Neutral Citation: [2023] UKFTT 00448 (TC)

Case Number: TC08824

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

London

Appeal reference: TC/2018/04963

*INCOME TAX – PAYE – National Insurance Contributions – subsistence expenses – earnings – reimbursement of expenses – whether or not "round sum allowances" - Pook v Owen – Donnelly v Williamson – Cheshire Employer and Skills Development Ltd v HMRC – Reed Employment plc v RCC – dispensations – necessity of checks – Parts 2, 3, 5 and 11 ITEPA 2003 – Social Security Contributions (Decisions and Appeals) Regulations 1999 – Social Security (Contributions) Regulations 2001 – whether the Tribunal should (or must) decide that the appellant was undercharged to tax by HMRC's Determinations and Decisions – s.50(7) Taxes Management Act 1970*

**Heard on:** 5 and 6 November 2019
**Judgment date:** 11 May 2023

**Before**

**TRIBUNAL JUDGE JAMES AUSTEN**
**MR MARK BUFFERY**

**Between**

**NWM SOLUTIONS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: David Ewart KC and Laura Ruxandu of Counsel, instructed by David Kirk & Co. Ltd, Accountants

For the Respondents: Rebecca Murray of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. This appeal by NWM Solutions Limited ("NWMSL") is in respect of:

   (1) Determinations made by the respondents ("HMRC") pursuant to Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (the "Determinations") as follows:

      (a) £70,000.17 for the period 2013-14;

      (b) £200,161 for the period 2014-15; and

      (c) £239,679.62 for the period 2015-16

   and

   (2) Decisions made by HMRC pursuant to s.8 Social Security Contributions (Transfer of Functions) Act 1999 relating to Class 1 NICs (the "Decisions") as follows:

      (a) £837.26 for the period 20 October 2014 to 5 April 2015 in respect of Michael Bollard;

      (b) £110.79 for the period 21 April 2014 to 5 April 2015 in respect of John Wylde;

      (c) £2,829.44 for the period 7 April 2014 to 5 April 2015 in respect of Derek Gordon;

      (d) £251.12 for the period 1 September 2014 to 5 May 2015 in respect of Callum Simons;

      (e) £354.23 for the period 12 October 2014 to 19 December 2014 in respect of Alexander Cassidy; and

      (f) £51.06 for the period 21 November 2014 to 5 April 2015 in respect of Jim Dott.

   Each of the Determinations and Decisions was issued on 1 November 2017.

2. Essentially, the appeal relates to payments made by NWMSL to its employees for subsistence expenses on the basis of scale rates set by HMRC. The question for the Tribunal to determine was whether those payments ought to be subject to income tax and NICs.

3. At the hearing, an issue arose as to the quantum of the Determinations and Decisions. This is dealt with as a preliminary issue at [5.]ff below.

4. We have allowed the appeal and set aside the Determinations and Decisions.

### PRELIMINARY ISSUE - QUANTUM

5. On 25 June 2019, Pembe Ramadan of HMRC wrote a letter to the Tribunal. It is apparent from the terms of the letter that it followed certain dealings and/or correspondence, evidence of which was not before the Tribunal.

6. Insofar as we can tell from the evidence before us:

   (1) HMRC and NWMSL had entered into "without prejudice" discussions as to the quantum of the tax and NICs in issue in this appeal;

   (2) The outcome of those discussions was reflected in a letter dated 22 June 2017 from Mr Wheeler of HMRC to Mr Kirk, NWMSL's representative. That letter

included a spreadsheet setting out HMRC's analysis of subsistence claims from 587 receipts (provided by NWMSL) from a review period of January to March 2016. The analysis indicated that, in HMRC's view, that 29.28% of the subsistence claims in question were substantiated by receipts (2,261 days worked; 587 receipts submitted). HMRC then applied that 29.28% success rate to the subsistence claims generally. It was this methodology that gave rise to the quantum of tax and NICs that the parties subsequently agreed were in dispute in this appeal, and which were consequently included in HMRC's Statement of Case dated 18 October 2018 (reflecting the amounts of the Determinations and Decisions);

(3) HMRC issued the Determinations and Decisions on 1 November 2017, and NWMSL lodged its appeal with HMRC on 29 November 2017;

(4) HMRC offered a review by an independent officer, which NWMSL accepted on 4 January 2018. On 5 July 2018, the review officer (Mr Smith) upheld the Determinations and Decisions in reviewed amounts, which were stated to have been agreed between HMRC and NWMSL. He wrote:

> Notwithstanding the substantive issue in this case I have been advised that there is now agreement on the tax and NIC quantum's [*sic*] that arise out of the HMRC decision.

(5) HMRC subsequently proposed to include copies of the "without prejudice" documents giving rise to the 22 June 2017 letter in the Tribunal's hearing bundle for this appeal;

(6) NWMSL objected to the inclusion of those documents in the hearing bundle and, in consequence, HMRC stated its intention to remove them from the bundle.

7. That being the relevant background, HMRC's letter of 25 June 2019, insofar as relevant, reads as follows:

> As a consequence of [NWMSL]'s objection to HMRC's reliance on these particular ["without prejudice"] documents, HMRC put [NWMSL] to proof that it acted within the terms of the dispensation notice on all amounts paid to employees in respect of subsistence instead of the (lower) amounts on which the determinations under regulation 80 were based (giving rise to a total income tax liability of £568,885.08) and additional Class 1 National Insurance Contributions ("NIC") liability including the section 8 notices issued (giving rise to a total class 1 NICs liability of £733,861.74).
>
> Instead, the full amount of income tax liability should be £804,418.00 and the full amount of Class 1 NICs liability should be £1,037,700.00. We come to the conclusion on the full amount using figures of the total amounts of subsistence paid during the review period from 6 April 2013 to March 2016, a supplied by the agent Mr Kirk in his email to HMRC dated 25 July 2017…
>
> In light of this, should [NWMSL]'s appeal be dismissed we would invite the Tribunal to use its general case management powers under rule 5(1) and (3)(a) of the Tribunal rules to amend the regulation 80 determinations and section 8 notices to the full amount of Income Tax and NICs due.
>
> Since the correct amount of Income Tax and Class 1 NICs is based on figures supplied by [NWMSL] we do not consider that this should come as any surprise to [NWMSL]. However, this letter is copied to [NWMSL]'s representative in case he wishes to comment.

8. Insofar as we have been able to ascertain, the Tribunal wrote to HMRC to acknowledge receipt of this letter, but no steps were taken to put it before a judge to determine the issues it

raised. We infer that this was because the letter did not include a formal application to amend HMRC's Statement of Case so as to reflect its terms.

