TC02466

Appeal number: TC/2012/05720

Section 144(1) Income Tax (Earnings and Pensions) Act 2003 – proper construction of. Does the employee's offsetting payment need to be in the same tax year as receipt of the car benefit – No.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER MARSHALL **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
RICHARD THOMAS ESQ

Sitting in public at 45 Bedford Square, London WC1 on 06 December 2012.

The Appellant in person.

Mr Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns two separate matters. Our decision is written as a Full Decision notwithstanding that the parties agreed to a Summary Decision being issued after we had informed them of the outcome of the appeal at the end of the hearing. It is being presented as a Full Decision only because of our decision on the issue of statutory construction that fell for determination during the hearing before us; that is, the true and proper construction of section 144(1) Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Otherwise, our main findings of fact are dealt with in the format appropriate to a Summary Decision.

2. The appellant is a Director of a company known as DCD Systems Limited. He has been charged to income tax for the tax years 2007-08 and 2008-09 on benefits said to be derived from his directorship of that company. Part of the charge relates to a motorcar used by the appellant that was owned by that company when he was a director and a charge to car benefit has been levied against the appellant because, it is not disputed, he had use of that motorcar and so Chapter 6 of ITEPA applies. The other part of the charge relates to "use of office at home" on the basis that the company had shown a charge in its accounts for paying for such use. It was not clear to us under which Chapter of Part 3 ITEPA this part of the charge arose and Mr Bradley was unable to enlighten us.

3. During the course of the appeal hearing before us we were able to peruse the company's accounts for its years ended 30 June 2007 and 30 June 2008. It is immediately apparent from a perusal of those accounts that, at the material time, the company was not solvent and had a substantial deficit on its balance sheet.

4. The evidence before us, which was not in dispute, was that as the company was not solvent, the appellant paid most of its outgoings from his personal monies. We noted from the loan account details that whenever, for example, the car needed fuel, servicing, taxing or repairs same were paid for by the appellant. They had to be paid for by him as the company had no assets from which to make such payment. Similarly, the company had no assets with which to pay for any use of the space that it used at the appellant's home. The fact that the company recorded such payment in its accounts is, on any view of the matter, merely a paper or bookkeeping entry detached from reality.

5. We find as a fact that the appellant did not receive any payment from the company for the use of space within his home.

6. We also find as a fact that the appellant paid a sum equal to (or even perhaps exceeding) the statutory car benefit, because the company was incapable of funding the running of the motorcar.

7. The company was also subject to an enquiry from the respondents on the basis that it should have paid Class 1A National Insurance Contributions ("NICs") on the car benefits and payments for use of home received by the appellant. Eventually that matter was settled by negotiation of a contract offer to cover NICs, interest and a

penalty and the company agreed to pay £4,196 in settlement. Because the company had no funds to pay this charge, the appellant paid it by personal cheque. The respondents proceeded on the basis that the appellant could not now, following the NICs settlement, gainsay the fact of car benefit and/or the fact that he had not reimbursed the company to such an extent that he was left with no taxable car benefit. Nor they maintained could he contest the use of home charge, and they argued that the appellant could only deduct against the income tax charge a minimal amount of the expenses of running his home. That argument was put on the basis that the appellant had been a party to the settlement involving the company. That, as a matter of law, is wrong. In so far as the appellant was involved in the settlement he was then acting as a Director of the company; not in his personal capacity. There is no question of any estoppel arising against the appellant. Furthermore proceeding first to settle the NICs issue and to use it to justify a charge on benefits under ITEPA is, in terms of the statute, the wrong way round. Section 10 of the Social Security (Contributions and Benefits) Act 1992 provides at subsection (1)—

10(1) "*Where—*

> *(a) for any tax year an earner is chargeable to income tax under ITEPA 2003 on an amount of general earnings received by him from any employment ("the relevant employment"),*
>
> …
>
> *a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of the general earnings as falls to be so left out of account".*

8. It seems to the Tribunal therefore that the question of the charge to income tax under the benefits code in ITEPA is entirely at large. So far as the income tax charge was based on the company's use of the appellant's house, we were not satisfied that there was any basis for the charge in the benefits code and Mr Bradley could not point us to one. We observe, without deciding the point, that Chapter 3 of Part 3 ITEPA "Expenses payments" requires there to be a "sum paid to an employee" or, more relevantly, a "sum paid away by an employee" which is reimbursed, which strongly suggests that an actual payment is required, not just a credit to an account in the books of the employer. We also observe, again without deciding the point, that Chapter 10 of Part 3 ("Residual liability to charge") only seems to cover the making available of assets.

9. So far as the income tax charge was based on the appellant's use of the company's car, there was clearly a charge in principle under Chapter 6 of Part 3 ITEPA. There was no disagreement between the parties about the correct way to calculate the benefit under section 121 ITEPA, up to and including Step 7 in subsection (1). The dispute turned on Step 8, the calculation of payments by the employee for the private use of the car under section 144 ITEPA. The respondents

had accepted in the NICs settlement negotiations that some payments had been made for private use but not enough to extinguish the charge.

10. That raised an interesting legal point because during the correspondence with the appellant, the respondents had contended that under section 144(1) ITEPA, the appellant could only deduct from the provisional sum calculated under steps 1 to 7 in section 121(1) ICTA any sum that he had paid to or for the benefit of the company, representing payment for the car, *"in the tax year in question."*

11. We should say that that point arose because it was common ground that in respect of the £4,196 settlement agreed between the company and the respondents, the company had no funds with which to pay that amount. Instead, the appellant paid that sum from his personal monies and paid it in the tax year 2010-11. He was not obligated so to do, but did so voluntarily. He argued that that sum could and should be counted as a payment by him to the company that could be offset against the value of any car benefit received by him, because he, as a Director of the company could agree to accept it on that basis and he, as the payer, could condition the payment in that manner. That point was not in dispute. The point raised by the respondents is the point that we consider below.

12. The point raised by the respondents gave rise to an interesting issue of statutory construction. It was argued that any amount paid to the company further to a requirement upon an employee to pay a sum for the use of a motorcar, had to be paid "in the tax year in question". For that reason we set out sub-section 144(1) Income and Corporation Taxes Act 1988 in full:

S144(1) *"A deduction is to be made from the provisional sum calculated under step 7 of section 121(1) if, as a condition of the car being available for the employee's private use, the employee -*

> *(a) is required in the tax year in question to pay (whether by way of deduction from earnings or otherwise) an amount of money for that use, and*
>
> *(b) makes such payment."*

13. The respondent contended that upon its true and proper construction that statutory provision requires that the sum that the employee is required to pay in the tax year in question, must also be paid in the tax year in question. We consider that construction of that subsection to be incorrect. That is because the qualifying words "in the tax year in question" appear only in sub sub section (a) and do not appear in sub sub section (b). The respondents' construction of the subsection could only be correct if, instead of being worded as it is, the subsection read as follows :

"*A deduction is to be made from the provisional sum calculated under step 7 of section 121(1) if, as a condition of the car being available for the employee's private use, in the tax year in question the employee –*

> *(a) is required to pay ....., and*

(b) makes such payment."

14. We therefore hold that there is nothing in law to prevent the payment of £4,196 being set off at Step 8 in section 121(1) ITEPA against the calculation of the car benefit, and that as a result in neither tax year is there a taxable amount within section 121.We therefore uphold the appellant's appeal against the assessments under section 29 Taxes Management Act 1970 for 2007-08 and 2008-09.

15. 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.

Decision

Appeal allowed.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 7 January 2013