[2016] UKFTT 156 (TC)

TC04941

Appeal number: TC/2015/04837

Income tax, car benefit and fuel benefit- whether car was a pooled car-no, whether penalty due owing to carelessness-yes, whether proposed level of penalty is appropriate-yes-Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SARAH CLEMENTS **Appellant**

- and -

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

TRIBUNAL: JUDGE GETHING
Member Sheila Cheesman

Sitting in public at Fox Court, Court 13, 5th Floor, 30 Brooke Street, London EC1N 7RS on Thursday 18 February 2016

The Appellant was not present but her agent had sent a letter which she wished the Tribunal to consider

Ms Joanna Bartup officer of HM Revenue and Customs, for the Respondents

DECISION

1. The issues in this case are:

(1) Whether a Land Rover Discovery Tdv6 Hse A Estate (which we refer to as the Land Rover) owned by Ms Clements' employer Bridges Healthcare Services Ltd was made available to her so as to give rise to a car benefit in the years 07/08 08/09, 09/10, 10/11 and 11/12 or whether it was a pooled car within the meaning of section 167 ITEPA 2003.

(2) Whether there was a car fuel benefit within the meaning of section 149 ITEPA 2003 in each of those years.

(3) Whether Ms Clements's failure to include the information relating to the car and the fuel in her returns for those years was careless.

(4) If so, whether the level of penalty proposed was appropriate.

2. The relevant provisions read as follows:

S 114 Cars, vans and related benefits

(1) This chapter applies to a car or van in relation to a particular tax year if in that year the car or van-

(a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household

(b) is so made available by reason of the employment(see section 117) and

(c) is available for the employee's or member's private use (see section 118).

(2) Where this chapter applies to a car or van-

(a) section 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.

S118 Availability for private use

(1) For the purpose 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).

S 121 Method of calculating the cash equivalent of the benefit of the car-

(1) the cash equivalent of the benefit of a car for a tax year is calculated as follows:

Step 1

Find the price of the car in accordance with sections 122 to 124.

S122 The price of the car

For the purposes of this Chapter the price of a car means-

(a) its list price, if it has one, or

(b) the notional price, if it has no list price.

S 123 The list price of a car

(1)In this chapter a car's list price means the price published by the car's manufacturer, importer and distributor (as the case may be) as the inclusive price appropriate for a car of that kind if sold-

(a) in the United Kingdom,

(b) singly,

(c) in a retail sale,

(d) in the open market, and

(d) on the day immediately before the date of the car's first registration.

S149 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)…

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

(a) …

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

(c)…

(d)…

S 167 Pooled cars

(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 the purposes of the tax year the car-

(a) is to be treated under section 114(1) (cars to which this Chapter applies) as not being available for the private use 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 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.

Discovery Assessment Section 29 Taxes

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment--

(*a*) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(*b*) that an assessment to tax is or has become insufficient, or

(*c*) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where--

(*a*) the taxpayer has made and delivered a return under [section 8 or 8A] [2] of this Act in respect of the relevant [year of assessment] [2], and

(*b*) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above--

(*a*) in respect of the year of assessment mentioned in that subsection; and

(*b*) ... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board--

(*a*) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(*b*) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if--

(*a*) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(*b*) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(*c*) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer ...[5]; or

(*d*) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above--

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (*a*) to (*c*) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above--

(*a*) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes--

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(*b*) any reference in paragraphs (*b*) to (*d*) to the taxpayer includes a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to-

(*a*) in the case of the situation mentioned in paragraph (*a*) or (*b*) of subsection (1) above, the year of assessment mentioned in that subsection; and

(*b*) in the case of the situation mentioned in paragraph (*c*) of that subsection, the year of assessment in respect of which the claim was made.

Penalties Schedule 24 FA 2007

SCHEDULE 24 PENALTIES FOR ERRORS

Part 1 Liability for Penalty

1--

(1) A penalty is payable by a person (P) where—

(*a*) P gives HMRC a document of a kind listed in the Table below, and

(*b*) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(*a*) an understatement of a liability to tax,

(*b*) a false or inflated statement of a loss …[1], or

(*c*) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	*Document*
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).

Degrees of Culpability

3--

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

(*a*) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(*b*) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(*c*) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—

(*a*) discovered the inaccuracy at some later time, and

(*b*) did not take reasonable steps to inform HMRC.

PART 2 AMOUNT OF PENALTY

Standard Amount

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is—

(*a*) for careless action, 30% of the potential lost revenue,

Reductions for Disclosure

9--

(A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment by—

(*a*) telling HMRC about it,

(*b*) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(*c*) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the [supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure—

(*a*) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy[, the supply of false information or withholding of information, or the under-assessment][1], and

(*b*) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

10—

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(*a*) in the case of a prompted disclosure, in column 2 of the Table, and

(*b*) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%

140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%.][1]

"10—

(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.