9. Mr Ewart's written submissions for this appeal objected that in seeking to undo the prior agreement between the parties on quantum, the letter of 25 June 2019 raised a new point. This new point did not form part of HMRC's case as pleaded in its Statement of Case. It followed, in Mr Ewart's submission, that HMRC ought not to be allowed to plead the new quantum point – unless it made an application to the Tribunal for permission to do so; Mr Ewart would oppose any such application. Mr Ewart commented:

> It is unclear what exactly HMRC's request under this letter entails and what rules they are referencing. In any event, if HMRC want the Determinations and the Decisions to be increased, the onus is on them to establish the higher figures by evidence if necessary (*Glaxo Group Ltd and others v Inland Revenue Commissioners* [1996] STC 191).
>
> [NWMSL] notes that there has been no application by HMRC to amend their statement of case following this correspondence. Accordingly, NWM assumes that this point will not be pursued before the FTT.

10. For HMRC, Ms Murray argued that the Tribunal had general case management powers under Rule 5(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") to permit HMRC to argue the point.

11. Ms Murray then went further, raising a point which was not covered in HMRC's letter to the Tribunal of 25 June 2019, and referred the Tribunal to s.50(7)(c) TMA 1970 (**TMA**), which reads as follows:

> (7) [If, on an appeal notified to the tribunal, the tribunal decides]…
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.]

12. In Ms Murray's submission, there was ample evidence before the Tribunal to show that the Determinations and Decisions in this appeal undercharged NWMSL to tax as a result of the quantum issue raised in the 25 June 2019 letter. This was not therefore in fact, she submitted, a point on which the Tribunal had any discretion: there was a positive obligation on the Tribunal to increase the amounts in question – s.50(7) TMA prescribes *mandatory* action ("…the… amounts *shall* be increased…").

13. Ms Murray explained that in light of that submission, it was not necessary for HMRC to make an application to amend its Statement of Case when it sent the 25 June 2019 letter to the Tribunal, nor was it necessary for her to make an oral application. I pressed Ms Murray on this point, and she reluctantly agreed to make a "protective" application for permission to amend HMRC's Statement of Case "if and to the extent necessary".

14. For his part, Mr Ewart said that if HMRC was allowed to amend its pleadings at this late stage, it would cause significant detriment to NWMSL. This was because NWMSL would not have the opportunity to seek additional evidence (such as receipts) in respect of claims for all periods subject to the Determinations and Decisions. It occurs to the Tribunal that additional witness evidence might also have been sought.

15. Mr Ewart pointed to the apparent reason for HMRC's desire to undo the agreement on quantum agreed between the parties, as expressed in the 25 June 2019 letter: *"[a]s a consequence of [NWMSL]'s objection to HMRC's reliance on these particular documents*, HMRC put NWMSL to proof that it acted within the terms of the dispensation notice

[referred to afterwards as the Dispensation] on all amounts paid…". In Mr Ewart's submission, HMRC's decision to withdraw from the quantum agreement was unrelated to NWMSL's objection to the inclusion of "without prejudice" documents in the hearing bundle: it was simply a punitive act intended to make NWMSL's task more burdensome in preparing evidence for the Tribunal. Furthermore, Mr Ewart argued, *Glaxo Group Ltd and others v Inland Revenue Commissioners* [1996] STC 191 (at 200, per Millett LJ, I infer) (***Glaxo***) required HMRC to adduce evidence to support a contention of an insufficiency to tax. In Mr Ewart's submission, HMRC had failed to do so.

16. Ms Murray denied that the higher quantum sought by HMRC would put NWMSL to any additional effort, as she doubted that any further evidence existed (though this ignores our point that additional witness evidence might be sought, even if documentary evidence was to prove elusive or non-existent).

17. Ms Murray added in oral argument that if NWMSL was objecting to the "unfairness" of HMRC seeking to resile from an agreement on quantum (i.e., on public law principles), then the Tribunal lacked the jurisdiction to determine the point. I did not understand Mr Ewart to be objecting to unfairness on those grounds, and Mr Ewart did not pursue such a line of argument. Rather, he argued, the context was undoubtedly relevant to the Tribunal's consideration of its case management powers under Rule 5, and in his submission, "[i]t would be unfair and prejudicial to [NWMSL] if HMRC were allowed to raise a new issue on quantum at this stage in the proceedings."

18. The Tribunal gave its decision on this point in favour of NWMSL: HMRC ought not to be permitted to change its position on quantum reflected in its pleadings absent the agreement of the Tribunal, which we declined to give.

19. The reasons for that decision were as follows:

(1) As to s.50(7) TMA, we agreed with Mr Ewart that *Glaxo* was relevant. In this case, HMRC's general factual position is essentially that NWMSL has not provided ("any") evidence to show that expenses were incurred by NWMSL's employees, and that as the burden of proof is on NWMSL, this should (they say) be sufficient to determine the case against NWMSL. HMRC did not have a specific response to Mr Ewart's argument that *Glaxo* required HMRC to adduce positive evidence in support of their contention that s.50(7) TMA obliged the Tribunal to increase the assessments. It is a point of statutory construction: in our view, s.50(7) TMA requires the Tribunal to be satisfied from the totality of the evidence before it (and on the balance of probabilities) that an appellant is undercharged to tax on an assessment. The Tribunal could reach such a decision either on an application by HMRC or on its own motion. But in either event, sufficient evidence is a necessary pre-requisite. Nevertheless, we did not consider that Mr Ewart was right to say that HMRC has any specific evidential burden on it in the context of s.50(7) TMA – at least not in all cases: it could be the case that the evidence before the Tribunal (including, in principle, evidence from NWMSL) was sufficient for the Tribunal to form that view. But (relevantly) if not, and if HMRC wishes to rely on s.50(7) TMA, then it is certainly true that it would be necessary for HMRC to show (such that the Tribunal is satisfied) that NWMSL is undercharged.

(2) In this case, having considered the evidence before it, the Tribunal was not satisfied that NWMSL was undercharged by the Determinations and Decisions: having weighed and evaluated the evidence before us, there was in our view insufficient evidence to enable us to do so. The purported absence of evidence (on which HMRC

relied in their general submissions) was not enough to meet the burden on them which we identified in the last sentence of the preceding sub-paragraph.

(3) Stepping back, in our judgment, it would be materially prejudicial to NWMSL to allow HMRC's application in the circumstances without adjourning the hearing (for which there was no application or support from either party) – probably for a significant period of time. We were not persuaded by HMRC's supposition that there would not be any additional factual evidence, and that providing time to search for it would be futile. Whether or not documentary evidence (including, but not necessarily exclusively limited to receipts) exists, we do not preclude the possible availability of further witness evidence (e.g., from affected (ex-)employees). The existence and nature of possible evidence ought not to be predetermined.

(4) It follows that the first limb of Ms Murray's application – on the necessity of the Tribunal increasing the amounts of the Determinations and Decisions – failed.

(5) As, in our view, our decision therefore concerned the exercise of our Rule 5 discretion, we had in mind the overriding objective to deal with cases fairly and justly in Rule 2(1) of the Rules.

