hodgson said. Otherwise, the Tribunal would proceed on the basis that Mr Hodgson had attended the hearing prepared to give sworn evidence confirming his notes of meetings with the Appellant, and that the Appellant had had the opportunity to cross-examine him but had declined to do so. Although Mrs Oliver had indicated that she would do no more in her examination-in-chief than to ask Mr Hodgson to adopt his statement, the Tribunal did make it clear to Mr Clarke that if Mr Hodgson gave evidence, the Tribunal may have questions arising out any cross-examination, and Mrs Oliver would have a right to ask any questions by way of re-examination. Ultimately, Mr Clarke withdrew his objection, and Mr Hodgson gave evidence.

11. Another matter that arose at the outset of the hearing concerned the health of the Appellant. Mr Clarke said that due to various health issues, the Appellant, despite being present, would not be able to follow effectively everything that was happening at the hearing. Mr Clarke referred to a letter from a medical practice dated 13 January 2011 (bundle, page B74). The Tribunal asked whether any accommodations could be made to assist, such as by rearranging where the various parties at the hearing would sit. Mr Clarke said that this would be unnecessary, and that the Appellant was content for the hearing to proceed, with Mr Clarke having full authority to conduct the case on

the Appellant's behalf, even if the Appellant could not follow it fully. The Tribunal accordingly proceeded with the hearing.

12. At the hearing, Mr Clarke called as witnesses Mr Hall and Mr Murray, both of whom gave evidence on oath. At the end of the presentation of the Appellant's evidence, the Tribunal noted that there was apparently no evidence before it of the purposes for which the Appellant and Mrs Ryan-Munden used the vehicle. While it was a matter for the Appellant, the Tribunal noted that it might be in the Appellant's interest for one or both of the Appellant and/or Mrs Ryan-Munden to give evidence on this issue. The Tribunal noted that even if it was the case that the Appellant could not give evidence for health reasons, Mrs Ryan-Munden was present at the hearing. Mr Clarke then indicated that he wished to call Mrs Ryan-Munden as a witness, to which HMRC did not object.

13. The Tribunal also noted at the hearing that it was aware that a previous appeal had been determined by a differently constituted Tribunal in relation to another vehicle that had been claimed to be a pool car of the same company. The Appellant in that other case was Mrs Ryan-Munden. Mrs Oliver indicated that she had intended to refer to that other appeal in the course of her argument. The Tribunal noted that the decision in that other appeal had not been included in the bundle, and that the circumstances of that other appeal would therefore be excluded from the Tribunal's consideration of the present appeal.

The documentary evidence

14. Notes prepared by Mr Hodgson of a meeting that he and other HMRC officials had with the Appellant on 22 November 2006 (bundle, pages A1-A5) indicate as follows. When asked about the business economics of having a 2-seat pool car, the Appellant at first replied that he wanted a Porsche and that is why they had got one, but later retracted this and said that it was the company that had wanted the vehicle. The Appellant also said that the company did not have a logbook of journeys but that these could be quite easily made up. He later retracted this statement and said that he would not be making up the records in terms of a fabrication, but would be putting them together. The Appellant confirmed that the insurance papers for the Porsche were in his own name.

15. An invoice from the Porsche Centre Newcastle dated 20 April 2007 (bundle, pages D4-D5) shows that the vehicle had a service on that day. The invoice is in the Appellant's own name. The invoice refers to a "48000 mile service", but also indicates that the mileage was at the time "4891".

16. Notes prepared by Mr Hodgson of a meeting that he and another HMRC official had with the Appellant on 22 June 2007 (bundle, pages A6-A9) indicate as follows. It was agreed with the Appellant that Mr Hodgson would calculate the benefit for the vehicle and send the Appellant the calculation, which the Appellant could then discuss with his accountant. The Appellant also advised that the Porsche had been sold to "a company" and when asked said that he did not know which company. When Mr Hodgson asked the Appellant if in fact he had bought the car, the Appellant

admitted that he had actually bought the car himself for £31,000, and had sold it on for £38,500 after doing a few repairs.

17. By a letter dated 7 January 2008 (bundle, pages B7-B10), HMRC sent to the Appellant's then accountant the HMRC calculations of car and fuel benefits and the tax thereon.

18. By a letter dated 9 April 2008 (bundle, page B12), the Appellant's accountant agreed those figures.

19. In a letter to the Appellant dated 1 September 2009 (bundle, pages B53-B54), HMRC provided a revised calculation of the car and fuel benefit and of the tax assessed thereon.

20. A letter from a medical practice dated 13 January 2011 (bundle, page B74) confirms several medical matters in relation to the Appellant.

21. A letter from the Appellant to HMRC dated 1 December 2009 (bundle, page A66 and B57) states as follows. The Appellant's accountant assured him that the accountant had never said to HMRC that the vehicle was available to the Appellant for private use. The vehicle was bought for £50,000 and sold 50 months later for £30,000. The Appellant owned his own vehicle for the entire time that the company owned the Porsche. The vehicle covered under 5,000 miles when sold, of which 300 were delivery miles, so that it would have cost the Appellant £11 per mile or £44 per day to use it as a private vehicle, which would be ludicrous. In the time that this issue was pending, the Appellant had had health issues, which he thought were brought on in part by HMRC's persistence.