(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.

(4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

(5) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.

(6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure.".

Special Reduction

11--

(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include—

(*a*) ability to pay, or

(*b*) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(*a*) staying a penalty, and

(*b*) agreeing a compromise in relation to proceedings for a penalty.

Suspension

14--

(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify—

(*a*) what part of the penalty is to be suspended,

(*b*) a period of suspension not exceeding two years, and

(*c*) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify—

(*a*) action to be taken, and

(*b*) a period within which it must be taken.

(5) On the expiry of the period of suspension—

(*a*) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

(*b*) otherwise, the suspended penalty or part becomes payable.

(6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable.

The Evidence

In the absence of Ms Clements we were taken by Ms Bartup through the correspondence between HMRC, Bridges Healthcare and Gorrie Whitson, a firm of accountants who were originally advisers to Bridges Healthcare until its liquidation and then of Ms Clements. In particular we were taken to each passage in each letter in the correspondence dealing the Land Rover and car fuel. Gorrie Whitson had written a letter to the Tribunal on 12th February advising that Ms Clements would not be attending due to her work commitments and making some representations for the Tribunal to consider. Mr Keith Upsdell was the main correspondent on behalf of Gorrie Whitson. We also had the benefit of some insurance proposal forms and certificates in relation to the Land Rover, DVLA record relating to the Land Rover and an annual return of Bridges Healthcare filed on 1 November 2011.

The Ownership of the Land Rover

3. A receipt from Sturgess, a car dealer, dated 16 January 2008 shows that the Land Rover was purchased by Bridges Community Healthcare second hand on 16 January 2008 for £33,695.

4. The DVLA records show that the Land Rover was sold to an unrelated third party on 4 August 2011.

5. The list price of the particular 2007 model Land Rover according to the extract to Parker's Car Guide dated 19 October 2010 was £43,812.

6. At the date of purchase the Land Rover had done 8,700 miles.

Insurance of the Land Rover

7. From a proposal form it seems that RSA insured the Land Rover between 16th January 2008 and 16th January 2009. Bridges Healthcare had not produced the certificate insurance. The insured was Bridges Healthcare Limited. There are three named drivers in addition to Ms Clements who is identified as the Proposer. In relation to each driver there is a statement of their occupation, the nature of the business the person is engaged and their relationship with the Proposer. The details are as follows:

8. Ms Clements' occupation is described as company director, the business she is engaged in is described as Residential Home. The other three are described as employees of the proposer.

Julia Lewer is described as a sales assistant, in residential home business.

Penny Parish is described as a sales assistant in residential home business.

Scott Tully is described as a sales assistant, in advertising business..

9. The estimated annual mileage is 9,750. In the section covering Use of the vehicle the proposal form indicates that:

"the vehicle is not used solely for social, domestic and pleasure purposes unless otherwise stated in the insurance certificate." We did not have the benefit of seeing the insurance certificate.

10. The proposal form indicates it was a requirement that the Proposer had checked the licences of all the drivers who will drive the vehicle and disclosed to RSA all convictions etc. All three drivers are described as being employees of Ms Clements.

11. The proposal form indicates that the premium incorporates 9 years proven No Claims Discount from the Proposer's previous insurance and the Land Rover is kept "off road".

12. Highway (part of Liverpool Victoria) insured the Land Rover between 16 January 2009 and 15 January 2010. Bridges Healthcare had provided both the proposal from and the certificate of insurance.

The policyholder was Bridges Healthcare. There were 4 drivers named in addition to Ms Clements:

> Penny Parish, sales assistant, residential home
>
> Scott Tulley, sales assistant, residential home
>
> Spencer Barton, company director, advertising
>
> Richard Clements, consultant, residential home

The Class of insurance is Class 2 which is specified in the certificate as:

> "Use for Social Domestic & Pleasure Purposes and for the business of the Insured or Spouse and his/her employer or partner."

13. Alliance insured the Land Rover between 16 January 2010 and 15 February 2010. The Policy Holder was Ms Clements and the named drivers were as above but with the omission of Penny Parish.

The insured Use is described as

> "For social, domestic and pleasure purposes (including commuting) and personal business use by the policyholder and or spouses and civil partner and business use by any other driver"

14. The proposal form records that the Land Rover was to be kept "off road".

15. Ms Clements was a director of Bridges Healthcare Limited. Mr Barton was a director but was no longer providing services on the operations side by 5 October 2010. From HMRC records Ms Tulley and Ms Parish were not employees of Bridges Healthcare.

16. Ms Clements owned a Nissan Micra car throughout the years in question.

Use of the Land Rover

There is no contemporaneous record of the car use. No logs relating to the use of the Land Rover were produced by Bridges Healthcare. Mr Trantom of the finance department of Bridges Healthcare said no logs existed. Mr Trantom joined Bridges Healthcare in September 2009. Mr Tranton advised HMRC that Mr Barton was no longer with the company in 2010

Ms Clements has produced some mileage records which we understand she created from other business records in February 2015. Ms Clements has not supplied a sample of those records to HMRC despite requests to do so.