(6) Though the Tribunal was not referred to it, we took support from *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) (*per* Carr J (as she then was)) (***Quah***), at [37]-[38], which set out the relevant principles – albeit in the context of the Civil Procedure Rules, which do not apply in this Tribunal. As to that latter point, we are aware that the Upper Tribunal in *First Class Communications v HMRC* [2014] UKUT 244 (TCC), said at [44] that "although the CPR do not apply to tribunals, they are a useful guide, especially when considering procedural matters not covered in detail or at all by the FTT Rules or the UT Rules.", and that the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 made it clear at [26] that whilst the time limits and sanctions in the CPR do not apply directly to the Tribunals, they should generally follow a similar approach. We therefore proceeded on the basis that whilst the Tribunal is not obliged strictly to follow the approach in *Quah*, it is nevertheless a relevant and useful guide.

(7) Having cited the relevant prior authorities, *Quah* included the following summary of the principles to be applied, as follows:

> 38. …the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be

> lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

(8) Applying those principles, this was clearly a "very late application", because it was made orally on the first morning of a 2-day hearing. We considered that, were we to allow it, an adjournment would be necessary to give NWMSL the opportunity to gather additional evidence, which would then become necessary. Furthermore, the explanation for the late application to change the pleadings was insufficient, and somewhat concerning, *viz*. in response to NWMSL declining to agree to the inclusion in the Tribunal's bundle of without prejudice correspondence. No attempt was made to explain *why* the consequence of not including those papers (which the Tribunal would not expect to see) should make appropriate the proposed change to the quantum of tax in dispute, which was previously agreed by the parties. Mr Ewart's view was that it was intended to be a punitive step: we were minded to agree. In any event, we were unable to say that a "good explanation" for the delay had been given. These factors weighed heavily against allowing the change.

(9) Against that, we were conscious that there is a "…venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax": *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2008] EWHC 2387 (Ch) at [116] (*per* Henderson J (as he then was)), and later expressly approved by the Supreme Court in that case ([2011] STC 1143 at [15]). It follows that had we been persuaded on the facts of the intrinsic correctness of HMRC's new position, sufficient weight would have to be given to this factor when considering how to exercise the Tribunal's discretion. In the event, though, we were not satisfied that the evidence supported HMRC's position.

20. As noted above, we agreed with Mr Ewart that exercising our discretion to allow HMRC to amend their Statement of Case at this late stage would undoubtedly be prejudicial to NWMSL – particularly in circumstances in which NWMSL would not have the opportunity to seek additional evidence to support its case in that changed context. It would, in our view, be unfair and unjust (within the meaning of Rule 2).

21. Accordingly, we denied HMRC permission to amend their Statement of Case, and we required them to argue the quantum in accordance with their pleadings.

**SUBSTANTIVE ISSUES TO BE DETERMINED**

22. Following the parties' submissions and the evidence before us, the following issues arose:

(1) Whether the payments subject to the Determinations and Decisions were "round sum allowances" or not;

(2) Whether the existence of the Dispensation should be determinative of the appeal or not;

(3) (Subject to [23.] below) whether the stated "Qualifying conditions" of the Dispensation were validly incorporated under the statutory scheme;

(4) Whether NWMSL satisfied the "Qualifying conditions" on the facts as found; and

(5) Whether a breach of the "Qualifying conditions" could lead to the Determinations and Decisions.

23. We were not addressed on the third issue referred to above, which arises because of our construction of s.65 ITEPA 2003 (**ITEPA** – all subsequent statutory references are to this Act unless specified to the contrary). As noted at [79.] below, it was not necessary to decide this issue to determine the appeal, and our comments on it played no part in our decision. We have nevertheless included it in this decision notice to preface our conclusions on issue 4.

24. This decision notice concentrates largely on the income tax issue, and the parties were agreed that the NICs treatment would follow the outcome of that.

**BURDEN AND STANDARD OF PROOF**

25. In respect of the substantive issues, it was common ground that the burden of proof was on NWMSL to show that the Determinations and Decisions were incorrect.

26. The standard of proof is the civil standard, i.e. on the balance of probabilities.

**EVIDENCE**

27. The documentary evidence consisted of a three-volume bundle of documents, correspondence, legislation, and authorities, which had been prepared for the hearing, and which we read and considered.

28. We had evidence from Mr Williams (the sole director/shareholder) and Ms Cook (the payroll manager) for NWMSL, and Mr Wheeler (an employer compliance officer with 40 years' experience) for HMRC. In each case, their Witness Statement (including exhibits, where relevant) served as their evidence in chief. Additionally, Mr Williams and Ms Cook gave oral testimony; each witness was then cross-examined. With one minor caveat in respect of Mr Williams (discussed below), we found each to be a credible and truthful witness who was endeavouring to assist the Tribunal to the best of his or her ability, and we accepted their evidence. We also had a Witness Statement from Jacqueline Ellis-Jenkins of HMRC, but she did not give oral evidence and we did not find her written evidence to be of assistance.

29. It was apparent from our bundle that NWMSL's expenses claim form changed over time. One particular alteration was especially relevant to this appeal, as it went to the necessity (or otherwise) of the retention of receipts to substantiate subsistence expenses. Ms Cook told us in evidence that NWMSL's expenses claim form underwent a change in 2015 following a review in August 2014 by a firm called Professional Passport, which was a membership organisation for umbrella employment companies of which NWMSL was a

member. As a result of that review, the following clause was added to the claim form: "NB: NWM randomly audit expenses and if you are unable to produce receipts we will disallow further subsistence claims, and cancel any previous unsupported expense claims."

30. Mr Williams was pressed on that point in his cross-examination. His evidence in chief and his oral testimony under cross-examination was to the effect that the change to the claim form was not relevant to the question of whether receipts actually ought to be retained by employees or checked by NWMSL. We found Mr Williams' answers on this issue to be somewhat unconvincing and self-serving. We considered that the change to the claim form, albeit prompted by a review from a third-party organisation, indicated a sensitivity on the question of receipts which must have been shared by NWMSL. We considered this point when reaching our conclusion on the evidential sufficiency of the claim forms, as it is plainly relevant to the weight we should allot to the forms. Ultimately, we considered that this aspect of Mr Williams' evidence was not determinative of the wider factual and legal issues before us – nor does it call into question the remainder of Mr Williams' testimony, which we accepted.

31. During Mr Williams' cross-examination, there was a largely hypothetical discussion between Ms Murray, Mr Williams, and the Tribunal, about the likely eating habits of employees, including whether they were more likely than not to have eaten breakfast before leaving the house. We derived no material benefit from those exchanges and we do not consider that they introduced anything which we might accept as factually helpful when considering whether employees did incur expenditure on food and drink within the strictures imposed for subsistence payments under the benefits code. Though (as we say below) the evidence relating to such expenditure is very slight, we prefer to proceed on the basis of that evidence, such as it is, rather than on contrasting hypothetical notions of what might have been more or less likely.

32. As to the crucial question of whether the employees incurred expenditure on subsistence (within the relevant strictures required by the benefits code) with which this appeal is primarily concerned, we find on the basis of the evidence before us, and on the balance of probabilities, that they did. The payments were therefore within Chapter 3, Part 3 of ITEPA, being the reimbursement of expenses.

