[2021] UKFTT 0211 (TC)

TC08161

NICs – whether payments to employees who chose a cash allowance instead of a company car on the basis that they would use a non-company car meeting stated requirements for business use were "earnings" - yes – application of Owen v Pook and Donnelly v Williamson - is the disregard of "qualifying amounts" limited to payments of relevant motoring expenditure – yes – were the payments relevant motoring expenditure – no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/03733

BETWEEN

LAING O'ROURKE SERVICES LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER

The hearing took place on 23-25 February 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the circumstances of the pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Jolyon Maugham QC and Ms Georgia Hicks, instructed by Deloitte LLP for the Appellant.

Mr Akash Nawbatt QC and Mr Joshua Carey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. The Appellant ("LOR") appeals against the decisions issued by the Respondent ("HMRC") under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 that LOR paid the correct amount of primary and secondary National Insurance Contributions ("NICs") on payments made to employees in the period from 2004/2005 to 2017/2018 under a car allowance scheme ("the Scheme") and was not entitled to any refund of the NICs. In essence, the Scheme allowed employees who were entitled to receive a company car the choice of payments under the Scheme ("the Payments") instead of the company car, provided that the employee had a car available for use which met specified requirements.

2. In summary, LOR claimed that an amount of the Payments falls within what regulation 22A of, and paragraph 7A of Part VIII of Schedule 3 to, the Social Security (Contributions) Regulations 2001 ("the 2001 Regulations") refer to as the "Qualifying Amount" ("QA") and, as a result, should not be subject to NICs. HMRC say that QA is limited to payments of "relevant motoring expenditure" ("RME") defined in regulation 22A and the Payments were not RME. LOR say that if the QA disregard for NICs is limited to payments of RME that disregard still applies as the Payments are RME.

3. Alternatively, LOR say that the Payments were not "earnings" for the purposes of NICs.

4. The quantum of the claim has not yet been determined and is not a matter for this decision. The parties have agreed that if LOR succeeds in its appeal, the quantum will then be addressed by them.

BACKGROUND

5. On 29 November 2010 the Appellant wrote to the Respondents attaching a protective claim for a reimbursement of Secondary NICs on payments made to employees for the use of employee-owned vehicles from 2004 – 2010 inclusive following the decision of First-tier Tribunal in *Cheshire Employer and Sills Development Limited* (previously *Total People Limited) -v- The Commissioners for HM Revenue and Customs* [2010] UKFTT 379 (TC).

6. Correspondence between HMRC and LOR followed and in a letter dated 31 July 2018 LOR sought to extend the claim for a refund to later years.

7. It was agreed between the parties that a representative sample of employees would be chosen for decisions to be made by HMRC under Section 8 Social Security Contributions (Transfer of Functions, Etc) Act 1999 ("Section 8").

8. On 18 April 2019 HMRC issued 17 decisions to a sample of LOR employees under Section 8 declining to refund NICs paid in relation to Payments made during the tax years 2004/2005 to 2017/2018.

9. On 16 May 2019 LOR wrote to HMRC and sought to appeal against the section 8 decisions. It was noted that the appeal was in respect of the entirety of its population of earners in respect of which protective refund claims were made.

10. On 19 August 2019 HMRC wrote to LOR and confirmed that their view of the matter was set out in the correspondence dated 18 April 2019.

11. On 29 August 2019 HMRC issued a review conclusion letter to LOR, confirming the decisions made on 18 April 2019.

12. A Notice of Appeal was submitted to the Tribunal on 24 September 2019 in which LOR seeks repayment of £2,228,892.04 of NICs, although as stated above quantum is yet to be determined.

13. LOR's appeal has been designated as a lead case under rule 18 of the First-Tier Tribunal Procedure Rules and the appeal of one other appellant is stayed behind this appeal. On 9 December 2020 an application by HMRC to stay the appeals of three other appellants behind this appeal was refused by the Tribunal.

THE EVIDENCE

14. The evidence consists of a bundle running to 523 pages, separate spreadsheet exhibits attached to the Witness Statement of Mr Waller and the oral evidence of Mr Waller, who is the Head of Fleet at LOR. There are also two separate HMRC spreadsheets considering business mileage, which were amended during the hearing to reflect updated information about business mileage of LOR employees using fuel cards as well as information from separate claims for business mileage fuel payments.

15. Some of the spreadsheets provide evidence about all of the employees taking part in the Scheme; for example, identifying all of the job descriptions of those eligible for the Scheme, or showing the percentage of employees in the Scheme driving more than 20,000 business miles or driving zero business miles. Some only provide details such as business mileage for the employees to whom the Section 8 notices were issued. Some provide analysis of the Payments made to, and business mileage driven by, a representative sample of participants in the Scheme. One spreadsheet sets out the amounts taken into account by Mr Waller in a review of the Scheme in 2019.

THE BURDEN OF PROOF

16. LOR bears the burden of proof. The usual civil standard of balance of probabilities applies.

STRUCTURE OF THIS DECISION

17. There were two distinct areas of this case on which Mr Nawbatt and Mr Maugham made extensive submissions: the approach to the evidence and, in particular, the evidence of Mr Waller; and the substantive issues. I have set out this decision as follows:

(1) Addressing the submissions made about, and deciding the correct approach to, the evidence and making findings of fact;

(2) Addressing the submissions made about, and deciding the correct approach to, the application of the law to those facts.

18. More than two days were taken up with submissions from Mr Nawbatt and Mr Maugham. For the sake of brevity I only record the main points made by them in this decision.

FINDINGS OF FACT AND REASONS FOR THE FINDINGS

HMRC's submissions about the evidence

19. Mr Nawbatt submits that it is unclear how LOR can say that Mr Waller is the best placed person to act as witness. He does not work within the Department who are ultimately responsible for the Scheme and says that he has only been involved "more recently" in assessing it. He had not been asked to look at it before 2016. However, the 2016 and 2017 reviews were not mentioned in his Witness Statement, no documents relating thereto have been produced and these reviews were raised for the first time in oral evidence at the hearing. The spreadsheet provide by him explaining the review in 2019, entitled "car versus car allowance comparison", and listing various costs of owning and running a car, had only been produced after the appeal years. This evidence therefore should not be treated as showing the design of the Scheme despite Mr Waller's statements in his Witness Statement to that effect.

20. Mr Waller has no personal knowledge of when the Scheme was first introduced, how it was designed, or when the rates were set or how they were calculated. Mr Nawbatt submits

that personal knowledge is not necessarily required but Mr Waller's evidence must be based on sources of information and yet no such sources have been identified.

21. Cross-examination showed inaccuracies in Mr Waller's Witness Statement; for example, what he had described as eligibility for the Scheme was in fact eligibility for a company car. Mr Waller's oral evidence showed his limited knowledge of the Scheme; for example, he could not explain when or why it was decided that all employees at Grade 4 and above would need a car to fulfil their roles. His lack of personal knowledge of the Scheme and his inability to identify other sources of information must be taken into account.

22. Mr Nawbatt submits that the evidence of Mr Waller was challenged, particularly regarding the purpose of the Scheme. He submits that some of Mr Waller's answers were evasive and were effectively submissions. The principles of *Gestmin SGPS SA v Credit Suisse (UK) Ltd and Anor* [2013] EWHC 3560 should be applied.

23. Mr Nawbatt made detailed submissions about the assumptions that have been made by Mr Waller in conducting his review of the Scheme. He also submitted that account should be taken of the fact that a document entitled "FAQs", which describes the allowance as being genuinely intended to reimburse employees for costs associated with using their private vehicle for business purposes, was only produced after the appeal was made. Mr Nawbatt submits that the fact that a review was carried out into the operation of the Scheme after the periods under appeal cannot mean that the design was appropriate at an earlier point in time as this is looking at the issue through the wrong end of the telescope.

24. Mr Nawbatt submits that LOR would have been aware of the need to preserve and obtain evidence when their claim was first made in 2010 and there should be relevant contemporaneous evidence held by the LOR Rewards Team in respect of the period from 2010 onwards at least. HMRC had requested relevant contemporaneous documentation and have put LOR on notice that it would need to establish that the Payments were not earnings and were not RME. He submitted that it "beggars belief" that there are no documents showing how the LOR Rewards Team operates the Scheme and how the reviews in 2016 and 2017 took place. Mr Nawbatt relies upon *Wetton v Ahmed* [2011] EWCA Civ 610 and *Hannah and Hodgson v HMRC* [2021] UKUT 0022.

25. In response to a submission by Mr Maugham that HMRC should have provided expert evidence, Mr Nawbatt submitted that there was no such obligation or expectation. The criteria in caselaw were not met for such an expectation to arise given that there is no established body of opinion on the relevant matters.

LOR's submissions about the evidence

26. Mr Maugham submits that if HMRC had thought that there was appropriate material relating to the car policy its design or its reviews, such material could have been requested by HMRC. Similarly, account should be taken of the fact that HMRC chose not to produce expert evidence that Payments were higher than the cost of the obligations LOR imposed on its employees by way of business travel, although Mr Maugham recognises that it is for LOR to prove its case.

27. Mr Maugham submits that any assertions made by HMRC challenging the credibility of Mr Waller are misconceived and inappropriate. The credibility of a witness can only be called into question, based on the absence of documentary evidence, where: their credibility is a relevant feature of the case; specific documents exist and have been identified which have not been disclosed despite request and/or are material to the issues in the case; and a positive case is being advanced by the other side, including some prima facie evidence that invites the drawing of inferences or the calling into question of credibility.

28. The Tribunal can only take into account a failure to call a relevant witness where there is a case to answer in relation to a finding which the Tribunal is asked to make. In such case the Tribunal is able to draw the inference, but is not obliged to do so. It can take into account any explanation as to why the witness was not called. The weight which the Tribunal gives to the failure to give evidence is a matter for the Tribunal.

29. Even if another LOR person might have been able to provide evidence about the design of the scheme that does not mean that the weight given to Mr Waller's evidence should be reduced. There is no "best witness" rule.

30. Requiring evidence of the person who was originally responsible for designing the Scheme sets the bar impossibly high in a situation such as this where it was inherited some 20 years ago. In any event, the criteria set out in *Donnelly (Inspector of Taxes) v Williamson* [1982] STC 88 look at whether, throughout the material time, the Scheme was applied and managed in a genuine endeavour to produce equivalence between the employees' costs and the Payments. It is the intention of the Scheme and not the intention of the person who created it that is relevant. Mr Waller was, in fact, the best person to give evidence about this. There is nothing wrong with making assumptions and devising a broad brush scheme. Mr Waller's assumption that employees travel 25,000 miles, based on the average mileage done in company cars, should be respected.

31. The evidence showing LOR's current description of the Scheme should be taken into account as evidence about what it is intended for, given that the Scheme has not changed since 2004. It is specifically designed to cover identified costs given the conditions imposed for its operation. HMRC has not contended that the Payments do not equate to the costs described by Mr Waller and it was not put to him that the sums were overly generous. Mr Waller's personal experience as Fleet Manager should be taken into account in assessing his evidence about the likelihood that the employees receiving the Payments would have incurred finance or leasing costs on their own cars.