There is no contemporaneous record of any prohibition being imposed by Bridges Healthcare on private use of Land Rover by Ms Clements.

The correspondence

17. By a letter of 20 July 2010 HMRC commenced a check of the employer and contractor records of Bridges Healthcare to ensure that PAYE and NIC had been operated correctly.

18. A visit followed on 5th October 2010 when HMRC met Mr Richard Trantom, of the finance department of Bridges Healthcare. The notes of the meeting show that Mr Trantom stated as follows:

> (1) Bridges Healthcare supplied health care assistants to aid people in their homes, getting them up in the mornings, assisting in going to bed, assistance with lunches etc. Some clients need nurses, and so many of the staff are nurses. There are 100 staff employed in the business. The company operates in the Bromley area.
>
> (2) Bridges Healthcare has a single credit card which was used to purchase various items including car fuel for the company car.
>
> (3) There was one company car used by Ms Clements the managing director and other staff. The vehicle was kept at Ms Clements home address or in the car park at the rear of the office building.
>
> (4) If private cars are used in the business the expenses are reimbursed out of petty cash.
>
> (5) No log sheets are kept for the use of the company car. There were no pool cars or vans.
>
> (6) The insurance records show the Land Rover as being kept at Ms Clements home address in order to secure a lower premium. The car is also kept outside the office in the car park.

HMRC explained that they considered the Land Rover was made available to Ms Clements, the conditions for pool car status were not met and a P11D for the car and fuel benefit should be provided.

19. A note of the meeting was sent by HMRC to Mr Trantom by letter on 20 October 2010 asking Mr Trantom to comment on the notes. If no comments were received it would be assumed Mr Trantom agreed with the content.

20. By Letter of 9 November 2010 Mr Trantom advised HMRC that:

(1) the insurance for the current year was mistakenly in the name of Ms Clements. It should be in the company's name as it was in the prior year.

(2) The car frequently stands outside Ms Clements home as the company is on 24 hour call and the Land Rover is used to deal with emergencies and Ms Clements quite often attends to these emergencies.

(3) Other personnel on call quite often stay at Ms Clements' home to be able them to use the Land Rover.

(4) The Land Rover is kept outside Ms Clements home as it would cause unnecessary delays if it was kept outside the office.

(5) The Land Rover was "a company car".

21. In a letter of 11 February 2011 Mr Trantom advised that the car is parked outside Ms Clements' house because that is where the "on call manager stays during the period they are on call. Records of usage have not been kept as it was not considered necessary as it was assumed the vehicle was a company vehicle and not used privately."

22. On 13 May 2011 Gorrie Whitson a firm of chartered accountants were appointed to act for Bridges Healthcare.

23. At a meeting with HMRC on 28 June 2011 at which Bridges Health care was represented by Mr Keith Upsdell an accountant at Gorrie Whitson, Mr Upsdell said:

(1) The Land Rover had been bought when Bridges Healthcare obtained a large contract with Maidstone hospital in 2008.

(2) At that time the Land Rover had been used as a pool car but since then Ms Clements' Nissan Micra had been used as the pool car and the mileage had increased from 35,000 to 100,000.

(3) There could be no benefit for Ms Clements from October 2007 to March 2009 for the Micra or the Land Rover. Mr Upsdell said Ms Clements had used the Land Rover from 2009.

(4) Mr Upsdell agreed to locate the insurance certificates to confirm that the Land Rover was available for use by other drivers.

(5) In relation to penalties for failure to make returns of the car benefit Mr Upsdell admitted the Company had failed to take reasonable care. HMRC officer agreed to calculate penalties on that basis.

24. Mr Upsdell wrote to HMRC on 8 August 2011 to say that:

> (1) since 2007 when the Maidstone hospital contract was obtained the Land Rover was used by staff to drive to the Maidstone hospital and Ms Clements drove her own Nissan Micra.
>
> (2) When the contract was lost in 2009 Ms Clements "started to use the Land Rover Discovery personally and allowed the Nissan Micra to be used by staff for local visits to patients." .."*..I understand that for 2008 and 2009 staff members were insured to drive the [Land Rover] for the Maidstone Contract. I would suggest therefore that Mrs Clements is charged for 2009/10 and 2010/11 for use of the [Land Rover] and the vehicle is treated as a pool car for earlier periods.*"

25. At a meeting on 16 September 2011 between HMRC and Mr Upsdell, Mr Upsdell said the company had no insurance records to show staff were permitted to drive the Land Rover but would try to ask the insurance company. He would try and get copies from insurers. HMRC indicated that if there was a company car benefit there would also be a car fuel benefit charge. Penalties should be assessed on the basis of failure to take reasonable care.