The witness evidence

22. Mr Hall gave evidence as follows. He was the production manager for Securi-door from 1994 to 2010. The Porsche was a pool car owned by the company. When the Porsche was not in use, it was kept on company premises, initially under a tarpaulin, and later in a locked steel container. The Porsche was used very infrequently. It was predominantly used by the Appellant and Mrs Ryan-Munden. At least one other staff member also used it. Mr Hall never used it other than to manoeuvre it in and out of the steel container for the Appellant and Mrs Ryan-Munden. In cross-examination, he gave evidence as follows. He was never a passenger in the vehicle while it was used, and could not say what anyone used it for. He was aware that Mr Murray had used the vehicle.

23. Mr Murray gave evidence as follows. He was employed by Securi-door from 2001 to 2010. The Porsche was always kept either in the factory or in a high security steel container next to the factory. The vehicle was often unused for weeks on end, and the battery would get flat. Mr Murray was allowed to use the Porsche on a number of occasions. He used it twice in January 2004 to travel to Liverpool to see a company client on company business, and on one of these trips also detoured to Blackpool for company purposes. He was also permitted to use the car in March 2004

to drive to Edinburgh to sit an examination for a technical qualification for his work. Normally for a trip such as this he would use his own personal car and claim the mileage, but on this occasion his own vehicle was unavailable. His own personal car was a Porsche that was better than the pool car, so that it was nothing special to have used the pool car. In cross-examination he gave evidence as follows. In all, he would have driven the Porsche for something like 960 to 1,000 miles. He did not take passengers on any of the trips, although on one occasion he intended to but the passenger dropped out. The journeys he made were not logged or recorded. His personal car insurance covered him for any vehicle he drove. In re-examination, he gave evidence as follows. In addition to the other trips referred to, he used the car on a number of occasions for work purposes on local trips, but could not remember the dates or the local destinations. These all occurred over a space of a few months.

24. Mrs Ryan-Munden gave evidence in chief as follows. She used her own car to drive to work and back. The Porsche was a pool car. She only ever used it for business purposes. She gave two examples. She had significant use of the vehicle. She did not use it for any long journeys. Of the 5,000 miles that the vehicle was driven while owned by the company, she did about 20% of these. The Appellant only ever used it for work purposes. In cross-examination she gave evidence as follows. She could not remember dates of any of the occasions that she used the vehicle. There were no written records of when she used it.

25. HMRC officer Mr Hodgson adopted his witness statement, which essentially repeated information in notes of meetings he had had with the Appellant, referred to in paragraphs 14 and 16 above. In cross-examination, Mr Clarke asked Mr Hodgson several questions suggesting that the issue of the Porsche had been pursued by HMRC in order to put pressure on the Appellant in relation to other matters that HMRC was investigating. Mr Hodgson denied this. Mr Clarke asked a number of other questions, suggesting that due to his health condition, the Appellant might not have understood what Mr Hodgson was saying to him during the meetings that they had, and that the Appellant may have merely been responding to what he thought Mr Hodgson had said. Mr Hodgson said that he had asked the Appellant details relating to a number of different topics, and that Mr Hodgson never gave any indication that he was in difficulty answering the questions. Mr Hodgson acknowledged that he was not medically qualified.

The submissions of the parties

26. On behalf of HMRC, Mrs Oliver submitted amongst other matters as follows. The appeal is against tax for car and fuel benefit in four separate tax years, and the criteria of the legislation need to be satisfied separately for each separate year in order for the appeal to be allowed in relation to a given tax year. A requirement of s 118 is that there must be a prohibition on the vehicle being used for private purposes, since otherwise the vehicle is made "available" for private use, whether or not it is actually used for private purposes. The onus of proof is on the Appellant to establish that each of the criteria is met for each tax year. The burden of proof is the balance of probability. It is not disputed by HMRC that the Appellant, Mrs Ryan-Munden and Mr Murray were all employees of Securi-door at material times. At no time during

the course of the HMRC enquiry has the Appellant provided evidence of the use of the vehicle. Although the matter was raised with the Appellant in the meeting on 22 November 2006, logs were not even kept of the vehicle's use after that date. The evidence of the Appellant's witnesses is very vague, but in any event does not establish that the vehicle was not available to the Appellant for private purposes. The appeal should be dismissed.