32. The fact that reviews took place and the amount of the car allowance did not change is powerful evidence that it was set at the appropriate rate to cover the costs of business travel in earlier years. This is in contrast to salaries which increased year-on-year, save for 2009/10, 2010/11 and last year. The Payments are therefore wholly unlike salary. Documents relating to the Scheme show that it and its terms were considered previously in 2006/07, 2008 and 2011.

33. The Payments were not a "round sum allowance" given the necessity to have a car available for use. Employees receiving the Payments had to provide evidence that the car meets specified criteria, that they maintain insurance for business use, that it is reliable and roadworthy and that they are members of road side recovery scheme. Therefore actual costs were assumed. Entitlement to Payments ceases if various criteria are not met (including evidence of insurance and maintenance etc.), if the employee loses their driving licence, or is banned from driving, and on termination of employment.

My overall assessment of Mr Waller's evidence

34. In summary, I found Mr Waller to be a credible witness: he did not dissemble, attempt to obfuscate, or otherwise give any indication of dishonesty. The issue that arose with his evidence was not one of credibility but one about the extent of his knowledge of the Scheme and the weight to be given to his evidence on various matters. He has made claims (for example, about the design of the Scheme) which, in essence, are more akin to statements of opinion than statements of facts as I now explain.

35. Some of the statements in his Witness Statement are inaccurate (for example, his description of eligibility for the Scheme was in fact eligibility for a company car which is not

identical; and his description of certain Scheme requirements failed to recognise that those requirements differentiate between those who do, and those who do not, drive business miles). In cross-examination Mr Waller recognised those inaccuracies which were put to him, although he could not always explain them, but he did not attempt to deny them or hide the facts.

36. I am therefore satisfied that the principles in *Wetton v Ahmed* and *Hannah and Hodgson* addressing credibility do not apply.

37. Mr Waller's evidence is not a paradigm example of evidence to which the principles set out in *Gestmin* by Legatt J, apply. Although his team carry out various checks required under the Scheme (such as checking employees' driving licenses and that annual inspections of employees' cars more than 6 years old are submitted), and approve makes of cars as falling within the Scheme requirements, he has only been involved in considering the costs of operating a car for one or more reviews of the Scheme in recent years. The issues with his evidence therefore are not primarily ones of memory. They are more fundamental and concern the extent to which he has sufficient knowledge to make some of the statements contained in his Witness Statement.

38. As noted, there are several inaccuracies in his evidence. I am satisfied that those inaccuracies reflect the fact that he does not, and has not needed to, engage with the details of the Scheme because he does not administer its application beyond certain documentary checks and car checks. His team administers some of the checks and he has carried out a costs exercise. Mr Maugham confirmed at the hearing that Mr Waller was not able to comment on the detail of any of the spreadsheets other than the one prepared by him in the context of the 2019 review. His evidence must therefore be considered in that context.

39. However, there are two subsidiary memory issues in this case. First, Mr Waller has carried out a review in 2019 which took place after the appeal years. In 2019 the Scheme's requirements fundamentally changed – a new term was introduced that the Payments should be spent on a four wheeled vehicle. The changes to the Scheme are recent matters of which Mr Waller is likely to have been aware. He has not been involved in more than document and car checks before at least 2016 and therefore will not have been aware of many of the detailed variations in the Scheme requirements. I note the description of the typical process of producing a witness statement described in *Gestmin* (at paragraph 20). Mr Waller's Witness Statement has quite clearly been drafted with the significance of various issues in mind.

40. The second issue concerns corporate memory. I accept the evidence that there is no one available to provide evidence of the original design of the Scheme, given the time which has elapsed. The Scheme was inherited by LOR in 2001 and therefore is at least 20 years old. It is somewhat surprising that in the context of such a significant appeal LOR did not provide evidence from someone in the LOR Rewards Team who administers the scheme and is involved with decisions such as those concerning the offer of the Scheme to employees in job grades 1-3. Such evidence may have assisted in providing greater clarity about the criteria used for determining which of those employees was offered the Scheme. It may have been helpful to have heard from someone with more knowledge of its operation from earlier years. However, I do not make an adverse inference as a result. As said, I accept that as the Scheme was inherited in 2001 there is no one available to describe the original design the scheme. There is no implication in this case that witnesses have not been called because there is something to hide.

41. I agree with Mr Maugham's submission that there is no "best witness" rule. I also agree, for the reasons explained, that the issues regarding the Mr Waller's evidence go to its weight. The result of my conclusions about Mr Waller's evidence is that where Mr Waller's evidence conflicts with the evidence in Scheme documents I have relied on the Scheme documents. I

have also carefully considered the context and basis of other statements made by him, as I explain in the findings. I have indicated where a finding is made on the basis of Mr Waller's evidence alone.

42. Another issue raised by Mr Nawbatt concerns the lack of evidence regarding reviews said to have taken place in 2016 and 2017. Although Mr Waller was involved in the 2016 and 2017 reviews, LOR has not provided any evidence beyond Mr Waller saying that the reviews concluded that no change was required to the Scheme. He has not provided any spreadsheets, calculations or reports which were produced at that time. I am more inclined to make an adverse inference as a result of that lack of evidence, given that HMRC have repeatedly asked for evidence of reviews. However, in this case I have not done so. For the reasons I explain below, the evidence provided by LOR is insufficient in itself to discharge the burden of proof on it, without reference to any adverse inferences.

43. I am satisfied that there was no obligation on HMRC to provide expert evidence about car costs in this case. The burden of proof rests on LOR. In addition, as Mr Nawbatt submitted, the criteria set out at paragraph 44 of *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 are not met.

44. Later in the decision I address Mr Maugham's submissions about matters such as the implications of changes to Scheme terms, reviews and the lack of change in the rates set for the Payments.

Findings of fact

General

45. Laing O'Rourke is a multinational construction and engineering company. Most of its projects are carried out in the UK. It employs more than 8,000 people.

46. The head office is in Dartford, Kent. The public transport links to the office are poor and most employees going there use a car to do so. LOR also has four permanent offices in St Neots, Leeds, Manchester and Worksop.

47. The Scheme was inherited by LOR when it acquired Laing Construction in 2001. There was no evidence from Mr Waller or otherwise about the original design of the Scheme. It is not known when the Scheme was originally set up.

48. It is common ground that the cars driven by the participants in the Scheme are "qualifying vehicles" for the purposes of the relevant legislation.

Staff categorisation and business mileage

49. Different employees are offered different options for transport. LOR operates a fleet of vans which are made available to employees. The fleet vehicles are made available to "operatives" – employees paid weekly and who are site - or depot - based manual workers. They need to carry equipment, materials or tools to various locations. This appeal does not concern the fleet.

50. Other staff fall into one of eight staff grades. Within those grades staff may be categorised as fixed location staff, site-based staff, or roving staff.

51. Fixed location staff work from a permanent office location and their business mileage will vary considerably. Those at lower grades, for example in payroll, will rarely do any business mileage, whereas those in higher grade such as design staff may be more regularly travelling.

52. Site-based staff will be allocated to a particular site and will include staff such as project leaders. The sites are often in places with poor transport links

53. Roving staff move around the country to consult on specific matters or troubleshoot.

54. Contracts for staff with a fixed location state that they "may be required to work at, or relocate to, such other office location as may reasonably be requested". Contracts for staff who are site-based or who are "roving" staff contain a clause stating "you will be required to transfer from one project site/location to another as may be required by the Company from time to time".

55. The amount of business travel each employee completes varies hugely within the categories of staff and between roles. This even applies to roving staff who are specialists said to move around the country to "troubleshoot". For example, one roving specialist in the sample only drove 843 miles per annum whereas another drove nearly 29,000 miles in one year. Even within a role a person's travel can vary hugely from one year to the next; for example, one employee in the sample travelled more than 7300 miles per annum on average between 2013/2014 and 2016/2017, but no business miles in 2017/2018. These are not isolated examples within the Scheme participants. Indeed, it is just that variability which Mr Waller says means that the Scheme does not apply any modification to the rates of the Payments made to the participants. I return to the issues surrounding business mileage later in these findings.

Eligibility for the Scheme

56. The Scheme document for 2008 shows that staff at grade 1 were entitled on a business need basis only to a company car but not to participate in the Scheme. Mr Waller explained that most of the employees in those roles do not need to travel. Those who do need to travel are assessed on a case by case basis. He said that from 2010 onwards employees at job grade 1 were eligible for the Scheme on a role by role basis.

57. The Scheme documentation shows that staff at grades 2-3 in specified roles were entitled to a car or to participate in the Scheme. Other staff in those roles needed to show business need for a company car but had no choice of the Scheme. Business need was described in the 2008 Scheme guide as 8000 business miles per annum.

58. Staff in graduate schemes and job grades 4 upwards were all entitled to a company car or to participate in the Scheme automatically. Job grade 4 includes roles such as the senior engineers and architects. Job grades 5 and 6 are managerial and consultant roles. Job grades 7A and 7B are heads of departments and leaders such as project leaders and planning leaders. Job grade 7E is for a higher pay grade level of heads of departments and leaders. Job grade 8 is for the top executive positions within the company, such as the Finance Director. Within job grades 4 to 8 car use will be unpredictable and varied.

59. Only those eligible for a company car may be offered the Scheme alternative, but not everyone offered a company car can participate in the Scheme. For example, those unable to access a car to use for business mileage (and for a short period explained below those without a car registered in their name), or those without insurance would not qualify for the Scheme.

60. Scheme documents draw a comparison for employees between the advantages and disadvantages of taking a company car or participating in the Scheme. The advantages identified for the Scheme are that employees have more flexibility over choice of car; in particular, they can use people carriers or automatics which would not be provided as company cars, and they can utilise an existing car so long as it meets the Scheme criteria.

The Payments

61. Payments made under the Scheme are determined solely by reference to job grade, not staff category or mileage driven. However, for each grade there is an assumed level of car which an employee must have available for use in order to qualify for the Scheme. For those able to participate in the Scheme in grades 1-3 and through the graduate scheme the Payments

were £4000 per annum. At job grades 4-5 the Payments were £5000 per annum; at grade 6 £6000 per annum, at grade 7 £7500 per annum and at executive level £10,000 per annum. Those amounts have not changed at any point through the appeal years.

62. The Payments are made to employees monthly in arrears. There is no minimum business mileage requirement or overall minimum mileage requirement.

63. Mr Waller said that the lack of a minimum mileage requirement is because the mileage a person travels can vary hugely year to year and the system would be administratively unworkable to operate the scheme if the amount paid was based on mileage. However, there is detailed bookkeeping carried out by LOR. They have been in a position to identify in the spreadsheets provided as evidence the range of mileage driven by participants in the Scheme in different years as a result of the separate business mileage claims and fuel card use. I therefore find that the assertion of any adjustment reflecting mileage being administratively unworkable is not supported. Given that employees will make business mileage claims I find the evidence is insufficient to show that it would be administratively unworkable to review mileage for each employee on, say, an annual basis.