26. A note of the meeting was signed by K Upsdell on 19 September 2011.

27. At a meeting on 19 January 2012 Mr Upsdell:

> (1) Confirmed that the company had no details of the insurance cover for the Land Rover but the Land Rover had been sold.
>
> (2) Agreed to inform HMRC when and to whom it was sold.
>
> (3) Confirmed it was acceptable for HMRC to send the calculation of the tax and National insurance contributions to Mr Upsdell which was in the region of £10,000 before issuing an assessment.

28. A note of the meeting was sent to Bridges Healthcare and was signed by K Upsdell on 3 February 2012.

29. From the DVLA records we note the Land Rover was sold to an unrelated third party on 4th August 2011.

30. HMRC sent the computation relating to the Land Rover and the car fuel to Mr Upsdell on 5th March 2012. HMRC asked that form P11D be submitted in the current year up to when the Land Rover had been sold in September 2011 and asked for a copy of the form P11D for their records.

31. In a letter of 28 March 2012 Mr Upsdell questions the calculation of the tax and national insurance liabilities relating to the Land Rover of £10,814. This was based on income tax of £20,374, £21,249, £21,249 and £21,634 for the years 07/08, 08/09, 09/10 and 10/11. The charge for 07/08 should be reduced as the Land Rover lease agreement was signed on 7 January 2008. Mr Upsdell also questioned the income tax

figures which by his calculations should be £18,198. He asks how the figures of £21,000 are arrived at.

32. In a letter of 15 May 2012 to Mr Gibson of Gorrie Whitson HMRC accept the adjustment for 07/08 to reflect the date of purchase but confirm that the charge to tax is based on the list price of the vehicle and not the actual purchase price.

33. HMRC received a notification from Mr Gibson of Gorrie Whitson on 23 August 2012 that Bridges Healthcare was put into insolvent liquidation.

34. On 23 January 2013 Local Compliance Individuals and Public Bodies unit of HMRC write to Ms Clements and Shee &Co (who we suspect was Ms Clements' tax agent) in connection with a self-assessment check for 2010/11 attaching Regulation 80 assessments in relation to the Land Rover and car fuel benefit for the years 2007/8, 08/09, 09/10, 10/11. Mr Upsdell of Gorrie Whitson replied on behalf of Ms Clements and asserted that the last communication with the Inspector in connection with Bridges Healthcare was a letter of 18th April 2012 when he had queried the car benefit calculations and credit card items charged to Ms Clements. He says the "…*benefit position had never been finalised with the Inspector and subsequently the company went into liquidation.*".

35. There is a gap in the correspondence until July 2014 and a change in officers at HMRC. By 16 August 2014 the new caseworker has the paperwork pertaining to the Employer Compliance Review of Bridges Healthcare and sends a letter to Mr Upsdell which sets out the basis of the charges to income tax in relation to the Land Rover and car fuel. A copy of the letter was sent also to Ms Clements with another letter of the same date which indicates that a check is to be made into her return for 11/12 as the officer had discovered the omission of car and car fuel benefits for 10/11.

36. Mr Upsdell replied by letter on 8th September 2014. In that letter it was stated that:

> (1) The Land Rover was bought when Bridges Healthcare won a contract to supply nurses to Maidstone Hospital. Although he has no insurance details, as and when staff used the Land Rover they were temporarily put on cover.
>
> (2) "Ms Clements used to complete mileage records for all business use of this vehicle and is going back through her records to try to find them".
>
> (3) "Ms Clements did own another vehicle during the time that the land Rover was used, a Nissan Micra, and this was used by her for **most** of her personal journeys." [Our emphasis.]
>
> (4) "The main reason Ms Clements did not submit a P11D for the years in question was that she believed that the Land Rover was a Pool car and her personal expenditure on the credit card was being debited from her director's current account."

37. In a letter of 4 November 2014 Mr Upsdell:

(1) Supplied a summary of the sales ledger of Bridges Healthcare for the period 22 January 2008 to 10 March 2009 showing a list of invoices relating to the Maidstone hospital account. We note the list has very little detail as to which nurse was performing duties and whether they had their own vehicle or had to use the company car or public transport. Not all entries record the nurse engaged. None show the shift worked. None show emergency call out. None show Ms Clements attending in person.

(2) Asserted no mileage records have been found but it is hoped they were sent to the Liquidators;

(3) Stated Ms Clements confirms that the Land Rover was used during the period of the contract to transport staff to the hospital and that she used her own Nissan Micra for personal use.

We note the contract with Maidstone came to an end in 2009.