33. There was limited evidence on this point of paramount importance. But it is not true to say, as HMRC did, that there was "no" evidence before the Tribunal that the relevant expenditure was incurred. As Ms Cook told us, every expense payment made by NWMSL was made following the receipt from an employee of its standard expenses form. We were provided with a sample form in our bundle. The subsistence expenses part of the form included the following statement (or similar): "You do NOT need to submit receipts to support this claim. *By making a subsistence claim, you confirm that you have incurred a cost on a meal (food and drink) after starting the journey* and understand that you will be required to submit receipts to support the claim should NWM request that you do so" (our emphasis). The form also contained the following (or similar) declaration, made by the employee: "I declare that this claim relates to expenses *incurred* wholly, exclusively, and necessarily in the course of my work…" (our emphasis). The form is then signed and dated by the employee.

34. We considered that this form, once completed and signed by an employee, was itself evidence that expenditure had been incurred in respect of any subsistence expenses claimed on it. We fully acknowledge that it was slim evidence, but it was not non-existent. The question was whether we were satisfied on the balance of probabilities that the expenditure had been incurred as claimed. After much reflection, and having evaluated the specific evidence before us in the context of the appeal as a whole, we decided that it does.

35. We considered whether the claim form satisfied us that the necessary expenditure had actually been incurred by the employee, or only that the employee had *claimed* that such expenditure had been incurred.

36. Regrettably, as no employee gave evidence before us, we were not able to ascertain for ourselves the truth or otherwise of the signed statement made on the expenses claim form in any given case. We therefore had to proceed on the basis of the available evidence before us such as it was. HMRC did not seek specifically to impugn the veracity of the signed expenses claim forms in evidence in respect of any of the subsistence expenses claims at issue in this appeal, nor did HMRC adduce any evidence undermining the reliability of those forms (which, whilst they were not obliged to do, they could have done if they chose). Notwithstanding our conclusion about Mr Williams' evidence on the question of whether or not the changes to the claim form over time indicated a sensitivity on the part of NWMSL as to the reliability of the expenses claims made on those forms, and having evaluated the forms in the context of all the factual evidence before us, we decided to accept – on the balance of probabilities – that the forms could be accepted as truthful as to the expenses claims made in them and we so find.

37. Furthermore, the Tribunal is permitted to draw evidential inferences of fact from the direct evidence before it. Making common sense inferences is an important tool in the efficient administration of justice (*Crewe Services and Investment Corporation v Silk* (2000) 79 P&CR 500 at 509, per Robert Walker LJ, as he then was). As Ryder J (as he then was) held in *A Local Authority v A (No 1)* [2010] EWHC 28 (Fam); [2011] 2 FLR 137 at [18]:

> A judicial inference… is no more or less an evidential assessment than a determination of likelihood... It has to be based on facts which can be found. If there is no direct evidence of the primary fact, there have to be secondary facts from which an inference as to the primary fact can be drawn.

38. In the context of the evidence available to us, we consider that we are justified in reaching our finding at [34.]. Nevertheless, if and to the extent it is necessary that we draw a judicial inference (from the primary evidence of the claim forms) that the relevant expenditure was incurred in each case, then we do so.

39. Notwithstanding Ms Murray's submissions to the contrary, we consider our finding largely to be corroborated by the survey which Ms Cook subsequently undertook at HMRC's request in February 2017 of employees and ex-employees who had claimed expenses in the quarter ended 31 March 2016. We are content that the results of this survey may fairly be taken as indicative of other periods, and in particular the expenses claims subject to the Determinations and Decisions.

40. Of the 1,946 surveys sent out, 552 were returned. Of those, 20 respondents sent back receipts corroborating their subsistence expenses claims; 472 respondents said they had retained receipts at the time, but no longer had them; and 60 said they had never retained receipts.

41. Ms Cook subsequently double-checked relevant petrol receipts (which NWMSL had retained) to see if those showed costs being incurred on food and drink. Her evidence (which was unchallenged) was that approximately 500 such receipts did reveal such expenditure.

42. We accept the findings of the survey at their face value and we conclude that the receipts referred to were kept or lost as described. Certainly, we were not told that any respondent disavowed having made any expenditure on food or drink. We cannot make any finding as regards the survey results not returned. So even at its lowest, we cannot say that the survey tells us anything to undermine NWMSL's positive evidence.

43. Further findings of fact are, where necessary, made as they arise below.

## THE LEGAL FRAMEWORK

### Legislation

44. The core of this appeal relates to Part 3 of ITEPA – in particular, ss. 62, 70, 72, and 65.

45. Section 62 is as follows:

> 62 Earnings
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means—
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is—
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee.
>
> (4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

46. Section 70 is as follows:

> 70 Sums in respect of expenses
>
> (1) This Chapter applies to a sum paid to an employee in a tax year if the sum—
>
> (a) is paid to the employee in respect of expenses, and
>
> (b) is so paid by reason of the employment.
>
> (2) This Chapter applies to a sum paid away by an employee in a tax year if the sum—
>
> (a) was put at the employee's disposal in respect of expenses,
>
> (b) was so put by reason of the employment, and
>
> (c) is paid away by the employee in respect of expenses.
>
> (3) For the purposes of this Chapter it does not matter whether the employment is held at the time when the sum is paid or paid away so long as it is held at some point in the tax year in which the sum is paid or paid away.
>
> (4) References in this Chapter to an employee accordingly include a prospective or former employee.
>
> (5) This Chapter does not apply to the extent that the sum constitutes earnings from the employment by virtue of any other provision.

47. Section 72 is as follows:

> 72 Sums in respect of expenses treated as earnings

(1) If this Chapter applies to a sum, the sum is to be treated as earnings from the employment for the tax year in which it is paid or paid away.

(2) Subsection (1) does not prevent the making of a deduction allowed under any of the provisions listed in subsection (3).

(3) The provisions are—

section 336 (deductions for expenses: the general rule);

section 337 (travel in performance of duties);

section 338 (travel for necessary attendance);

…

48. Section 65 (as it stood at the relevant time) is as follows:

65 Dispensations relating to benefits within provisions not applicable to lower-paid employment

(1) This section applies for the purposes of the listed provisions where a person ("P") supplies an officer of Revenue and Customs with a statement of the cases and circumstances in which—

(a) payments of a particular character are made to or for any employees, or

(b) benefits or facilities of a particular kind are provided for any employees, whether they are employees of P or some other person.

(2) The "listed provisions" are the provisions listed in section 216(4) (provisions of the benefits code which do not apply to lower-paid employments).

(3) If an officer of Revenue and Customs is satisfied that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in the statement, the officer must give P a dispensation under this section.

(4) A "dispensation" is a notice stating that an officer of Revenue and Customs agrees that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in the statement supplied by P.

(5) If a dispensation is given under this section, nothing in the listed provisions applies to the payments, or the provision of the benefits or facilities, covered by the dispensation or otherwise has the effect of imposing any additional liability to tax in respect of them.