Fuel

64. Non-operative staff who are not eligible for the company car or the Scheme, but who have to undertake occasional travel, are able to claim business mileage for the use of their own car if permission to do so is granted by their manager. Such a person would be paid a higher mileage rate for business mileage in their own vehicle than was paid to employees with a company car or participating in the Scheme. A mileage rate guide attached to the 2008 scheme document shows that an employee who did not participate in the Scheme or receive a company car did not receive the full HMRC Approved Mileage Allowance Payments ("AMAPs") described later in this decision, but were paid a lower rate of 35p per mile for the first 4000 business miles in a tax year and 20p per mile thereafter.

65. I rely on Mr Waller's evidence and the implications of the tax wording in Scheme documents to find the rate payable to employees participating in the Scheme or with a company car were the HMRC advisory fuel rates described later in this decision.

66. Historically, some employees were provided with a fuel card to claim the cost of fuel. Those participating in the Scheme were able to use the fuel card for all journeys both business and private. The provision of fuel cards has been grandfathered for existing recipients, but ceased to be offered to employees many years ago. The particular relevance of the fuel cards in this case has been the provision of information regarding the business mileage for fuel card holders used in the spreadsheet evidence.

LOR's description of the taxation of Payments

67. The Scheme documents show that LOR has consistently treated the Payments as being fully subject to income tax in the hands of its employees.

68. Employees participating in the Scheme are advised that they can claim income tax relief (the MAR described later) on the difference between the lower advisory fuel rate, claimed separately by them for business miles, and the HMRC approved "AMAP" rate (described later).

Conditions of the Scheme

69. Mr Waller's description of the Scheme requirements does not pick up the variations in the Scheme throughout the appeal period and does not engage with some of the more detailed rules, which are relevant in the appeal. I make my findings about the Scheme requirements on the basis of the Scheme documents rather than Mr Waller's Witness Statement.

70. Throughout the appeal years employees were required to provide evidence to show that the car which they would drive:

(a) is registered in the UK or Eire;

(b) is right-hand drive;

(c) has at least four full-size seats;

(d) is reliable and roadworthy;

(e) is commensurate with the car they would be eligible for under the company car scheme

(f) if over 6 years of age passes an annual approved condition assessment. Initially this was described by reference to reports by the AA or RAC, but in 2008 this was changed to a specific Duty of Care Vehicle Inspection report from Nationwide Autocentre

71. In 2004 all participants in the Scheme were required to have insurance covering them for business purposes and the vehicle had to be registered in the UK in the employee's name. The requirement to be the registered keeper was removed and the insurance requirement was modified by the time of the terms drafted in November 2007 to have effect from 1 April 2008.

72. The 2004 and 2005 Scheme terms taken together with example offer letters from 2004 and 2005 show that at that time:

(1) The Scheme was described as being a car allowance in lieu of a company car;

(2) The employee was required to have a reliable and roadworthy vehicle available at all times which was appropriate for representing the Company and conducting its business;

(3) The employee must use their own transport for business journeys whenever it was economic from a business point of view to do so;

(4) Convertibles and commercial vehicles were not acceptable;

(5) The Payments ceased on termination of employment, loss of the employee's driving license, for periods of unpaid leave or where there was abuse such as drawing fuel for unauthorised vehicles. Payments were ceased for any period when an employee was banned from driving.

73. Evidence has not been provided from later employment contracts to show that the description of the Scheme as being a car allowance in lieu of a company car had stopped.

74. By 2008 (as shown by the Scheme document taking effect from 1 April 2008) the requirement for the vehicle to be registered in the employee's name had gone. The terms of the Scheme now made some requirements limited to those employees required to undertake business mileage:

(1) Completion of a mandate enabling LOR to check their driving license. This was not altered until the 2017 Scheme guide which states that all employees eligible for the Scheme must provide evidence of their driving license and complete the mandate;

(2) the requirement to have a reliable and roadworthy vehicle;

(3) insurance covering the employee for use of the car used on LOR business;

(4) evidence of membership of a roadside recovery scheme.

75. Where the employee drove business miles they were specifically now required to use the car identified on their Scheme records.

76. The Scheme therefore distinguished at that point between those receiving Payments and required to drive business miles and those who were not so required. The Payments made to the employees did not adjust with reference to the differing requirements even though some would inevitably give rise to additional costs.

77. Some further classes of vehicle such as light goods vehicles were added to the list of non-permitted vehicles. Exceptions to the requirements for a car to have 4 seats and not be convertible were now permitted, depending on the merits of the case and the overall need for the vehicle to be suitable to represent LOR (and further classes of vehicle such as light goods vehicles were added to the list covered by this merit-based approval).

78. The 2008 Scheme terms also show that by that point the provisions dealing with termination of participation in the Scheme had changed. Instead of automatic termination LOR now reserved the right to cease Payments if an employee was on an extended period of unpaid leave, was banned from driving, their driving licence was revoked and they were required to drive business miles, they were in breach of the Scheme terms, they repeatedly failed to meet acceptable driving standards, they had been disciplined for abuse of LOR's business travel procedures; or the employee had been banned from driving. The Payments only automatically ceased if the employee's employment was terminated.

79. Therefore by 2008 an employee taking part in the Scheme could potentially continue to receive Payments even though their driving license was revoked if they were not required to drive business miles; or the employee was banned from driving. Therefore, by 2008 an employee could potentially remain in the Scheme even when they could not drive a car.

80. In 2011 the requirements for the car were increased to make reference to CO2 emissions and Euro NCAP ratings.

81. In 2017 the Scheme document specifically envisages the situation where the employee is not the registered keeper of the vehicle and notes that it may be necessary for LOR to check that the employee is authorised to use the vehicle. It states that the employee should be shown as the main driver of the car and not the named or additional driver. This is specifically stated to be because of the issues concerned with an illegal practice called "fronting".

82. The 2017 Scheme documentation maintained the reference to a requirement to undertake business mileage as a condition for a vehicle being reliable and roadworthy, membership of a road-side recovery scheme and business use insurance.

83. The terms of the Scheme changed significantly in the version dated October 2019. For example, that document requires the Payments to be spent on a vehicle with four wheels. The employee must have insurance covering them for business purposes and ensure the car is legal and roadworthy regardless of whether the car will be used for business mileage. However, as these amendments were not applied during the years in this appeal they are not taken into account by me for considering the NICs treatment of the Payments in the appeal years.

84. Similarly, I do not consider that the FAQs which are dated 6 August 2019 should be taken into account in my findings about the Payments made in 2004-2018. By this stage the appealed decisions had been issued and LOR's appeal had been lodged. The arguments in this case would therefore inevitably have been in the minds of LOR.

Monitoring of Scheme requirements

85. Evidence in the bundles shows that the requirements of the Scheme, such as an employee having a valid driving license, are checked when the employee is signed up for the scheme and

spot checks take place throughout. I accept Mr Waller's evidence that throughout the relevant periods in this appeal LOR conducted annual spot checks on 10% of the employees.

The 2019 review

86. As explained, the evidence does not show how the amounts payable under the Scheme were originally calculated. It was adopted in 2001 and operated by LOR from that point with no evidence of any reviews of the amounts paid until the review described by Mr Waller at the hearing in 2016. He has provided no details of that review or the one said to have been conducted in 2017, although he was involved in carrying out both. He said at the hearing that the 2016 and 2017 reviews were less detailed than the 2019 review. I find that there is insufficient evidence to provide any findings about those reviews which would have impact on this decision, beyond recognising that LOR considered the Scheme in 2016 and 2017.

87. Mr Waller led a review of the Scheme in 2019. He states that the Scheme "is designed to cover" various costs which are reflected in that review. However, Mr Waller recognised in cross-examination that he had no knowledge of how the Scheme was originally put together. "Design" is defined in the Oxford English Dictionary as "a plan or drawing produced to show the look and function of something before it is built or made; and the purpose or planning that exists behind an action or object." What Mr Waller was in fact describing was the approach adopted by him in conducting a review in 2019 and not the Scheme's "design". This is made clear when the details of the review and its assumptions are considered against the Scheme requirements and operation, as I now explain.

88. In conducting the 2019 review the following cost elements were taken into account by Mr Waller and his team:

(1) leasing a car;

(2) insuring it for business use;

(3) servicing it on a regular basis; and

(4) maintaining it in a roadworthy state.

89. As described above, the Scheme documents show that LOR give differing levels of car to differing grades of employee and the Scheme requires that the employees drive cars which are broadly consistent with those categories and commensurate with their position in the company, albeit with some added flexibility for vehicles such as people carriers.

90. Mr Waller has taken the cost of leasing that type of car as the starting point for his review of the Payments. There was some exploration of this basis at the hearing and Mr Waller recognised that leasing had become more common in recent years. He has used leasing costs as the starting point in his spreadsheet because of his experience as a fleet manager as all the LOR company cars are leased and because he perceives that leasing is commonly used as a way of affording a vehicle amongst the current workforce. I recognise in a scheme such as this the precise circumstances of each participant cannot be addressed. Most may be expected to incur finance or leasing costs. However, I consider that reference to leasing costs in 2019 cannot be evidence of any weight about leasing or other finance costs in 2004.

91. Mr Waller then adds further costs on the assumption that the employee drives 25,000 miles per year. That is based on the average mileage of the company cars. However, as Mr Waller recognised in the hearing, the company car is likely to be more attractive to those employees who undertake higher mileage. I therefore find little basis for the 25,000 mile assumption made by him to be considered relevant to an estimation of Scheme participants' costs.

92. Analysis of the provision of the car allowance in an LOR spreadsheet shows that the percentage of employees receiving the car allowance and driving more than 20,000 business miles a year ranged from 0.5% to 7.3% in the relevant years and the number of employees who drove no business miles in the relevant years ranged from 37% to 76%. In 10 out of the 14 relevant years 50% or more of the employees drove no business miles.

93. In an HMRC spreadsheet which was updated to reflect data from fuel cards from 2009/10 the average proportion of Scheme participants driving no business years over the 9 years considered was more than one third of the Scheme participants. The percentage of the Scheme participants driving more than 20,000 miles ranged from 2.99% to 8.08% in those years.

94. The spreadsheets identify the business mileage rather than total mileage but business mileage is at the heart of the issues in this case. There is no evidence in Mr Waller's review of a consideration of business mileage costs in a broad brush manner, or indeed any manner at all.

95. The amount allocated by Mr Waller for insurance is only £139 for all rates of Payment (i.e. for all classes of car) and is based on what LOR pays for third party cover through its insurer split across its total fleet. In practice, as recognised at the hearing, employees are likely to pay significantly more than that as individuals. Those costs may be increased further for those who are required to drive business miles as that category of Scheme participant must also have comprehensive insurance covering business use. There is no attempt at estimating increased insurance costs to reflect such policies, or the increased insurance costs for more expensive cars required for higher grade employees. Mr Waller says that there are too many variables such as employees' ages and addresses. However, the £139 is not related to Scheme participants' insurance costs. There is no attempt, for example, to carry out some form of averaging exercise to estimate, in even the broadest sense, insurance costs for each Scheme rate group.

96. Another amount is said to cover expected costs of servicing, maintenance and repair based on industry costs published in Fleet News.