38. By a letter of 22 December 2014 HMRC sent to Mr Upsdell calculations of the liability in respect of the Land Rover and the car fuel because:

(1) No evidence had been provided to show the Land Rover was not available for Ms Clements personal use as no contemporaneous records had been produced of mileage or that the car was insured to carry nurses in the period covering the Maidstone hospital contract.

(2) Mr Trantom of Bridges Healthcare had confirmed to HMRC on 5 October 2010 and 11 February 2011 that no mileage records were kept for the Land Rover.

(3) The extract of the sales ledger does not show that the vehicle was used as a pool car and that it was not available for Ms Clements' use.

39. The letter also enclosed information relating to penalties and invited Mr Upsdell to provide any information relevant to the assessment of penalties.

40. Assessments were issued and Mr Upsdell on behalf of Ms Clements appealed against them on 12 February 2015. In support of the appeal, Mr Upsdell provided some reconstructed mileage records relating to the Land Rover for the period 2008 and 2011 which Ms Clements had reconstructed from Bridges Healthcare records. This had taken Ms Clements 25 hours. It is claimed that 57,597 miles had been covered during business use. When added to the 8,700 mile odometer reading when the Land Rover was acquired gave a total of 66,297 miles which is said to be the approximate odometer reading when the Land Rover was sold in 2011. The Schedule has some entries marked yellow. It is those entries which are said to relate to the land Rover use. We note that if these records were correct it is claimed in 3.5 years the Land Rover had been driven nearly 58,000 miles which would be double the expected number of miles expected to be driven as disclosed in the insurance proposal forms to RSA and Highway.

41. HMRC did not find the schedule as evidence that the Land Rover was not available for private use by Ms Clements or that it was a pool car particularly as it had been confirmed that the Land Rover had been parked outside of Ms Clements' home.

42. We note this assertion is inconsistent with the statement that the Nissan Micra was used as the company car after the Maidstone Hospital contract had been lost and Ms Clements used the Land Rover for her private use thereafter.

43. Mr Upsdell wrote to HMRC again on 31 March 2013stating that

> *"It should be noted that although the vehicle was kept either at Ms Clements' home address or in the car park at the rear of the office the mileage records previously provided show that the vehicle was used almost entirely for business purposes."*

We note this is inconsistent with earlier statements relating to the post 2009 use of the Land Rover made by Mr Upsdell and the acceptance that P11Ds were required for 09/10 and 10/11. We also note

44. On 30 April 2015 HMRC request among other things a sample of the business records from which the reconstructed mileage records were created by Ms Clements. The records were not produced owing to Ms Clements being too busy at work.

45. Mr Upsdell asked for the decision of the officer to be reviewed. The Review Officer upheld the decision of the assessing officer.

46. Mr Upsdell wrote to HMRC again on 16 July 2015 challenging the conclusion of the Review officer of HMRC that the car was not a pooled car. In particular the satisfaction of condition (e) of the definition. The following statements were made in this connection:

> (1) The reason the Land Rover was kept outside of Ms Clements' home was because of security concerns – it was not safe to leave the vehicle in the Sainsbury's carpark in Chislehurst as it is not secured by a barrier and so was exposed to theft or violence and because of concerns for the safety of the staff using the car approaching the car park from a dark area in the town centre.
>
> (2) Ms Clements allowed staff to stay at her home if early pickups were required and so Ms Clements' home was an extension of the business premises.
>
> (3) The Land Rover was frequently parked outside of Maidstone hospital overnight driven there by the nurses themselves.
>
> (4) "as you will be aware Ms Clements had a car of her own for private use, and when the Discovery was made available all insured users (including Ms Clements) were instructed that the car was not to be used for private purposes."

47. In the letter to the Tribunal Mr Upsdell stated

> *"It is our client's contention that the assessed benefit is incorrect as the Land Rover Discovery Vehicle was, at all times, used as a pool car and was parked at Miss Clements home for ease of use by nurses who regularly stayed at those premises, & for security*

reasons (refer to our letter 16th July 2015 at page 267 of the bundle").

Mr Upsdell refers to the authority of Gilbert v Helmsley 1981 TC 419.

48. Ms Bartup explained to the Tribunal that HMRC had reviewed the company's records and neither Ms Parish, Ms Lewer nor Mr Tulley were employees of Bridges Healthcare.

The facts

49. We did not have the benefit of Ms Clements oral testimony, nor any witness evidence of any nurses who stayed at the home of Ms Clements and so base our conclusions of fact on the statements made in meetings and in correspondence by Mr Trantom of Bridges Healthcare, the statements made by Mr Upsdell representing Bridges Healthcare and subsequently representing Ms Clements, namely:

(1) The land Rover was bought by Bridges Healthcare on 16th January 2008 so no benefit could accrue prior to that date.

(2) The Land Rover was sold to an unrelated third party on 4 August 2011 and so no benefit can accrue beyond that date.