27. On behalf of the Appellant, Mr Clarke submitted amongst other matters as follows. It may be unusual to have a high performance sports car as a pool car, but the legislation does not prevent this. All of the requirements of s 167(2) ITEPA are met in this case. The Porsche was made available to more than one employee, by reason of their employment, and was not used by one employee to the exclusion of others. There is no requirement in the legislation to keep logbooks, or to have a written policy as to the use of the car. The vehicle was rarely used, and the evidence is that it was only ever used for business purposes. It can be inferred from the evidence as a whole that it was only permitted to be used only for business purposes. The evidence of use could apply to any of the tax years in question. Mr Hall and Mr Murray no longer work for the company and were not close friends of the Appellant, so there was no reason to doubt the truth of their evidence. There is evidence as to the Appellant's medical situation, which he may have been too proud to admit to Mr Hodgson at their meetings, and he may not have understood what Mr Hodgson was asking him.

The Tribunal's findings

28. The Tribunal finds as a matter of law that the burden of proof is on the Appellant to establish on a balance of probability that the vehicle was a pool car in each of the tax years in question. That is to say, in relation to each of the tax years in question, the Appellant must show that the requirements of s 167 ITEPA were met in relation to that particular tax year.

29. The Tribunal does not accept the HMRC argument that by virtue of s 118(1)(a) ITEPA, the Appellant must necessarily show that the company had a policy prohibiting the use of the vehicle for private purposes. If the company had such a policy, and if in fact the vehicle was not used for private purposes, then by virtue of s 118(1) the vehicle would not be regarded as having been made available to the Appellant, and there would simply be no need to rely on the pool car provision in s 167. The terms of s 167(3)(d) in fact expressly provide that a degree of private use is permissible, provided that "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".

30. The Tribunal accepts that a high performance sports car could in principle satisfy the requirements of s 167. The Tribunal also accepts that it is not a mandatory requirement that there be a written company policy on how the vehicle can be used, or that there be a log or other written record of each use made of the car. However, the Tribunal must make findings of fact based on the evidence and circumstances as a whole, in accordance with the applicable burden and standard of proof. The fact that the vehicle is a high performance sports car is one of the circumstances that can be

taken into account, even if not of itself conclusive. In the absence of a logbook or written company policy, other sufficient evidence needs to be identified to support the claim that the vehicle was a pool car.

31. In this case, the Tribunal finds on the evidence as a whole as follows.

32. There is no evidence of the dates on which the car was used by the Appellant or Mrs Ryan-Munden. There is no evidence that one or both of them used the vehicle in any particular tax year. The evidence does not exclude the possibility that all of their usage of the vehicle might have been confined to a single tax year, or to only two or three of the four tax years. There is no evidence whether the Appellant and Mrs Ryan-Munden both used the car in the same tax year, in relation to any of the four tax years in issue. There is evidence that Mr Murray used the vehicle on a number of occasions over a period of several months from January to March 2004, that is, in a single tax year. There is no evidence whether the Appellant or Mrs Ryan-Munden used the vehicle in that same tax year. The Tribunal therefore finds that it has not been established that the requirements of s 167(3)(a) were satisfied in any given tax year.

33. Similarly, in the absence of evidence as to the dates on which the car was used by the Appellant or Mrs Ryan-Munden, it cannot be known in relation to any given tax year whether the vehicle was ordinarily used by more than one of the company's employees in that tax year. All that is known is that Mr Murray used the car several times over a period of several months in one tax year. However, it is not clear from the evidence whether the Appellant or Mrs Ryan-Munden used the car during that same tax year. The Appellant's case is that the vehicle was only driven some 4,700 miles (excluding delivery miles) in the time that the company owned it, and that the evidence is that Mr Murray and Mrs Ryan-Munden each drove about 1,000 miles, leaving about 2,700 miles driven by the Appellant. For the Appellant it is argued that the usage was therefore proportionately distributed amongst three different users, such that it cannot be said that any one of them used it to the exclusion of the other two. The difficulty with that argument is that the requirement of s 167(3)(c) must be looked at separately for each tax year. Mr Murray used the car in one tax year only. There is no evidence as to when the car was used by the Appellant or Mrs Ryan-Munden, so that their relative usage of the car in the other tax years simply cannot be assessed.

34. The Tribunal also finds that the Appellant has not discharged the burden of establishing that the requirement of s 167(3)(d) was met. There is evidence that Mr Murray never used the car for private purposes, and Mrs Ryan-Munden gave evidence that she never used the car for private purposes. However, there is no evidence of the purposes for which the Appellant used the car, other than a very brief and general statement by Mrs Ryan-Munden in her oral evidence that the Appellant only ever used the car for work purposes. The Tribunal does not consider that sufficient to discharge the burden of proof in relation to the Appellant. Quite apart from anything else, the question whether a particular use of the car was for "private purposes" or for company purposes would ultimately be a matter for the Tribunal to determine. Even if the Appellant thought in good faith that a particular use of the car was not "private

purposes", the Tribunal might or might not agree. Without any details of the circumstances in which the vehicle was used by the Appellant, the Tribunal is simply unable to form a view.

35. It follows that the Appellant has failed to discharge the burden of proof in relation to at least three of the criteria in s 167, and that the Appellant has consequently failed to establish that the vehicle was a pool car.

Conclusion

36. The appeal is dismissed.

37. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 8 August 2013