97. There is no amount in Mr Waller's spreadsheet for roadside recovery membership, even though this is a requirement of the Scheme for those driving business miles and would not be difficult to estimate.

98. The final amount included by Mr Waller in his spreadsheet is to allow for damage, based on the average annual cost of damage to cars that LOR incurs across its fleet. Given that Mr Waller accepts that the company cars will often be driven significantly more than the cars used by recipients of the Payments, the use of the company car damage comparator is, without further explanation, inconsistent with the expected use of the Scheme cars.

99. The spreadsheet provided by Mr Waller shows that the amounts taken into account in the review indicate varying levels of consistency between those costs and the Payments. In the case of lower job grades the Payment is less than the total estimated costs: for grades 1-3 the Payments are 13% less than Mr Waller's estimates, by job grade 6 the Payment is roughly equivalent to Mr Waller's estimate and by job grade 7 the Payment is 7% higher than the estimated costs.

100. With little explanation, Mr Waller says in his witness Statement that for job grade 7 the amount of £7500 is based on the company car budget for that job grade of £25,000. He says that the amount of £25,000 is divided by four to split it across four years, but clearly that would produce £6250. However, his spreadsheet carries out the same analysis of costs for that job grade as for others. The inconsistent explanation of the £7,500 figure sheds no further light on the calculation of that amount.

101. Mr Waller says in his Witness Statement that the stated aim is to ensure that employees neither profit from the Scheme, nor find that it is insufficient to cover their costs, but it is difficult on the basis of the evidence provided to me to view this statement as anything more than an assertion given my findings. Even if the rough approximation whereby some participants are a little worse off and some a little better off was considered to be inevitable in a broad brush scheme, I find that the issues identified with the assumptions mean that the review is insufficient to show that the Scheme has operated to broadly compensate participants for the costs of business travel, or, indeed, any travel. The fact that the Payments have remained constant does not mean that they reflected costs, even to the extent Mr Waller's spreadsheet attempts to attribute, more than 16 years ago.

102. Overall, for all the reasons stated above, I find that Mr Waller's review provides little evidence of the costs which are said to have formed the basis for the Scheme at any stage in the appeal years 2004-2018.

103. The 2019 review also conducted a benchmarking exercise comparing the Scheme to similar scheme payments made by other employers in both the construction and the wider market. That review identified an average benchmark figure which was higher than the LOR amount for job grades 1-6 and accordingly recommended an increase to bring the LOR Scheme rates into line. The 2019 Scheme document exactly reflected the figures recommended by that benchmarking exercise. I therefore find that it was the benchmark median which was relied upon by the LOR Rewards Team to recommend the increase rather than a calculation of increased costs for employees in using their own cars.

104. This conclusion is supported by the fact that the 2019 recommendations included the review of the Scheme annually "to ensure that they remain suitably positioned"; not to ensure that the Scheme in some way compensated for estimated costs of the participants' cars.

105. I return to these findings later, but at this point that I therefore make the following key findings:

(1) the basis on which the Scheme was designed originally has not been shown;

(2) Payments are made to participants solely according to job grade;

(3) While some participants are chosen at lower job grades to have the opportunity of joining the Scheme because of the expectation of their business travel, those from job grade 4 and in the graduate scheme were offered the Scheme solely as a result of their job categorisation. Those who were invited to join the Scheme at lower grades because of business travel did not have their ongoing travel monitored to remove them from the Scheme if it reduced;

(4) The rates at which the Payments were made was not changed at any time in the years 2004-2018;

(5) The Scheme expressly envisages that participants might not use a car for business mileage at all and the spreadsheets show that was the case for a third or more of Participants on average over the appeal years. For most of the appeal years additional requirements and consequent costs are imposed on those who do, but the Payments are not adjusted in any way as a result. The rates at which the Payments are made are the same for both categories of employees;

(6) For nearly all of the appeal years participants in the Scheme were not required to own the vehicle they would use for business travel (if any);

(7) There is no minimum mileage requirement and there is no periodic review of the Payments made to an employee to take into account variation in business mileage;

(8) The basis of calculation for the review of the Scheme in 2019 provided in spreadsheets for the hearing and Mr Waller's evidence is insufficient to show that the Scheme represents a broad brush attempt at a genuine estimate of an employee's costs in undertaking their business-related journeys, or indeed any journeys.

Transport Allowance

106. Finally I note that LOR also introduced another allowance called the "transport allowance". The travel allowance amounts are paid according to the same the rates as those applied under the Scheme and on the same basis of job grade. They are described as a flexible alternative to the Scheme for employees that do not use a car for work, or choose not to operate a vehicle. There are no limitations on what the travel allowance can be spent on, but employees receiving the travel allowance cannot claim fuel costs for business mileage as it is assumed that they do not use a car. However, I consider that the fact that these payments match those paid to employees under the Scheme does not alter the analysis of the Scheme itself.

THE APPLICATION OF THE LAW

107. For ease of reference I have addressed the representatives' submissions in the context of each step of this decision, but start with a summary of their cases overall, addressing, in particular, the route through the law which this decision should adopt.

Overview of the arguments

108. In essence, HMRC say that if the Payments are treated as earnings under general principles, paragraph 7A of Part VIII of Schedule 3 to the 2001 Regulations ("Paragraph 7A") only excludes the QA part of RME from NICs and therefore if the Payments are not RME the QA exclusion cannot apply. If the Payments are not treated as earnings under general principles they are not subject to NICs because the extension of the meaning of earnings under regulation 22A of the 2001 Regulations ("Regulation 22A") only applies to RME and HMRC say that the Payments are not RME.

109. LOR say that this leaves a gap in the legislation and that in fact the correct approach is to read the legislation in such a way as to conclude that whether or not the Payments are earnings under general principles, there is exclusion for the QA. That is because LOR say that if the Payments are earnings under general principles, Paragraph 7A excludes QA and if the Payments are not earnings under general principles Regulation 22A excludes QA, regardless of whether they Payments qualify as RME. However, if it is necessary to address whether the Payments are RME, then the Payments should, in this case, be considered to fall within that definition. Alternatively, if the Payments are not RME, they are also not earnings under general principles and NICs were not due on any part of the Payments.

110. Mr Maugham submits that the approach set out in *Cheshire Employer* is not necessary or appropriate. Whether or not the Payments are earnings under general principles, there is a NICs disregard for QA.

The approach taken

111. I am mindful of the Court of Appeal decision in *Cheshire Employer*. That was a case concerning the payment of travel allowances to employees. The employer paid either a mileage allowance payment of roughly 40p per mile or a smaller mileage allowance of about 12p per mile together with an annual sum payable in monthly instalments. The issue was whether the annual sum was subject to NICs.

112. To understand its impact in this case it is necessary to note the case's history through the First-tier Tribunal ("FTT") and the Upper Tribunal ("UT").

113. The FTT said (at paragraph 9) that the question before it was whether the lump sum was a payment of earnings. If not, the FTT said that was the end of the question because HMRC had accepted that the payments would be RME under Regulation 22A.

114. In the UT, Judge Bishopp decided that the FTT's approach had been wrong. The FTT had asked the wrong question. Judge Bishopp then proceeded to consider the application of Regulation 22A(3) and in particular the application of the mileage allowance payments exclusion in subparagraph (a) with reference to section 229 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). He overturned the FTT decision.

115. The Court of Appeal decided that the FTT had been entitled to reach the conclusion on the evidence before it that the payments were not earnings. In paragraph 26 of the decision it is made clear that HMRC had accepted that if the lump sum payments were not earnings, then they would be RME (and indeed that reflects paragraph 13 of the FTT's decision.) Therefore as a result of being RME the QA would be excluded from NICs and the appellant had limited its claim to QA. Accordingly, in that case if the FTT found that the payments were not earnings there was no further analysis to be undertaken. As it had not made an error of law in reaching that decision the UT had no jurisdiction to set aside its decision and remake it.

116. This case is notably different to the position adopted at the FTT, not least because HMRC say here that if the Payments are not earnings under general principles, Regulation 22A does not treat them as such because the Payments are not RME. Therefore HMRC say that the QA disregard cannot apply.

117. The Court of Appeal declined to hear argument about Regulation 22A, Paragraph 7A and the scope of RME. At paragraph 59 the Court of Appeal said that no view whatever was expressed on them or anything that the UT said about them expressly or impliedly.

118. Mr Maugham submitted that the Court of Appeal's decision in *Cheshire Employer* concerned the jurisdictional issue. That is clearly the subject of the Court's ratio decidendi. However, the Court of Appeal also set out its recommended approach for addressing the issues in that case as follows at paragraph 47:

> "The proper structured approach to the issues in this case seems quite clear. The first question is whether the lump sum payments were earnings for NIC purposes on ordinary principles. If they were not, then that is the end of the matter and CESDL succeeds in its claim for reimbursement of NIC. It succeeds because either, as HMRC contend, the payments were not RME and so the deemed earnings provisions of reg 22A do not apply; or, if, as CESDL contends, they were RME, the claim still succeeds because CESDL has limited its claim to reimbursement to the QA. If, on the other hand, the lump sum payments were earnings for NIC purposes on ordinary principles, then other questions arise. The first is whether para 7A of Pt VIII of Sch 3 to the 2001 Regulations is, as HMRC contend, implicitly limited to RME. If it is not, then again that is the end of the matter and CESDL succeeds in its claim for reimbursement. If it is implicitly limited to RME, then, thirdly, it must be determined whether, as CESDL contends, the payments were RME or, as HMRC contend, they were not."

119. Mr Nawbatt has followed that approach, but Mr Maugham has rejected it in this case on the basis that under his analysis the Court of Appeal's approach can be short-circuited because the only issue is whether an exclusion for QA depends upon the Payments being RME. Despite this line of argument though, Mr Maugham was content for the Court of Appeal pathway to be adopted.

120. The only advantage to Mr Maugham's approach is that, if he is correct in his analysis, this decision can be shorter. That is clearly a significant potential benefit, but in my view it overlooks the implications of the stance adopted by HMRC that if the Payments are not within the general definition of earnings they are not subject to NICs at all, as HMRC maintain that the extension under Regulation 22A does not apply.

121. In addition, and importantly in my view, the law as it stands now sets the following framework:

(1) are the Payments "earnings" under general law?

(2) if the answer to (1) is yes, does the disregard in Paragraph 7A apply?

(3) if the answer to (1) is no, does Regulation 22A apply? (recognising that Regulation 22A only applies to the extent that the payments are not otherwise earnings).

122. That was the basis of the Court of Appeal's directions about approach, albeit largely obiter dicta; but obiter dicta comments of the Court of Appeal should be given considerable weight by me.

123. Finally, I note now that for the reasons I set out later I have rejected Mr Maugham's submission regarding the ability to short-circuit the steps and simply ask whether QA has been paid.