(3) The earliest insurance proposal document shows Ms Clements as the insured and only she and four named drivers may use the Land Rover. None of the persons named are described as nurses. There were no ad hoc cover-notes for nurses.

(4) The insurance cover for the years in respect of which proposal documents and insurance certificates exist is not limited to business purposes only. The Insurance Certificates as do exist show that social, domestic and pleasure are the first mentioned uses.

(5) The premium paid to RSA for 2008/9 was reduced by a No Claims Discount of Ms Clements which is suggestive RSA expected Ms Clements was to be the main user of the Land Rover.

(6) We find there was no prohibition on Ms Clements the managing director of Bridges Healthcare from using the Land Rover for personal use. The only occasion when it was asserted that Ms Clements was prohibited from using the Land Rover for private use was in Mr Upsdell's letter of 12 February 2016 to this Tribunal. This does not ring true and is inconsistent with a number of statements mentioned below and we do not accept it.

(7) If the Land Rover was normally parked outside of Ms Clements home for use in emergencies and was needed the following day for use by staff it seems likely that Ms Clements would not have driven the Land Rover to the office for use by staff the following day. That journey would be personal use.

(8) Although other staff may have used the Land Rover from time to time it was available for private use of Ms Clements throughout. In reaching

this conclusion we rely on Mr Trantom's confirmation at the meeting on 5th October 2010 that no mileage records were kept in relation to the Land Rover, that there were no pool cars, that he accepted the requirement that Ms Clements should be completing P11Ds in respect of the Land Rover and fuel benefit, that Ms Clements was the first named driver in the insurance certificates and proposal form, that the RSA premium reflected her own no claims discount, that Social and Domestic Use was insured.

(9) We find it improbable that the Land Rover was habitually kept at Ms Clements' home for 24/7 on call emergencies which were attended to by Ms Clements regularly and other nurses who stayed at her home to enable them to do so. There were over 100 staff engaged in the business. We would have expected an "on-call" rota of nurses and the Land Rover be stationed outside the on–call nurse's home to enable the emergency to be covered. We would also expect an appropriately worded insurance cover note to accommodate the use by many nurses and we would not have expected the no claims discount of Ms Clements to play any part in determining the premium. The idea that ad hoc cover notes would be provided for the nurses providing 24/7 on-call cover is not credible. We have not seen any ad hoc cover notices.

(10) We found it impossible to see how nurses could be provided to cover successive shifts at the Maidstone hospital if they drove themselves to the hospital in the Land Rover. If nurse A drives herself to the hospital for the first shift the land Rover is at the hospital. If nurse A drives herself home how does nurse B get the land rover to drive to the hospital? If nurse A drives to nurse B's home how does nurse A get home? How could successive shifts be covered? We find it much more likely that nurses drove themselves using their own vehicles and were reimbursed for doing so as explained by Mr Trantom at the 5th October 2010 meeting or used public transport.

(11) It is quite possible that nurses did on occasions use the Land Rover but if their use of it had been regular we would have expected mileage records to be kept. We would also have expected generic insurance cover.

(12) Mr Upsdell's assertion in his letter to the Tribunal dated 12 February 2016 that Ms Clements was prohibited from using the Land Rover for her personal use is inconsistent with:

(a) the terms of the insurance which permits personal use by Ms Clements,

(b) Mr Trantom's implicit confirmation in October 2010 that a P11D is required for Ms Clements for the Land Rover and the fuel,

(c) the statement in Mr Upsdell's letter of 8 August 2011 that Maidstone Hospital contract was lost in 2009 since when Ms Clements Nissan Micra was being used as a pool car and Ms Clements was using the Land Rover for personal use and that

car and fuel benefit should be assessed on Ms Clements for 2009/10 and 2010/11.

Burden of Proof

50. It is for the taxpayer to demonstrate that returns filed are correct. The standard of proof is on a balance of probabilities.

Car benefit

51. In the notice of appeal Ms Clements asserts that her returns are correct and complete and that no return was required to be filed by her in respect of use of the Land Rover and fuel used in connection with the Land Rover because it was a pooled car for each of the years in question because each of the 5 conditions in section 167(3) ITEPA 2003 is satisfied.

52. If a car is in a car pool section 167(2) provides that it is treated as not being available for private use of any of the employees and is not treated as an employment related benefit.

53. Section 167 says that for a car to be in a car pool for the use of the employees of an employer in a year, five conditions must be satisfied. Turing to each of the five conditions in section 167(3):

54. (a) "the car was made available to, and actually used by, more than one of those employees."

It was claimed nurses used the Land Rover. We had no evidence from nurses that they had used it. We had no evidence that any nurse could have driven the Land Rover lawfully. It was not claimed that the four named drivers in the insurance proposals and certificates, none of whom were nurses, used the Land Rover. We had evidence that the insurance premium in the year 2008/9 was determined by reference to Ms Clements' prior no claims discount and that indicates the insurance company expected Ms Clements to be the main user. We had no contemporaneous record of use. Ms Clements reconstruction was inadequate and as sample documents from which the reconstructed records were made had not been made available to HMRC so we could not verify any statement contained in them.