(6) If in their opinion there is reason to do so, an officer of Revenue and Customs may revoke a dispensation by giving a further notice to P.

(7) That notice may revoke the dispensation from—

(a) the date when the dispensation was given, or

(b) a later date specified in the notice.

(8) If the notice revokes the dispensation from the date when the dispensation was given—

(a) any liability to tax that would have arisen if the dispensation had never been given is to be treated as having arisen, and

(b) P and the employees in question must make all the returns which they would have had to make if the dispensation had never been given.

(9) If the notice revokes the dispensation from a later date—

(a) any liability to tax that would have arisen if the dispensation had ceased to have effect on that date is to be treated as having arisen, and

(b) P and the employees in question must make all the returns which they would have had to make if the dispensation had ceased to have effect on that date.

49. Sections 336-338 are as follows:

336 Deductions for expenses: the general rule

(1) The general rule is that a deduction from earnings is allowed for an amount if—

(a) the employee is obliged to incur and pay it as holder of the employment, and

(b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

(2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.

(3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses).

337 Travel in performance of duties

(1) A deduction from earnings is allowed for travel expenses if—

(a) the employee is obliged to incur and pay them as holder of the employment, and

(b) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.

(2) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

338 Travel for necessary attendance

(1) A deduction from earnings is allowed for travel expenses if—

(a) the employee is obliged to incur and pay them as holder of the employment, and

(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.

(2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.

(3) In this section "ordinary commuting" means travel between—

(a) the employee's home and a permanent workplace, or

(b) a place that is not a workplace and a permanent workplace.

(4) Subsection (1) does not apply to the expenses of private travel or travel between any two places that is for practical purposes substantially private travel.

(5) In subsection (4) "private travel" means travel between—

(a) the employee's home and a place that is not a workplace, or

(b) two places neither of which is a workplace.

(6) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

**Authorities**

50. We were referred to: *Pook (Inspector of Taxes) v Owen* (1969) 45 TC 571 (HL); *Donnelly (Inspector of Taxes) v Williamson* [1982] STC 88 (HC) (***Williamson***); *Cheshire Employer and Skills Development Ltd v RCC* [2012] EWCA Civ 1429 (CA) (***Cheshire***); and *Reed Employment plc v RCC* [2014] UKUT 160 (TC) (UT) (***Reed***).

**DISCUSSION**

**Issue 1 – Whether the payments subject to the Determinations and Decisions were "round sum allowances"**

51. HMRC's primary argument was that the payments subject to the Determinations and Decisions were not the reimbursement of expenses incurred by the employees, but that they were (using HMRC's terminology in its published guidance) "round sum allowances" (referred to as "lump sum payments" in *Cheshire*). As such, Ms Murray said, they should be taxed under s.62 and to Class 1 NICs, and that the existence or otherwise of the Dispensation was irrelevant.

52. This argument was advanced on the following grounds:

(1) There was "no" evidence that expenditure on relevant items of subsistence had been incurred by the employees, such that "…the employees were paid the round sum allowance regardless of the amount actually incurred by them ["if any" – we infer]". Whilst arguably self-evident, the requirement for 'actual' expenditure was articulated by the House of Lords in *Pook v Owen*;

(2) NWMSL had not made any specific checks as to whether the employees had incurred any expenditure on subsistence until the survey carried out in February 2017, which had been prompted by HMRC's express request as part of their compliance check;

(3) In reliance on the requirements set out in *Williamson*, the scheme as operated by NWMSL was not intended "…as a genuine estimate of the cost to the taxpayer" of the relevant expenditure, but included "an element of bounty" (the quotations taken from *Williamson* at 97(e), to which we were taken by counsel). Similarly, contrary to *Cheshire* at [55], there was no "genuine endeavour" to construct a scheme "…to produce an equivalence between the allowance and the expenditure";

(4) In a point to which we shall return immediately below, HMRC's submission in oral argument on the second day of the hearing that "there was no genuine endeavour to establish what expenditure, if any, was incurred by the employees having left the house [on their way to work at a temporary workplace]". Furthermore, employees could make expenses claims "regardless of any actual expenditure", and that NWMSL had "not cared" whether or not employees made claims, as all claims were paid without checks. As such, it was argued that there would not just be a "bounty" paid to employees from NWMSL's expenses regime, but a "large profit". And going further still, it was argued that this outcome was positively intended by NWMSL: we were told that there was "deliberately no system in place to distinguish between 'bogus' and 'honest' claims". NWMSL could never, in HMRC's submission, have been able to tell the difference between the two because it made "no attempt to put a system in place" to do so. The motive for that, it was suggested, was that NWMSL advertised itself to

actual and potential employees in the context of a competitive employment environment by including in its in-house expenses guide the statement that "[y]ou can maximise your net income by claiming back business expenses connected with your work… Your reimbursement is not a cash sum, it is an off-set against your salary which means you pay less tax or equivocally draw more of your salary" – a point she put to Mr Williams in cross-examination. In that context, Ms Murray wryly commented, "it would have been bad for business if [NWMSL] had a tight system in place to check claims";

(5) In summary, HMRC said, there was no evidence of the required expenditure having occurred; there was no *bona fide* attempt to balance cost and repayment (contrary to *Williamson*); and there was no genuine endeavour to construct the scheme to meet such an outcome (contrary to *Cheshire*). The result was that the amounts paid by NWMSL to its employees were "round sum allowances" taxable both to income and NICs.

53. Notwithstanding [52.(4)] above, it is important to make clear that it was not part of HMRC's pleaded case that NWMSL had been complicit in perpetrating a fraud. We accept Mr Williams' evidence that NWMSL genuinely believed it unnecessary to collect receipts for subsistence expenses claims because the scale rates set by HMRC which applied pursuant to the Dispensation did not require it. Whether or not that belief was correct is dealt with under Issue 4, below.

54. As to the remainder, we can deal with HMRC's submissions succinctly, for the facts we have found support none of HMRC's contentions. Having considered and evaluated the evidence before us, we have decided that:

(1) The employees did incur the relevant expenditure on food and drink ([32.]-[41.] above); and

(2) Once the reality of the expenditure was allowed, the remaining question was whether the scheme was devised with a view to producing an equivalence between expenditure and its reimbursement. Having rejected HMRC's case on the expenditure point, we were satisfied that NWMSL's expenses scheme – whether generally, or relating specifically to subsistence payments – did what was necessary in that regard (with the "broad brush" allowed by Etherton LJ (as he then was) in *Cheshire* at [55]). As Etherton LJ said, "the test is not whether the allowance produces a mathematical equivalence with the expenditure…". We are fortified in our conclusion by the fact that NWMSL applied the subsistence scale rates which had been set *by HMRC*. As a result, it cannot be for HMRC to criticise the proportionality of the payments: if the payments were disproportionate (for which we saw no evidence) then the remedy was with HMRC, not NWMSL.