124. I therefore proceed applying the framework of the legislation as outlined *in Cheshire Employer.*

Earnings

The Law

125. Section 3 Social Security Contributions and Benefits Act 1992 ("SSCBA") states:

> (1) In this Part of this Act and Parts II to V below—
>
> (a) "earnings" includes any remuneration or profit derived from an employment;
>
> and
>
> (b) "earner" shall be construed accordingly.
>
> (2) For the purposes of this Part of this Act and of Parts II to V below other than those of Schedule 8
>
> (a) the amount of a person's earnings for any period; or
>
> (b) the amount of his earnings to be treated as comprised in any payment made to him or for his benefit,
>
> shall be calculated or estimated in such manner and on such basis as may be
>
> prescribed by regulations made by the Treasury with the concurrence of the Secretary of State.
>
> (3) Regulations made for the purposes of subsection (2) above may prescribe that payments of a particular class or description made or falling to be made to or by a person shall, to such extent as may be prescribed, be disregarded or, as the case may be, be deducted from the amount of that person's earnings.

126. Payments which are purely reimbursement of expenses are not payments to be classified as "profit derived from employment". *(Owen v Pook (Inspector of Taxes* (1969) 45 TC 571*).* (Although sections 70 and 72 ITEPA deem sums paid to employees in respect of expenses to be 'earnings' from the employment, with a right for the employee to show that the expense

incurred by them is deductible, that 'charge and relief' approach is not applied in the NICs legislation.)

127. Where a payment is made which is not restricted on its face to a reimbursement of expenses the leading case considering the approach is that of *Donnelly (Inspector of Taxes) v Williamson* [1982] STC 88. That case considered whether the payment of a travel allowance to a teacher in respect of out-of-school activities (nearly all of which were parents' evenings) was an "emolument" of her employment. At the time the charge to tax under the previous Schedular system was imposed by Case 1 of Schedule E on all "emoluments" which were defined to include "all salaries, fees, wages, perquisites and profits." There is no suggestion that the reference to profits in that context should be interpreted any differently from the reference to "profit derived from employment" in section 3 SSCBA 1992.

128. It was found as fact in that case that: the rates of the travel allowance were revised from time to time to take into account increases in costs, the purpose of the rates as revised from time to time was to reimburse the expenses incurred by the employee through the application of a formula based on certain assumptions, not all of which would have necessarily applied to each of the persons claiming reimbursement; the rates of allowances were similar to those agreed on a national level between the English local authorities and NALGO; and the scales so agreed were based on AA figures.

129. Walton J decided that the question was whether "the allowance was intended as a genuine estimate of the cost to the taxpayer of undertaking the journeys she did in fact undertake, or whether, on the other hand, it included an element of bounty". (97e-f) He noted that this should be applied with a broad brush, "otherwise the possible distinctions would become totally unrealistic" (97g), contemplating situations where a payment was made on the basis of a general price of petrol, but an employee managed to find a better deal making "a few pence profit" out of the journey. He said that therefore "The aim is to produce a formula which will apply with approximately equal justice to all within its scope… The test therefore is, I think, not whether the allowance produced mathematical equivalence with the expenditure, but whether it was constructed in a genuine endeavour to do just that." (97j)

130. This approach was approved by the Court of Appeal in *Cheshire Employer* (at para 55).

HMRC'S case

131. Mr Nawbatt submits that that having regard to the character of the Payments they are "earnings" under general principles. They are given to employees as an alternative to their contractual entitlement to accompany car. The company car is a personal benefit which forms part of each relevant employee's remuneration package and is taxed as a benefit in kind. The Payments have the same character.

132. In addition, the following factors lead to a conclusion that the Payments are earnings:

(1) There is no contemporaneous evidence that the rates, which were fixed at some point prior to 2001 and have not changed, were set with any reference to the business expenses which an employee would incur. The only factor determining the amount paid was the employee grade. In addition, the Payments involve personal benefit. Even if it was concluded that the Payments were for the running costs of a vehicle those are not specific and distinct business costs, but ones which would have been incurred by the employee regardless of any business use;

(2) A substantial number of the employees sampled did not do any business mileage between 2004 and 2018; and

(3) There is no contemporaneous evidence showing the design of the Scheme.

133. LOR has not shown that the round sum rates of the Payments did not involve a personal gain and were designed as part of a "genuine endeavour" to produce equivalence between allowance and the expenditure employees were likely to incur.

LOR's Case

134. LOR's primary case concerns the interpretation of Regulation 22A and Paragraph 7A which I deal with later. Its secondary case is that the Payments were not "earnings" because they were "constructed in a genuine endeavour to provide an equivalence between the allowance and the expenditure and to apply with approximately equal justice to all within its scope" as stated by Walton J in *Donnelly* and approved of by the Court of Appeal in *Cheshire Employer*. In applying *Donnelly* it is not necessary to be shown what was considered when the Scheme was originally devised. That sets an impossible evidential burden. Instead, it is a question of whether, throughout the material time, the Scheme was applied and managed in a way to produce equivalence. It is the intention of the Scheme, rather than the person who created it, which is relevant and Mr Waller's evidence shows that intention.

135. Mr Maugham submits that LOR has devised a scheme intended to provide rough and ready compensation for the differing groups of employees which was simple to administer. He relies upon the calculations carried out by Mr Waller as the basis of the Payments. The facts as described by Mr Waller show that a broad brush policy has been adopted and LOR has devised a scheme in a genuine endeavour to produce equivalence between allowance and expenditure. Such a scheme can make assumptions, as envisaged in *Donnelly*. The assumptions made mean that the rates were in fact set with reference to expenses an employee would be expected to incur in operating their own car. He submits that the unpredictable range of movement of LOR employees means that a precise scheme of reimbursement would be administratively unworkable.

136. Evidence from Mr Waller that reviews of the Scheme took place in 2016, 2017 and 2019 support LOR's claim that it was set at the appropriate rate to cover the costs of business travel throughout the relevant years. There is further evidence in the Scheme documentation showing other reviews which caused amendments to the Scheme, for example altering the CO2 emission requirements. The fact that it was reviewed and considered to be a at an appropriate rate to cover the costs of running a private car for business purposes meant it should be viewed as being at an appropriate rate in earlier years as well.

137. The Payments are wholly unlike salary, and while they have been occasionally described as a "benefit" for engaging with employees, that term does not describe their purpose or quality. They were not "round sum allowances" as such an allowance is paid regardless of whether the expenditure is incurred on the matter to which it relates. In this case the employees were required to have their own cars, or at least access to use one. The conditions for the operation of the Scheme meant that LOR took clear and robust steps to ensure that the money was being spent on maintaining a private car for business use.

138. Inevitably in a broad brush scheme some employees profit and others lose out and there will be an overlap between private and business reimbursement. The fact that some employees can operate a car at less cost than the Payments does not mean the Scheme involves an element of bounty (*Donnelly*). The aim is to ensure employees are neither over, nor under, compensated. The sum paid to employees to use a private car for business travel will inevitably go towards private travel costs as well. LOR cannot require employees to run two separate cars: one for business and one for private use. In any event some journeys are a mixture of the two. Participation in the Scheme is not withdrawn when travel is not in fact required as the employee has already incurred the expenses connected with the provision of their own car.

139. The Payments are not wholly earnings. The only matter which could properly be called an "emolument" would be the benefit in the allowance with the non-benefit element being protected by the principal in *Owen v Pook*.

Discussion: Are the Payments earnings under s3(1) SSCBA 1992?

140. I find that the Payments were not paid as reimbursement of business expenses which the employees were required to incur in carrying out their employment. The Payments have been recognised by LOR to involve some personal benefit as even on its case the allowance picks up the costs of operating a car regardless of whether any business mileage is in fact driven. The evidence does not show that the rates were set with reference to business expenses which an employee would incur. Instead, the Payments were amounts identified by reference to job grade, regardless of the extent of any business-related cost and specifically envisaging that some recipients would receive the Payments where no business mileage was driven.

141. Mr Waller said that it was administratively unworkable to adjust the Scheme's operation to take into account business mileage. I have commented on the fact that LOR has business mileage records from fuel claims, but there is no evidence to show that LOR has the detailed breakdown of costs incurred by the employees participating in the Scheme needed for LOR to identify the non-benefit elements.

142. This is, of course, where *Donnelly* attempts to ease the strictures of the rules and I turn to the test posed by that decision: was the Scheme intended to operate as a broad brush application of a genuine estimate of the cost to the employees of undertaking their business-related journeys or did it include an element of bounty?

143. I have no doubt that a lump sum scheme is capable of operating as such a genuine estimate as clearly envisaged in *Donnelly*. In this case there is a large workforce participating in the Scheme and some general assumptions might reasonably be made, where there was sufficient evidence to support doing so; for example, to assume that most would incur lease or other finance costs in having a car available to use.

144. However, I find that the Payments do not reflect a broad brush attempt at a "genuine estimate" for the following reasons:

(1) the Scheme was inherited in 2001, was not reviewed until 2016 and the Payments were not increased until after the appeal years, following the 2019 review. In the absence of evidence to the contrary, I therefore find little basis to conclude that even if the amount of the Payments was originally calculated before 2001 as a genuine estimate of the costs of using a car, that that same amount would continue to be so more than 17 years later. This is in stark contrast to the *Cheshire Employer* scheme which was reviewed annually;

(2) a significant proportion of the employees receiving the Payments did not do any business mileage and yet their Payments were the same as those driving more than 20,000 miles in a year. There is no requirement for the employees receiving the Payments to drive any business miles. Higher-ranking employees driving no business miles received higher Payments than lower-ranking employees driving many business miles;

(3) there is no attempt at reducing the Payments even on an annual basis if the employee does no business mileage. In contrast, in *Cheshire Employer* the employer pro-rated the payments made, for example, where an employee had a dual role part of which was mobile and part was site/office-based. I note that the Payments may cease where an employee takes an extended period of unpaid sick leave (although this is not automatic). However, there is no evidence that the Payments are stopped if the employee takes paid sick leave or is otherwise unable to undertake any business miles;

(4) the employee had to have a car available to use and had to use it for business travel if it was economic and practical from a business view point. However, the Payments did not alter if they did so use it even though for most of the appeal years extra obligations and costs were imposed in such circumstances;

(5) The Scheme even envisaged from 2008 that a participant may continue to receive payment if the participant was unable to drive;

(6) the evidence from Mr Waller about the costs reflected in the Payments is, as explained above, not an explanation of how the Payments were estimated, but an explanation of the assumptions he applied when conducting a review of the Payments ex post facto. Those assumptions themselves are not a broad brush attempt at making a genuine estimate of the costs related to business use, given the findings I have made and the discrepancies between the assumptions and the Scheme conditions;

(7) an employee receiving the Payments is not required to own or lease a car at any time other than for a brief period in and around 2004-2007;

(8) there is no real evidence about the design of the Scheme or the way on which the Payments were calculated when the Scheme was set up.