We find that this requirement is not satisfied as the Land Rover was made available to and was driven by Ms Clements and was not available to other employees.

We were referred to the case of Gilbert (Inspector of Taxes) v Hemsley 1981 STC 703 in which Vinelott J upheld the General Commissioners' decision that a car used by Mr Hemsley was not made available to him for his private use as home was regarded as his usual place of business because his duties required him to travel to various sites and the terms on which the car was given included an oral statement that he was not expected to use the car for private use. As we had no proof of Ms Clements' home being used as an office or by nurses, this case is of no assistance.

55. The second condition is:

(b) "the car was made available, in the case of each of those employees, by reason of the employees' employment."

This is not satisfied as although the Land Rover was available by reason of Ms Clements' employment with Bridges Healthcare, the Land Rover was only available to Ms Clements.

56. The third condition is

(c) "The car was not ordinarily used by one of those employees to the exclusion of the others."

This condition is failed because we find the Land Rover was ordinarily used by Ms Clements as there is no contemporaneous evidence that is was ordinarily used by others.

57. The fourth condition is

(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,"

This condition is failed because there must be more than one employee in the class of employees using the Land Rover and because we consider that even if Ms Clements used the Land Rover for business journeys she also used it to cover her usual commute to her office as it was normally parked outside her home. That commute is private use and cannot be regarded as incidental. We were referred to the case of Alexander Judd v The Commissioners for HMRC 2015 UKFTT 0618 which deals with the ownership of another car as being an irrelevant consideration, See Paras 24 to 26 with which we would agree.

58. The fifth condition is:

(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 car was normally parked outside Ms Clements residential home. In Mr Upsdell's letter of 16 July 2015 it is claimed that the use by nurses of Mrs Clements home made her home an extension of the office premises.

There is no evidence of nurses lawfully using the Land Rover and no evidence that burses stayed at Mrs Clements' house. We reject Mr Upsell's suggestion. We find this condition (e) is not satisfied.

59. We dismiss the appeal against the assessment in respect of car benefit for the years 2009/10 and 2010/11. In relation 2008/9 we dismiss the appeal to the extent it relates to the benefit for 2008 for the period from 16 January 2008. In relation to 2011/12 no benefit can arise after the disposal of the Land Rover in August 2011.

Car Fuel

As mentioned above, if a person is chargeable to tax in respect of a car by virtue of section 120 ITEPA and fuel is provided for the car, the "cash equivalent of the benefit is treated as earnings from the employment for that year. Further, fuel is treated as provided for a car if a credit-token is used to purchase the fuel (see section 149(3)(b)). The cash equivalent is zero if the employee is required to make good the expense and does in fact make good the expense (see section 151 ITEPA 2003). Under section 92(1) a credit token includes a credit card.

Mr Trantom confirmed that Ms Clements had the use of the company's credit card and used the card to purchase fuel in a meeting on 5th October 2010.

The signed note of meeting between HMRC and Mr Upsdell on 19 January 2012 makes it clear that HMRC were treating the car fuel payments on the credit card separately from the balance on the director's credit card. Mr Upsdell indicated that that was helpful as Bridges Healthcare especially as the company was paying the fuel bill.

Further as Ms Clements does not accept the Land Rover has been used for private use it would be inconsistent if she had reimbursed Bridges Healthcare for any sum referable to car fuel.

60. We accordingly dismiss the appeal against the assessment in respect of car fuel benefit.

Discovery assessment

61. HMRC's initial enquiry into Ms Clements' returns was in relation to 2010/11. Assessments were subsequently raised under section 29 Taxes Management Act 1970 in relation to 2008/9, 2009/10 and 20011/12. We asked HMRC to indicate the reasons why the discovery assessments could be made as the taxpayer was not present but might have raised the issue if Ms Clements had been present.

62. We were referred to section 29 which operates where income which ought to have been assessed has not been assessed, a further assessment is permitted to make good a loss to the Crown. No assessment is possible if the taxpayer had adopted usual practice in filing the returns (which is not the case here). Nor can assessment be made where a taxpayer has made or delivered a return for a year unless one of two conditions is satisfied under section 29(3).

63. The first condition is that the situation has been brought about by the careless or deliberate conduct of the taxpayer or a person acting on the taxpayer's behalf (section 29(4)).

64. The second condition applies if the officer of HMRC cannot reasonably be expected to have been aware of the deficiency in tax from the information delivered by the taxpayer in the taxpayer's returns, claims made, information in documents produced by the taxpayer or from information the existence of which could

reasonably be expected to be inferred by the officer from the information and documents supplied by the taxpayer (section 29(6)).