55. We therefore reject HMRC's primary case that the amounts subject to the Determinations and Decisions were "round sum allowances" and so subject to tax irrespective of the existence of the Dispensation: we conclude that they were not.

56. Accordingly, we now turn to the relevance – and subsequently to the terms – of the Dispensation itself.

**Issue 2 – Whether the existence of the Dispensation is determinative of the appeal**

57. By the time of the hearing, it was common ground between the parties that the Dispensation was in full force and effect throughout the relevant period.

58. The Dispensation included the following relevant sections, which, in view of their importance to the remainder of this decision, we set out here in full:

“Dispensation for Particular Expenses Payments and Other Matters

This Dispensation applies to the expenses payments, benefits and facilities which are set out overleaf. For the purposes of this Dispensation these matters are referred to collectively as “expenses payments and benefits”. It means you will not have to report these payments and benefits at the end of the year on form P11DF or P9D. It revokes from the date of this Dispensation any previous dispensation covering expenses payments or benefits of a similar nature.

I am giving you this Dispensation because I am satisfied, on the basis of what you have told me, that no additional tax will be payable by the employees concerned on these expenses payments and benefits. I am authorised to do this by Section 65 and ~Section 96 of the Income Tax (Earnings and Pensions) Act 2003 (formerly Section 166 and Section 144 of the Income and Corporation Taxes Act 1988).

The Dispensation applies only to the expenses payments and benefits set out overleaf, in the circumstances there set out. If the expenses payments or benefits are paid or provided in circumstances, which give rise to additional tax, this Dispensation will need to be revoked. Where necessary, the revocation may apply to expenses payments and benefits already provided. In that case additional tax will be due. So it is important that you let me know if you alter your [systems] for controlling expenses payments and benefits, or increase their amounts, or change their nature of making any other changes which may affect their taxability.

Payments and benefits that are in any way different, or are provided in circumstances that differ from those set out overleaf will not be covered by the Dispensation and should be reported in the normal way.”

and

“Travel and Subsistence

Payment of travelling expenses necessarily incurred in travelling in the performance of the duties of the employment or travelling to a temporary workplace whether by road, rail, or other means of public transport in the UK or abroad where supported by receipts. Travelling expenses may include the cost of subsistence or overnight accommodation to the extent that it is necessary for the travel. Payments for ordinary commuting, private travel and any payments in respect of a spouse or family member are specifically excluded from the Dispensation and must be reported on form P11D.

Benchmark Scale rates

The benchmark scale rates that apply from 6th April 2009 are as follows:

| Description | Amount (up to) |
|---|---|
| Breakfast rate | £5 |
| One meal (5 hour) rate | £5 |
| Two meal (10 hour) rate | £10 |
| Late | £15 |

evening
meal rate

Breakfast Rate- For the benchmark rates to apply the employee must have incurred subsistence expenses while travelling on an allowable business journey. ~The rate allowable for breakfast is for irregular starters only and employees must leave before 6.00 a.m. and incur a cost on breakfast taken away from their home. If an employee regularly leaves the house before 6.00 a.m. for example for working an early shift they would not qualify for the breakfast benchmark scale rate.

Late evening meal rate- The rate may be paid where the employee has to work later than usual, finishes work after 8.00 p.m. having worked his normal day and has to buy a meal before the qualifying journey ends which he would usually have at home.

The breakfast and the late evening meal rates are for use in exceptional circumstances only and are not intended for employees with regular early or late work patterns (see examples at EIM05232)

HMRC is committed to reviewing the rates annually and will consider revising them when there has been a change in the scale rate of plus or minus 10% based on the Consumer Price Index from when it was last revised."

and

"Qualifying conditions

Benchmark scale rates must only be used where all the qualifying conditions are met. The qualifying conditions are:

• the travel must be in the performance of an employee's duties or to a temporary place of work

• the employee should be absent from his normal place of work or home for a continuous period in excess of 5 hours or 10 hours

• the employee should have incurred a cost on a meal (food and drink) after starting the journey.

Early starter and late finisher rates

The early starter and late finisher rates are for use in exceptional circumstances only and not intended for employees with regular early or late work patterns.

Tax and NIC scale rate payments must be limited to three meal rates in one day (or 24hour period). A meal is defined as a combination of food and drink.

Where employees are required to start early or finish late on a regular basis, the over 5 hours or over 10 hours rates could be paid provided all the other qualifying rules are satisfied.

An employer will need to keep sufficient records to be able to demonstrate that the employee was entitled to the payment. An employer also needs to be able to demonstrate that routine checks are undertaken to ensure that the travel expenses rules are being followed."

59. NWMSL's primary case was that each of the payments subject to the Determinations and Decisions was made pursuant to (and in accordance with) the Dispensation, and were therefore exempted from tax by the operation of s.65(5).

60. Conversely, HMRC's main argument on this point was that NWMSL had not met the conditions in the Dispensation, and so the payments made consequently fell outside its scope and remained subject to tax.

61. As the parties were agreed that the Dispensation was in effect at all material times, the next question to arise was whether that fact alone should be determinative of the outcome of this appeal. Mr Ewart argued so, in reliance on *Reed* at [334].

62. In *Reed*, the relevant payments were held to fall within Part 3, Chapter 1 of ITEPA, and so outside the scope of s.65(5). Nevertheless, the Upper Tribunal went on to consider what the effect would have been had the payments been within the scope of Part 3, Chapter 3 of ITEPA (as we have found the payments subject to this appeal to be), and so in principle subject to the s.65 dispensation regime.

63. Relevantly, the Upper Tribunal said as follows:

> [334] If… the listed provisions [in s.65(1)] are applicable, a dispensation merely requires that HMRC be satisfied that no additional tax is payable, regardless of whether HMRC are correct in being so satisfied. In our judgment the dispensation would in those circumstances be validly granted and removes the liability to tax unless and until it is revoked.
>
> …
>
> [336] On the assumption… that… the allowances fell within Ch 3, …it follows from what we have said that the dispensations would have been fully effective according to their terms unless and until revoked…
>
> [337] On the hypothesis… that… the allowances fell within Ch 3, it follows from what we have already said that the dispensations would relieve the employer of any liability to deduct tax under the PAYE system. This is not merely the obligation to return details for PAYE purposes of the travelling expenses paid to employees, but to remove those travelling expenses from charge to tax altogether. We agree with the Decision for the reasons given at paras [291]–[293].