(9) the review in 2019 after the appeal years does not show that the Scheme was applied and managed in the appeal years as a genuine endeavour to produce equivalence with costs for business usage. There is insufficient evidence about the 2016 and 2017 reviews, but Mr Waller accepted that they were less detailed than the 2019 review. They would therefore have shown even less about the extent of an estimation of costs than the 2019 review;

(10) the principles in *Donnelly* set out what was considered to be a practical solution, but that solution still had at its heart the concept of reimbursement. So, Walton J described the employee finding a good deal for petrol or replacement tyres, but the allowance had at its heart the estimation of costs. Given the way the Scheme operates I find that it is too far removed from reimbursement to fall within the practical, "genuine estimate" approach of *Donnelly;*

(11) I do not consider that the fact that an employee participating in the Scheme had to provide details about their car and about matters such as insurance, MOT and road tax means that the fixed Payments, which were made regardless of use and which did not alter over the period of 2004-2018, can be treated as showing the Scheme operated as a genuine estimate of business usage;

(12) The changes to the Scheme requirements set out in the findings of fact were not illustrations of LOR applying and managing the Scheme to produce equivalence. If that was the case as Mr Maugham submits, I would have expected a change to the requirements to alter the amounts of the rates set for the Payments in some way. The fact that the requirements of the Scheme were amended did not mean that there was any engagement with the question of whether the amounts of the Payments were genuine estimates of business usage.

145. Mr Maugham submitted that an analogy could be drawn with an egg whisk. The fact that an egg whisk is currently used for whisking eggs implies that it was designed to do such a thing. However, I am not satisfied that a claim by LOR that the Scheme is currently considered to be a genuine estimate of the costs for employees of undertaking their business journeys would mean that such a claim described the position previously. In fact, the evidence has been found by me to be inadequate to show that the Scheme is even currently operated as a broad

brush attempt at a genuine estimate and therefore the egg whisk analogy can have no application.

Amounts to be disregarded in the calculation of earnings

The Law

146. Given that the Payments are earnings for the purposes of section 3 SSCBA the next question is whether the earnings disregard contained in Paragraph 7A applies.

147. Paragraph 7A needs to be considered in its legislative context. Regulation 25 of the 2001 Regulations directs that payments identified in Schedule 3 of those Regulations are to be disregarded when calculating earnings.

148. The introduction to Schedule 3 in Part I states that:

> (1) This Schedule contains provisions about payments which are to be disregarded in the calculation of earnings for the purposes of earnings-related contributions.
>
> (2) Part II contains provisions about the treatment of payments in kind.
>
> (3) Part III and IV specifies payments by way of assets which are not to be disregarded by virtue of paragraph 1 of Part II.
>
> (4) Part V specifies non-cash vouchers which are to be disregarded by virtue of paragraph 1 of Part II.
>
> (5) In computing earnings there are also to be disregarded
>
> …(*c*) the travelling, relocation and overseas expenses specified in Part VIII.

149. Paragraph 1(5)(c) therefore specifically identifies that the specified travelling expenses are disregarded by Part VIII.

150. The introduction to Part VIII of Schedule 3 states:

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

151. The specific provision within Part VIII which is potentially in dispute in this case is Paragraph 7A which was added to Part VIII by the 2002 Regulations. It states:

> **7A Qualifying amounts of relevant motoring expenditure**
>
> (1) To the extent that it would otherwise be earnings, the qualifying amount calculated in accordance with regulation 22A(4).

152. Paragraph 7A therefore needs to be read in conjunction with Regulation 22A.

153. Again to put Regulation 22A in context, I note that regulation 22 (which was in existence prior to the 2002 changes) provides a general identification of amounts to be treated as earnings and states that:

> (1) For the purposes of section 3 of the Act (earnings), the amounts specified in paragraphs (2) to (14) shall be treated as remuneration derived from an employed earner's employment.

154. There is then a general provision contained in sub-paragraph (2) dealing with payments to or for the benefit of directors; before sub-paragraphs 3-14 identify specific amounts by

reference to ITEPA, such as specific grants of shares and payments made under specific salary sacrifice arrangements.

155. Schedule 2 of the 2001 Regulations sets out the way to calculate earnings in particular cases. None of the provisions in Schedule 2 apply in this case, but it is notable that the Schedule 2 rules do not simply apply ITEPA rules. They set out specific bases of calculation for NIC purposes.

156. Regulation 22A follows on from regulation 22 in identifying a specific type of payment which should be treated as earnings. Regulation 22A was inserted by Social Security (Contributions) (Amendment No. 2) Regulations 2002 ("the 2002 Regulations") and provides (so far as relevant to this case):

> **22A Amounts to be treated as earnings in connection with the use of qualifying vehicles other than cycles**
>
> (1) To the extent that it would not otherwise be earnings, the amount specified in paragraph (2) shall be so treated.
>
> (2) The amount is that produced by the formula -
>
> RME – QA
>
> Here—
>
> RME is the aggregate of relevant motoring expenditure within the meaning of paragraph (3) in the earnings period; and
>
> QA is the qualifying amount calculated in accordance with paragraph (4).
>
> (3) A payment is relevant motoring expenditure if—
>
> (a) it is a mileage allowance payment within the meaning of section 229(2) of ITEPA 2003; …
>
> … or (c) it is any other form of payment, except a payment in kind, made by or on behalf of the employer, and made to, or for the benefit of, the employee in respect of the use by the employee of a qualifying vehicle…
>
> (4) The qualifying amount is the product of the formula—
>
> M x R
>
> Here—
>
> M is the sum of—
>
> (a) the number of miles of business travel undertaken, at or before the time when the payment is made—
>
> (i) in respect of which the payment is made, and
>
> (ii) in respect of which no other payment has been made; and
>
> (b) the number of miles of business travel undertaken-
>
> (i) since the last payment of relevant motoring expenditure was made, or, if there has been no such payment, since the employment began, and
>
> (ii) for which no payment has been, or is to be, made;
>
> and R is the rate applicable to the vehicle in question, at the time when the payment is made, in accordance with section 230(2) of ITEPA 2003 and, if more than one rate is applicable to the class of vehicle in question, is the higher or highest of those rates.

157. Section 229(2) ITEPA sets out the definition of "mileage allowance payments" as amounts, other than passenger payments… paid to an employee for expenses related to the employee's use of such a vehicle for business travel.

158. Returning to Paragraph 7A, the parties have disputed the extent to which amendments to it and the insertion of a subsequent provision in paragraph 7B impact the construction of Paragraph 7A.

159. After the years in dispute in this case (with effect from 6 April 2018) a further sub-paragraph was added to Paragraph 7A which HMRC say casts further light on the interpretation of sub-paragraph (1). That states:

> (2) Sub-paragraph (1) does not apply so far as the payment of relevant motoring expenditure within the meaning of regulation 22A(3) is made pursuant to optional remuneration arrangements.

160. Paragraph 7B was inserted by the 2002 Regulations and states:

> **7B Qualifying amounts of mileage allowance payment in respect of cycles**
>
> (1) To the extent that it would otherwise be earnings, the qualifying amount of a mileage allowance payment in respect of a cycle.

HMRC's submissions

161. Mr Nawbatt submits that the QA disregard only applies to relevant motoring expenditure ("RME"). In this regard he relies on:

(1) the heading to Paragraph 7A referring to "Qualifying amounts of relevant motoring expenditure", relying upon the case of *Montila.* In response to a query by me about the application of *Montila* to secondary legislation Mr Nawbatt relied upon *Brown v. Innovatorone [2009] EWHC 1376*;

(2) the Explanatory Note to the 2002 Regulations describing Paragraph 7A as providing for the disregard of the QA of RME;

(3) the drafting of Paragraph 7A stating "to the extent it would otherwise be earnings…" where "it" must refer back to RME in the heading;

(4) reference to Regulation 22A(4) which is the formula for calculating the QA of RME;

(5) the drafting of Paragraph 7A(2);

(6) the fact that Regulation 22A and Paragraph 7A were introduced at the same time and are linked. The statutory scheme introduced by those provisions provided for two separate scenarios (recognising a universal rate of 40p for all business miles):

> (a) a true business expense of more than 40p, for example 60p, where the reimbursement rate was 60p in which case HMRC did not consider any of the 60p to be "earnings" under general principles and treated 20p as deemed earnings under Regulation 22A;
>
> (b) a true business expense of 30p, where the reimbursement rate was 60p in which case HMRC regarded the difference between the 60p paid and the true business expense (i.e. 30p) to be "earnings". This left the employee with the 30p true business expense (which is not earnings as made clear by Paragraph 9 of Part VIII of Schedule 3), but to meet the policy intention of allowing the person to have 40p NICs free, 10p of the earnings amount was disregarded under Paragraph 7A.

LOR's submissions

162. Mr Maugham submits that Paragraph 7A on its face is not limited to payments of RME. *Montila* shows that the heading is not part of the substantive provisions. It could be used as an aid to construction if the provision is ambiguous, but cannot alter the plain words of the provision. The reference to "it" in Paragraph 7A cannot refer to the heading given that the heading is not part of the amendable provisions. The natural way of reading the provision is for the "it" to refer to the QA. No requirement that the payments be RME for the application of Paragraph 7A can be implied as there is no basis to find that the three criteria in *Inco Europe Ltd & Ors v First Choice Distribution & ors* [2000] 1 WLR 586 have been fulfilled. The drafting in Paragraph 7A should be contrasted with that in paragraph 7B.

163. He also submits that in paragraph 7B there would be no need for the additional words if the heading qualified the reference to QA itself. The drafting in Paragraph 7A(2) cannot be relevant as that was inserted after the periods in dispute.

164. Mr Maugham submits that Explanatory Notes can also only be an aid to construction where there is ambiguity and in this case the wording of Paragraph 7A is clear.

165. Paragraph 7A should be considered alongside and construed in accordance with section 231 ITEPA which provides the equivalent income tax relief – MAR.

Discussion: Application of Paragraph7A

166. I consider that even without consideration of the addition of sub-paragraph (2), (which was not in place in the relevant years), Paragraph 7A applies to the QA part of RME so that if the Payments are not RME they cannot benefit from the disregard for the following reasons.

(1) I consider that the natural reading of the substantive wording of Paragraph 7A is that the "it" refers to the QA. However, QA is stated to be calculated in accordance with Regulation 22A(4). That provision makes repeated reference to "the payment"; for example, "M is the sum of (a) the number of miles of business travel undertaken, at or before the time when the payment is made – (i) in respect of which the payment is made"(underlining added)…. The natural reading of "the payment" takes the reader back to Regulation 22A(3) and the payments identified therein. QA is therefore intrinsically bound within the provisions set out in Regulation 22A identifying RME. The reference in Paragraph 7A to Regulation 22A(4) ties the QA reference back to its origins in the identification of RME. If the drafter had wished to disassociate QA from RME it would have been a simple step to do so and that did not happen.

(2) If there were any ambiguity about the reading of the provision, I am satisfied that I would be entitled to have regard to the heading to Paragraph 7A applying the cases of *Montila* and *Brown.* The heading makes clear that the provision is dealing with the QA of RME. *Montila* considered the approach to headings in the context of Acts of Parliament and I take into account that in this context I am considering a statutory instrument which goes through a different drafting process and which will not have been debated in Parliament. However, Lord Hope noted (at paragraph 36) that as Lord Steyn said in *R (Westminster City Council) v National Asylum Support Service* [2002] 1WLR "language in all legal texts conveys meaning according to the circumstances in which it is used". In addition, in *Brown* Mr Justice Smith said:

> "Just as headings may, and indeed should, be considered in interpreting primary legislation provided that due account is taken of that fact that the function of a heading is to provide a brief and therefore necessary inexact guide to the material to which it applies (see Bennion on Statutory Interpretation, Code SS 255 and 256), so too headings are relevant when interpreting delegated legislation**."**

(3) I therefore see little basis on which I should ignore the heading to Paragraph 7A, at least if there is ambiguity. On considering Schedule 3 as a whole it is clearly apparent that the drafter has repeatedly used headings to identify the subject matter of provisions.