65. HMRC consider that the taxpayer acted carelessly in failing to return the car benefit because the Land Rover was made available to her by reason of her employment and it was normally kept at her home address which would have resulted in her using the Land Rover for her daily commute. Further Ms Clements did not take any professional advice in relation to the benefit and was accordingly careless.

66. We noted the correspondence showed that on 8th August 2011 Mr Upsdell wrote to HMRC proposing that P11Ds be prepared for the car benefit for 2009/10 and 2010/11.

67. HMRC wrote to Mr Upsdell on 5th March 2012 indicating that P11Ds were required for the year 2010/11 up until the date of disposal in August 2011.

68. No P11D had been submitted for the year 2008/9, 2009/10, 2010/11 nor 2011/12. Ms Clements returns for each of those years was received on the following dates:

Year	Date received
2008/09	29 October 2009
2009/10	2nd November 2010
2010/11	1st May 2012
2011/12	2nd August 2013

69. Both 2010/11 and 11/12 were filed after it was agreed a benefit should be returned in respect of the Land Rover.

70. The taxpayer did not provide any information to HMRC from which an officer could infer the existence of the car benefit for 2008/9 and 2009/10.

71. We find the first condition in section 29(4) is satisfied for 2010/11 and 11/12 and that the second condition in section 29(5) and (6) is satisfied in relation to 2008/9 and 2009/10 and that the assessments were validly made.

Penalties

72. HMRC assessed the penalties on the basis that the taxpayer failed to exercise reasonable care.

73. As set out above, penalties are imposed under Schedule 24 Finance Act 2007. Penalties are determined by percentages of the underpaid tax. The percentages are affected by the nature of the error- careless or deliberate, whether the disclosure of the

errors were prompted and the degree of assistance provided by the taxpayer in explaining the situation, helping to quantify the liability and giving access to records to verify the liabilities.

74. HMRC has assessed the penalty on the basis that:

(a) the errors were disclosed to HMRC through prompting rather than voluntary disclosure.

(b) the errors were careless but were not deliberate because Ms Clements believed the Land Rover was a pool car and failed to obtain professional advice.

75. In consequence HMRC assess the penalty range as between 15 % to 30%.

76. We consider that disclosure was prompted and that the behaviour was careless for each of the four years concerned because for 2008/09 and 2009/10 Ms Clements did not take professional advice and for 2010/11 and 2011/12 Ms Clements filed her return omitting the company car benefit and car fuel benefit after she or her agent had become aware of the liability as mentioned above.

77. We confirm the percentage range is the proper range of penalties.

78. Reduction in the penalties is allowed depending on the quality of the actual disclosure. HMRC calculated the reduction as follows:

(i) Telling but not fully admitting liability 15%.

(ii) Helping in the calculation but not providing documents to support the contention 20%.

(iii) Giving access to documents to verify claims - no mileage records were provided 15%.

Giving a total deduction of 50%.

79. Taking each element in turn and regarding the behaviour of Ms Clements and her advisers:

(i)Telling HMRC about the inaccuracies but not fully admitting the inaccuracies. We would agree there has been no admission as all four years assessments have been the subject of this appeal, some information has been provided but there are many inconsistent statements about use of the Land Rover and the Nissan Micra.

(ii) Helping to quantify the liability. HMRC consider that they received assistance in relation to the car fuel which we accept but we consider that inadequate information was provided to support the claim of no personal use of the Land Rover. All of the contemporaneous evidence pointed to the Land Rover being used for personal and social use although it may have been used for business on occasion that is insufficient. Repeated requests were made to obtain the insurance certificates, no ad hoc

certificates were ever produced for nurses' use of the car, and no records to support the reconstructed mileage records were ever produced despite repeated requests. No witness evidence has been made available from any of the nurses. No information or assistance was volunteered.

Giving documents to support the historic use of the car. The problem with the non provision of documents to support the claims for relief are relevant to this category of behaviour but as liability for car fuel benefit is dependent on the liability for car benefit and no documents were produced voluntarily, none without frequent requests and some were never produced at all we consider the smaller allowance made by HMRC for this behaviour than for Helping is justified.

80. We confirm the percentage reduction (50%) is reasonable. That percentage is then required to be applied to the lower range penalty figure and the resulting value is deducted from the maximum penalty, giving rise to 22.5% penalty percentage.

81. HMRC found there were no special circumstances giving rise to further adjustments and there were no grounds to suspend the penalties as Bridges Healthcare is no longer trading and the employment of Ms Clements terminated accordingly. We agree that there were no special circumstances and that this is not an occasion where suspension is appropriate owing to the fact that future improvement in behaviour is not possible as the particular employment has ceased.

82. We therefore confirm the penalty in the amounts assessed. The taxpayer's appeal against penalties is dismissed.

83. 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.

HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 29 FEBRUARY 2016