64. This Tribunal had said the following in *Reed v RCC* ([2012] SFTD 394) (***Reed FTT***) at [291]-[293], which the Upper Tribunal expressly approved at [337] (quoted above):

> **Issue 6: what is the effect of a dispensation?**
>
> [291] It will be recalled that this issue was broken down into three questions, with which we can deal fairly briefly… What follows… is based on the hypothesis that the dispensations were effective.
>
> [292] The first question is whether a dispensation relieves the employer of any obligation to deduct tax under the PAYE system that might otherwise arise—and if so in what circumstances? It seems to us clear that a dispensation does have that effect, provided only that the listed provisions are applicable (that is, by its own terms, s 65 cannot relieve the employer of an obligation to deduct tax which is due for other reasons).
>
> [293] The second and third questions can conveniently be taken together. They are whether a dispensation removes only any obligation that would otherwise arise under the PAYE regime to return details on form P11D of certain expenses and benefits paid to employees; or whether it removes the underlying income tax charge (including any liability to deduct the tax in accordance with the PAYE scheme) that would otherwise arise under the listed provisions. It follows from what we have already said that the answer to the second question is that does remove the P11D obligation, but that is

> not its only effect, and that the answer to the third question is 'yes'. In other words, an effective dispensation, unless and until revoked, removes the payments in question from tax altogether. This is so even though the inspectors were wrong in agreeing that the disputed payments were deductible on the basis that the employed temps had temporary workplaces. Since the dispensations were not revoked with retrospective effect this would have remained the position while each one was in force, assuming they had been effective.

65. Because the paragraphs of *Reed* and *Reed FTT* quoted above were *obiter*, they are not binding on us and we may depart from them if we consider that they are wrong. But we respectfully agree with both Tribunals, and we apply their reasoning to the facts of this appeal as we find them.

66. The parties are in agreement that the Dispensation in this case was in force at all material times. As a result, we consider that the only factual question which arises for determination at this point is whether NWMSL had an obligation to account for tax for reasons unrelated to s.65, *per Reed FTT* at [292]. If the answer to that is "yes", then then NWMSL would have to account for that tax (because s.65 and the Dispensation would be irrelevant, whether or not in force). But if not, then *Reed* at [334]-[337] is clear in our view that the Dispensation was "fully effective…unless and until revoked". Most importantly, our own construction of s.65 leads us to the same conclusion.

67. We have concluded that the "listed provisions" in s.65(1) did apply to the payments subject to this appeal because (unlike those in *Reed*), we found above that, being the reimbursement of expenses incurred by employees, the payments were within the scope of Chapter 3, which is one of the "listed provisions" in s.65(1).

68. As a result, we have decided that the reasoning in *Reed* at [334]-[337] applies, as contended by Mr Ewart. The effect of the Dispensation is therefore that (subject to Issue 4 and Issue 5 below) all the payments subject to this appeal were automatically removed from any liability to tax.

**Issue 3 – Whether the stated "Qualifying conditions" of the Dispensation were validly incorporated pursuant to the statutory scheme**

69. Neither party addressed us on whether or not the "qualifying conditions" were validly incorporated in the Dispensation pursuant to the statutory scheme, and both parties appeared to accept that they were. Having considered the matter following the hearing, we were inclined to doubt that view.

70. Absent a dispensation, the statutory scheme is clear: repayment of "travel expenses" (including subsistence payments) incurred by an employee are benefits constituting "earnings" (s.72(1)), but subject to an allowable deduction (s.72(2)-(3)). The consequence of this is that the employer would be required to account for tax, but the employee could recover the income tax paid via a self-assessment tax return (with corroborating receipts, if required).

71. The s.65 dispensation regime was intended to ameliorate the administrative inconvenience of that arrangement in respect of certain categories of expenses, provided that HMRC agreed in advance that no tax would become due on them. This regime was instigated by the employer, who would notify HMRC of its intention to repay expenses, and provide certain information required by HMRC as to the proposed operation of the scheme. If satisfied, HMRC would then grant the dispensation pursuant to s.65. Because both the employer and HMRC would typically have been contemplating future payments, whether or not HMRC were satisfied with the employer's proposals would have turned largely on questions of system (as Mr Wheeler confirmed in his evidence).

72. On our reading of the dispensation regime, its practical effects are just as clear as the statutory scheme absent a dispensation: the existence of a dispensation removes from the scope of s.62 all relevant payments unless or until the dispensation is revoked (retrospectively or otherwise). Consequently, the employer, whose obligation it is to operate the scheme, will not be in any doubt as to how to treat any given expenses payment.

73. Section 65 is not, in our view, a complex or difficult section to interpret. It operates as follows:

(1) Subsections (1) and (2) applies the section, in respect of certain "listed provisions";

(2) Subsection (3) is the enabling provision, which requires that the HMRC officer "must" give P a dispensation if satisfied "…that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in [P's] statement";

(3) Subsection (4) says what a dispensation is;

(4) Subsection (5), to which we shall return below, explains the legal effect of a dispensation once given;

(5) Subsection (6) entitles an HMRC officer to revoke a dispensation after one has been given, "[i]f in their opinion there is reason to do so";

(6) Subsection (7) confirms that the revocation power in subsection (6) can be exercised retrospectively or prospectively;

(7) Subsections (8) and (9) explain the consequences of a dispensation having been revoked.

74. For present purposes, s.65(5) is the key provision. It is important in this context that it is, by s.65(3), mandatory in its effect: the officer has no choice but to make the dispensation if satisfied that no tax will be payable as a result of the payments. It would in our view arguably make a difference to the construction of the provision if the making of a dispensation was discretionary, but it plainly is not. Crucially, no express provision in s.65 (or the surrounding provisions) empowers HMRC to specify conditions upon the issuance of a dispensation. S.65(5) does not, for example, say that the officer is to issue a dispensation "…on such terms and conditions as he may think fit…"

75. Of course, insofar as any stated conditions did nothing more than conveniently summarise the existing statutory requirements, then they could not be objectionable. But the source(s) of those requirements are the statutory provision(s) from which they derived rather than their inclusion as a "condition" in a dispensation. What would in our view be *ultra vires* of HMRC would be the inclusion of additional, non-statutory "conditions" for which there was no enabling power.

76. Accordingly, our interpretation of s.65 was that it did not empower HMRC to impose (non-statutory) 'conditions' when issuing a determination.

77. That much appeared to us to be self-evident on a plain reading of s.65 itself. But we took additional support from the uncertainty that would undoubtedly arise (as it has done in this case) if HMRC was free to impose non-statutory conditions in a dispensation. Doing so would undermine the clarity of the dispensation regime it was intended to operate, and replace it with equivocal and confusing obligations such that an employer could not be certain at the time of making any given expenses payment whether or not PAYE and NICs should be accounted for in respect of it.

78. As NWMSL complained in this case, the requirement for "routine checks", which (on the evidence of Mr Wheeler) HMRC interpreted as meaning that a sample of 10% of all subsistence payments should be checked against receipts each month, such that over the course of a year all claimants' expenses would be checked, was nowhere set out in the terms of the purported conditions of the Dispensation. In our view, replacing one of two alternative regimes (i.e. the provisions applying either or without a dispensation), both of which were clear and straightforward to apply, with the dispensation regime as understood by HMRC, which was inherently uncertain, would not have been Parliament's intention.

79. Ultimately, as we were not addressed on this issue, paragraphs [69.]-[79.] have played no part in our decision. In any event, as a result of the facts we found and our decisions on the other issues, it was not necessary for us to determine Issue 3 to be able to decide the outcome of this appeal. We have therefore recorded these observations to preface our conclusions on Issue 4 – without which we were concerned that this decision notice would played a part in perpetuating what we considered to be erroneous assumptions about the scope and effect of s.65.