(4) Furthermore, I am fortified by the explanation in the Explanatory Notes which states that "Paragraph 7A provides for the disregard of the qualifying amount of relevant motoring expenditure to the extent that it would otherwise be earnings." At paragraph 35 of *Montila* Lord Hope said that:

> "In *R (Westminster City Council) v National Asylum Support Service* … Lord Steyn said that, insofar as the Explanatory Notes… casts light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, such materials are always admissible aids to construction."

167. I am satisfied that my approach does not invoke the principles in *Inco Europe Ltd* as it simply involves interpreting substantive words as written and is not reading unstated words into the paragraph.

168. I am also satisfied that the drafting of paragraph 7B does not alter my conclusions. This provision was inserted with effect from 2018 and therefore could not impact the interpretation of Paragraph 7A in the appeal years.

169. However, to the extent I took the drafting of paragraph 7B into account, I am satisfied that the fact that its drafter chose to add the words "of a mileage allowance payment in respect of a cycle" in the substantive wording of the provision may reflect no more than a different drafting style, given that this is a statutory instrument the drafting processes of which will be entirely different to that of primary legislation. The drafter was clearly keen to ensure that the bicycle element of the QA was precisely identified.

170. In addition, if paragraph 7B is taken into account it is notable that my interpretation of Paragraph 7A would result in a consistent approach to the application of both Paragraph 7A and paragraph 7B.

171. Mr Maugham submitted that the reference to headings is only permitted where the substantive provision is ambiguous as a result of *Coventry and Solihull Waste Disposal Company Limited v. Russell (Valuation Officer)* [1999] UKHL 49**.** As explained above I do not consider the interpretation of Paragraph 7A to be ambiguous having regard to the substantive provisions alone and my reference to the heading is only to the extent that this is wrong and some ambiguity remains.

172. Mr Maugham has encouraged me to treat Paragraph 7A as the NICs equivalent of section 231 ITEPA to conclude that Paragraph 7A provides a free-standing disregard regardless of whether a payment is made at all. Not only for the reasons set out above, but also having regard to the issues concerned with claimed alignment of the income tax and NICs rules set out in the next section considering the scope of RME, I do not do so. As explained below, the *Cheshire Employer* description of a broad alignment of rules for income tax and NICs must be considered in the context of the different systems.

Were the Payments RME?

173. The next question is therefore whether the Payments qualified to be treated as RME in order for the QA to be disregarded under Paragraph 7A.

HMRC's submissions

174. HMRC did not seek to rely on procedural technicalities in this lead case, but submitted that if LOR wish to rely on the argument that Regulation 22A(3)(a) is satisfied (in addition to

Regulation 22A(3)(c) previously relied upon) the basis of such argument should be clearly identified given that LOR had previously stated that it did not rely on sub-paragraph (a).

175. In any event Mr Nawbatt submitted that, in relation to both subparagraph (a) and (c), the Upper Tribunal decision in *Cheshire Employer* shows that there must be a necessary connection with the "use" of a qualifying vehicle for a payment to be RME. In this case the payments made to LOR's employees bore no resemblance to the miles driven or the actual or anticipated degree of "use". The lack of evidence about the design of the Scheme supports this conclusion. The Scheme documentation shows that the payments were not made in respect of the use of a vehicle, but in lieu of the provision of a qualifying vehicle (a company car). He relied upon statements made by the Court of Appeal recognising though that they were obiter dicta. The terms and context of the provisions in Regulation 22A(3) are designed to capture only those payments which are related to the employees use of the vehicle. The words "related to" and "in respect of" are capable of creating a broad nexus but must be read in their context.

176. Mr Nawbatt submitted that Regulation 22A does not refer to motoring expenditure but relevant motoring expenditure and the use of that word must be recognised. As Regulation 22A imposes a charge it is understandable and likely that its focus is narrowed.

177. In response to Mr Maugham's comment (as noted below) that HMRC have not identified any description of payments in connection with the use of a private vehicle that are not "earnings" but are RME, Mr Nawbatt refers to HMRC's guidance and examples such as insurance, servicing and replacement tyres.

178. Mr Nawbatt submits that LOR's argument relying on equating treatment for income tax purposes under the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and the NICs legislation is misplaced. The provisions do not mirror each other.

LOR's submissions

179. Mr Maugham submits that restricting the scope of the RME definition would result in payments which are not "earnings" escaping liability to NICS. Regulation 22A is a charging provision and there is therefore no reason to narrow its scope.

180. Given that Regulation 22A(3) only applies where a payment is not "earnings", logically that means that RME must be something different, something broader. He submits that HMRC's approach is unworkable and notes that HMRC's Statement of Case does not identify any payments made in connection with the use of a private vehicle that are not "earnings" but are RME. In response to Mr Nawbatt's reference to the HMRC manual, Mr Maugham submits that this shows that HMRC accept that insurance, road fund licence, servicing, repairs and replacement tyres fall within RME. This therefore only leaves the leasing costs and a payment in respect of that cost is, just as the others, one in respect of, or related to, business use.

181. He relies on a statement in the *Cheshire Employer* case describing the "broad effect" of changes to the NICs regulations and the income tax legislation as introducing comparable treatment of mileage allowance payments and refers to the ITEPA provisions dealing with mileage allowance payments and mileage allowance relief.

182. In contrast to the approach taken to Paragraph 7A, Mr Maugham submits that the phrase "in connection with" in the heading of Regulation 22A is an accurate description of (3)(a) – (c) and that if there is any ambiguity in the application of Regulation 22A, *Montila* enables the heading to be taken into account. The heading contemplates a very wide link.

183. Mr Maugham submits that the phrasing "in respect of" in Regulation 22A(3)(c) (and "related to" in section 229(2) ITEPA) indicate a very broad nexus. He relies upon *R (Equal Opportunities Commission) v SS for Trade and Industry* [2007] ICR 1234 and *Trustees, Executors & Agency Co Ltd v Reilly* [1941] VLR 110.

184. Mr Maugham submits that a concession made by HMRC in their Statement of Case is fatal to their argument regarding the limitation of the definition of RME by reference to "use". In the Statement of Case HMRC state that the fact that employees receiving Payments were entitled to a lower business mileage rate when claiming fuel "is indicative of the business use being anticipated".

185. In applying Regulation 22A(3)(a) there is no need for a narrow reading of section 229 ITEPA as the narrowing results from the application of section 230 ITEPA.

Discussion: were the Payments RME?

The context of the 2002 Regulations' broad alignment of the income tax and NICs rules

186. Much has been made by the parties of the parallels which should, or should not, be drawn with the income tax system and the implications of the comment in *Cheshire Employer* about the broad alignment of the income tax and NICs rules in the context of 2002 changes. It is most relevant for me to consider these arguments at this stage of the decision.

187. I start by considering the income tax system rules addressing mileage allowance payments ("MAPs") in Section 229 ITEPA, to which the RME provision in Regulation 22A refers directly.

188. Section 229 is not a section imposing a charge on Mileage Allowance Payments ("MAPs"). Instead, it is a section excluding liability to income tax on Approved Mileage Allowance Payments ("AMAPs"). It is therefore a relieving, not a charging section.

189. In summary, MAPs are defined in Section 229(3) as "the amounts, other than passenger payments… paid to an employee for expenses related to the employee's use of such a vehicle for business travel".

190. "Business travel" is defined in section 236 ITEPA as "travelling expenses which, if incurred and paid by the employee in question, would (if this Chapter did not apply) be deductible under sections 337 to 342." There are then specific rules contained in sections 337 to 342 identifying deductible travel expenses including, in particular, for travel in performance of duties or for necessary attendance, subject to exclusions for ordinary commuting costs. So, the ordinary commuting costs for employees reaching the LOR offices are not business travel even if the journeys are difficult because of poor public transport.

191. AMAPs are those MAPs paid to an employee in a tax year which do not exceed the approved amount for the kind of vehicle used by the employee (section 239(3) ITEPA).

192. The approved amount is set out in section 230 ITEPA as M x R where M is the number of miles of business travel by the employee (other than as a passenger) in the tax year in question and R is the rate applicable to the kind of vehicle (car, motorcycle or bicycle) used by the employee. The current rates are 45p per mile for the first 10,000 miles and 25p thereafter. These HMRC rates have been constant since 2011 when it was 40p per mile for the first 10,000 miles.

193. The result is that payments of MAPs in excess of the AMAP amounts are taxable income of the employee under general principles. If an employer pays less than the approved amount, the employee is able to claim a specific tax relief (mileage allowance relief "MAR")) on the difference under section 231 ITEPA.

194. There is separate provision for the reimbursement by an employer of the fuel cost for business travel in a company car. In summary the payment of fuel costs for a company car is a taxable benefit (section 149 ITEPA), but that charge is reduced to nil if the employee is required to make good the cost of providing the fuel for private motoring, or fuel is made available only for business travel (section 151 ITEPA). As a practical matter advisory fuel rates

are set quarterly by HMRC and HMRC accepts that if payments for business travel do not exceed the relevant rate, there is no income tax charge. The relevant rate depends upon the size of the car's engine and its fuel. For example, in June to August 2014 (the earliest rates available on gov.uk) the advisory fuel rates payable for the use of petrol cars ranged from 14p-24p; whereas the current rate ranges from 10p-18p.

195. It is this advisory fuel rate which was used as the basis for the business mileage claims made by employees receiving a company car.

196. The participants in the Scheme were also reimbursed fuel costs for business mileage at the advisory fuel rate in line with the treatment given to company car recipients, but the income tax on that reimbursement is not governed by sections 149 and 151 ITEPA. Instead, it is governed by the MAPs rules. As a result, Scheme participants are referred by LOR to the availability of MAR for the difference between the advisory fuel rate amount they reclaim and the AMAP amount.

197. Other motoring-related expenses which do not fall within the definition of MAPs are subject to the application of the general earnings provision in section 62 ITEPA (which imposes tax on any salary, wages or fee, gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, and anything else that constitutes an emolument of the employment) and, to the extent not charged to tax under that section, are taxed by a raft of rules contained in the benefits code in ITEPA in sections 63-69B and the provisions dealing with taxable payments of expenses contained in section 72 ITEPA.

198. The provision of a company car is itself a taxable benefit for income tax (unless used solely for business travel) and is subject to a specific code for determining the amount of tax according to criteria including age and CO2 emissions. It is not subject to employee NICs, but is subject to employer's Class 1A NICs (the class of NICs payable on benefits in kind).

199. In other words, for income tax there are the general charging provisions, broadly taxing emoluments, supplemented by a series of specific charges including specific rules for the taxation of benefits and a separate code for the taxation of a company car and the fuel provided for it; and these sit alongside the narrowly drawn general rule for deduction of expenses incurred "wholly, exclusively and necessarily in the performance of duties" in Section 336 ITEPA, as supplemented by a series of specific reliefs such as MAR.

200. There are numerous boundaries and distinctions in the income tax legislation and in particular, in the treatment of pay and benefits provided to employees. Simply because a particular result can be achieved in one way does not mean that the provision of something economically similar in many respects results in even the same income tax treatment.

201. The income tax and NICs systems are riddled with situations where there are differences between them in the application of their rules. The differences are frequently the result of the fact that income tax and NICs are built on different foundations. In particular, as a result of its entirely different structure, the NICs system does not employ the technique used for income tax of bringing amounts into charge subject to the application of reliefs. NICs are not only paid by an employee but also their employer, whereas the income tax rules govern the application of charges on the employee.

202. More specifically in the context of MAPs, the NICs scheme is more generous to employers/earners in not operating the two authorised mileage rates. In other words the QA provisions use the highest rate, i.e. currently 45p per mile without limitation to the first 10,000 miles. There is no separate provision in the NICs legislation for the lower advisory fuel rate.

203. The drafter of the 2002 NICs legislation changes did not simply adopt the approach taken to MAPs and provide a vision mirroring section 229 to achieve a disregard of AMAPs. Instead,

the drafter provided a provision which is wider in scope, including MAPs in Regulation 22A(3)(a) (with the application of QA in Regulation 22A(4) producing the equivalent of AMAPs), but going further than the section 229 income tax rules in Regulation 22A(3)(b) and (c).

204. Mr Maugham says that his approach would ensure that the NICs treatment of the payments followed the income tax treatment and that this had been the intention when the provisions were introduced. I take into account the statement in *Cheshire Employer* where the Court of Appeal noted that the intention when the changes were made to the NICs rules in 2002 was to broadly align the NIC and income tax regimes, but that recognises that there may be differences in the detail.

205. What my brief overview of some of the disparities shows is that the rules between income tax and NICs treatment are far from aligned and adopting an approach which sought to conclude that the Payments should be treated in the same way for NICs as income tax begs the question as to which part or parts of the income tax rules should be followed.

206. Mr Maugham submits that his approach to QA provides a simple system where an employer can always disregard the QA of any amounts paid in relation to motoring expenses for NICs purposes. There is considerable attraction in this, but however attractive that may seem I am required to apply the rules set out by Parliament in legislation. In doing so, I recognise that the courts have confirmed in cases such as *UBS AG v HMRC and DB Group Services v HMRC* [2016] UKSC 13 that a purposive approach should be adopted, but that does not mean that I should somehow gloss over the statutory provisions.

Relevant Motoring expenditure

207. The drafter of the 2002 changes did not simply provide a disregard of all payments of QA. Instead, the QA disregard is bound up within the concept of RME, which notably is relevant motoring expenditure, not just any motoring expenditure. I consider that it is incumbent on me to give the word "relevant" some value. The natural reading of Regulation 22A is to treat the use of the word "relevant" as identifying particular (albeit widely drafted) categories of motoring expenditure form the wider pool of all motoring expenditure.

208. RME is stated to be the aggregate of the amounts set out in paragraph (3). I see no scope for extending RME to include any amounts beyond those set out in that paragraph.

209. I do not consider that the words "in connection with" in the heading can be relied upon to extend the clear meaning of the substantive provisions of Regulation 22A. If I adopt Mr Maugham's approach to headings, there is no ambiguity for "in connection with" to clarify. Even if the words in the heading are taken into account though, I agree with Mr Maugham that those words accurately convey a description of the provisions of Regulation 22A(3)(a)-(c). That is their function and no more.

210. My conclusion that the word "relevant" narrows the scope of Regulation 22A is fortified by the obiter dicta statement in the Court of Appeal's judgment in *Cheshire Employer* saying that the legislation provided for the disregard of "certain" travelling expenses (at para 18).

211. I now turn to the two bases said to cause the Payments to be treated as RME: Regulation 22A(3)(a) and (c).

Regulation 22A(3)(a)

212. Mr Maugham's skeleton argument raised the argument that the Payments would qualify as RME under Regulation 22A(3)(a). This was the first time in the conduct of the appeal that that argument had been raised. Indeed, in the course of correspondence, LOR had conceded that it was not possible to rely upon that provision. However, given that this is a lead case

HMRC did not seek to exclude consideration of this line of argument, but Mr Nawbatt asked for an explanation of the basis on which LOR has changed its view.

213. Mr Maugham made limited submissions about the application of this sub-paragraph beyond submitting that the payments referred to therein were not limited to those made solely for business purposes.

214. As explained above, section 229(2) ITEPA sets out the definition of "mileage allowance payments" as amounts, other than passenger payments… paid to an employee for expenses related to the employee's use of such a vehicle for business travel (underlining added).

215. MAPs and AMAPs allow an employee to be paid amounts up to the specified rate without income tax for the business miles driven. That higher compensation of 45p or 25p per mile is picking up some of the general overheads of running the car, recognising that a portion of those running costs should properly be attributed to the business mileage. The AMAP system therefore provides a practical way to prevent the need for some form of annual attribution of employees total running costs of their car between business and private mileage.

216. As a result, the draftsman has had to refer to expenses "related to" the employee's use of the vehicle for business travel. Business travel is then defined and, in summary, that excludes private mileage. In addition, in the context of AMAPs, the relief is only provided for the amount calculated under Section 230 which is itself limited to use for business mileage. Mr Maugham says that the "heavy lifting" in limiting the relief for AMAPs is carried out by Section 230. He says that its equivalent in the NICs legislation is the disregard provided in the QA definition. Neither party suggests that QA picks up anything other than the business mileage amount. The question is therefore whether the MAPs definition can apply to amounts paid for business and private mileage with the business mileage limitation left to Section 230 and the QA definition?

217. I am not satisfied that MAPs should be interpreted as widely as Mr Maugham submits for the following reasons.

218. I refer back to the underlined words in section 229(2) ITEPA. The payment must be for expenses related to use for business purposes. The paradigm example is the payment for fuel costs incurred in business mileage. The employee is paid for their expenses and those expenses relate to the use for business purposes.

219. The Payments are not for expenses related to use for business purposes because:

(1) The Payments are not for expenses. The same amount is paid regardless of the amount of expenses incurred by the employee;

(2) While some participants are chosen at lower job grades to have the opportunity of joining the Scheme because of the expectation of their business travel, those from job grade 4 and in the graduate scheme were offered the Scheme solely as a result of their job categorisation. Those who were invited to join the Scheme at lower grades because of business travel did not have their ongoing travel monitored to remove them from the Scheme if it reduced;

(3) The amount paid to a Scheme participant is determined solely by reference to job grade;

(4) The Payment is not for expenses related to "use", for business travel or otherwise. The same Payment is made to a person who drives no business miles in a year and a person who drives more than 20,000 business miles in a year. I recognise that "related to" must be given a broad nexus, but I am not satisfied that the words in Section 229(2)

ITEPA can be read to include not only actual use, but availability for use. To do so would require me to add words into the legislation;

(5) I refer to my conclusions set out earlier in this decision about the application of *Donnelly*. In particular, I refer to the fact that a higher-ranking employee driving no business miles receives higher Payments than the lower-ranking employee driving many business miles; and the fact that the extra obligations (and therefore expenses) imposed on a participant driving business miles under the Scheme terms did not give rise to any additional amount payable under the Scheme.

220. LOR recognised these constraints in the application of section 229(2) for Regulation 22A(3)(a) until the hearing. In correspondence it was said that LOR did not consider that the Payments would qualify as MAPs. Instead, it was said that the separate mileage fuel payments were MAPs and AMAPs and as the rate is the lower rate than the maximum permitted under the AMAP rules the employees claimed MAR on the difference in accordance with the rules I have described earlier. As explained those fuel payments paid by LOR are the classic example of payments within section 229(2) ITEPA.

Regulation 22A(3)(c)

221. This subparagraph applies to any other form of payment in respect of the use by the employee of a qualifying vehicle. It is therefore not limited in any way to use for business purposes and does not need to be a payment of expenses.

222. However, I consider that "use" is still the determining factor. I recognise that "in respect of" is a wide nexus, but for a payment to be treated as RME under this sub-paragraph it must be made in respect of use by the employee; not expected use, or potential use or availability for use.

223. The Payments were not only not made in respect of business use; they were not made in respect of use at all given that they were entirely determined by reference to the grade of the employee regardless of the extent of use of their car.

224. Mr Maugham submits that HMRC effectively conceded that the Payments recognised anticipated use of a car by virtue of the fact that the recipients could only claim the lower mileage amounts under the business expenses rules for fuel costs. However, I do not consider that HMRC conceded this point in their Statement of Case. They went on to say that the lower mileage payments were also made to recipients of company cars and that the Payments were more for the provision of a car than for its use.

225. Mr Maugham submits that my conclusions leave a gap in the rules for payments which are not earnings under general principles and to which the RME rules do not apply because Regulation 22A does not only provide the disregard but the charge on amounts which would not otherwise be earnings. Neither party has identified items which would in practice fall into this gap, and I struggle to do so given the breadth of the charging provision in section 3 SSCBA.

226. Conversely, Mr Maugham also says that these conclusions are unworkable because it causes the RME definitions to be otiose as HMRC had not identified payments in connection with the use of a private vehicle that are not earnings but are RME. HMRC responded by identifying payment for various matters including servicing and replacement tyres. I agree with the servicing and replacement tyre examples. In both cases the payment will be within the broad nexus provided by "in respect of" use of the car. Identifying the extent to which, if any, there was reimbursement of expenses incurred for carrying out an employee's duties when making payment for such items (and thereby disregarded applying *Pook*) would come back to the problems faced in *Donnelly*. The RME provisions deal with that problem by bringing the total payment into charge and applying the QA disregard.

227. This does not translate to mean that a fixed payment paid regardless of use, which in some way may pick up some or all of the costs of servicing a car which a person may or may not use must also be viewed as RME. The payment of service costs alone is clearly "related to" use. The payment of the fixed amount paid regardless of use is not; and the Payments fall within this category.

Conclusion about the application of Paragraph 7A to the Payments

228. As a result of concluding that the Payments do not fall within the definition of RME, and as a result of my conclusion regarding the scope of Paragraph 7A above being limited to payments of RME, the result is that the disregard in Paragraph 7A cannot be applied to the Payments.

OVERALL CONCLUSION

229. I have decided that:

(1) The Payments are "earnings" for the purposes of Section 3 SSCBA;

(2) The Payments are not RME;

(3) As a result of not being RME, the disregard for NICs in Paragraph 7A cannot apply to the Payments.

230. As a result, this means that LOR's appeal must be dismissed. HMRC's decisions issued on 18 April 2019 are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

231. 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.

TRACEY BOWLER
TRIBUNAL JUDGE

RELEASE DATE: 08 JUNE 2021