80. It follows that we must consider whether NWMSL did comply with the "conditions" apparently imposed in the Dispensation.

**Issue 4 – Whether NWMSL satisfied the "Qualifying conditions" on the facts as found**

81. On the assumption apparently shared by the parties that the "qualifying conditions" in the Dispensation were validly incorporated, Issue 4 arises because it is necessary to establish whether those "conditions" were met by NWMSL on the facts we have found.

82. This was a core part of HMRC's case: it was argued that in the event that we found that NWMSL's subsistence expenses payments were not "round sum allowances" (as we determined at [55.] above), then (it was said) NWMSL's failure to comply with the conditions stated in the Dispensation should remove those payments from the scope of s.65, with the consequence that they would be taxable under s.62. Ms Murray argued that if payments were not made within the circumstances envisaged in NWMSL's original application form (of which neither party had a copy, so it was not in evidence before us), or if NWMSL did not comply with the conditions stated in the Dispensation, then there was "no doubt" that those payments could not qualify for s.65, and so would instead be subject to tax in the usual way.

83. In evidence, Mr Wheeler of HMRC told the Tribunal that he considered receipts to be necessary in respect of subsistence expenses, just as they were for other expenses payments – irrespective of the fact that subsistence payments were made pursuant to HMRC's standard scale. He added that in the absence of receipts, he would expect an employer to query whether the expenses were properly payable. On cross-examination by Mr Ewart, Mr Wheeler conceded that where a dispensation was in place pursuant to s.65, an employer was allowed to pay expenses without receipts in all cases, but he said that in those circumstances he would expect a "random audit" of "for example, 10% per calendar month" of such expenses claims, so that every employee should expect of have to justify his or her expenses at least once in any twelve-month period. I asked Mr Wheeler whether HMRC were prescriptive in that requirement. His initial response was simply that HMRC expected employers to put systems in place to verify the validity of subsistence expenses claims. But in answer to a question from Mr Ewart just a few minutes later, Mr Wheeler said that employers "must" undertake a random sample. When pressed by Mr Ewart on the need for 10% of the expenses to be audited each month, Mr Wheeler explained that 10% was just his figure, rather than any official threshold, and he would expect to see "evidence of compliance".

84. In argument, Ms Murray confirmed our understanding that HMRC were prescriptive in their requirement for evidence of subsistence receipts: she told us that the "sufficient records" referred to in the Dispensation meant (and we understood her only to mean) corroborative receipts.

85. Conversely, Mr Ewart argued that NWMSL had complied with the terms of the Dispensation in all material respects. Mr Ewart took us to the three bullet-point "qualifying conditions" for subsistence scale payments (quoted at [58.] above). He then pointed to the evidence of Ms Cook (which was unchallenged in this regard) describing the checks that she and her team applied to travel expenses. Ms Cook explained that:

> (1) Mileage would be checked against the employee's home address and the temporary place of work, using either the AA or the RAC route planner;
>
> (2) Receipts (or print-outs of account statements, e.g. for London Transport journeys) were required for public transport expenses (and also for tools and protective equipment);
>
> (3) Subsistence claims at scale rates did not need to be substantiated by receipts, but checks were made to ensure that the correct rates had been claimed by reference to the times on the claim form for leaving home and returning there. Additionally, periodic checks were made "every so often" (which was not further particularised) against employee timesheets submitted to NWMSL's clients – though those would not arrive until after the expenses had been paid. Ms Cook described those reviews as "a common sense check", because the hours recorded in the clients' timesheets would not match those recorded on the expenses claim form because the latter included travel time, which the former excluded; and
>
> (4) It was ascertained that the workplace was a "temporary" one within the meaning of the benefits code, and systems were put in place to ensure that the employee had not spent 24 months or more at the same site.

86. We accepted Ms Cook's evidence as fact, and we agree with Mr Ewart that those checks satisfied the three bullet-points which were clearly expressed to be "conditions" in the Dispensation.

87. But that was not an end of the matter: the issue, as we see it, comes with the final paragraph of the Dispensation, which purported to make two further requirements of NWMSL – first, "to keep sufficient records to be able to demonstrate that the employee was entitled to the payment"; and secondly "to be able to demonstrate that routine checks are undertaken to ensure that the travel expenses rules are being followed."

88. A number of uncertainties linger about those requirements. It was not wholly clear to us that they were included within the "conditions" – we understood Mr Ewart's submission to imply that they were not. They were, after all, separated from the bullet-points (which in our view undoubtedly constituted "conditions") by three paragraphs which cannot be described as such. Additionally, no guidance was given in the Dispensation itself as to the nature of the records required to meet the 'sufficiency' test. Nor was the scope or frequency of the "routine checks" described. In our view, a "condition" which is materially uncertain on its terms cannot realistically be described as such, as there is little or no prospect of the subject complying with it.

89. In our view, the very high threshold for the sufficiency of records (i.e., receipts and nothing else) and the frequency and nature of the "routine checks" (e.g., a 10% sample of all subsistence claims every month) proposed by HMRC represented a counsel of perfection. Those requirements were not apparent from the face of the Dispensation, and we did not

consider them to have any force of compulsion as regards a taxpayer. In any event, on an appeal such as this, it falls to the Tribunal to determine the sufficiency of the records and the checks in respect of any relevant condition.

90. On balance, and with some hesitation, we have concluded that the additional requirements in the final paragraph of the Dispensation *were* additional "conditions" – though given their textual context, particularly their spatial separation from the bullet-points above, we were not surprised that NWMSL genuinely thought otherwise.

91. We have therefore considered whether NWMSL satisfied us of the sufficiency of their records and checks with those conditions in mind.

92. Having evaluated the evidence before us, we have concluded – again, with some hesitation – that on balance, it did. We do not consider HMRC's prescriptive approach to these matters to be correct: whilst it doubtless reflects HMRC's view of what evidence would satisfy them (and, we consider, would represent best practice), we do not believe them to be *necessary* in the context of the Dispensation. Certainly, they do not in our view receive support from the text of that document. We concluded at [34.] above that the claim forms were evidence which – either on their own or as primary evidence from which a judicial inference may properly be drawn – satisfied us that subsistence expenses had in fact been incurred. Ms Cook described what checks were applied to the claim forms to ensure that expenses were claimed and paid in accordance with the Dispensation. We also noted at [39.]-[41.] above that (insofar as positive results were obtained) the survey conducted by Ms Cook at HMRC's request largely corroborated NWMSL's position. Whilst undoubtedly less thoroughgoing than HMRC would wish, the checks carried out by NWMSL do, in our view – just – satisfy the description of "routine checks" in the Dispensation as we have interpreted it. Similarly, the documentary evidence before us, whilst much less detailed in some regards than we would have liked, is sufficient, on balance, to meet the record-keeping requirement.

93. Furthermore, stepping back from the details, we found ourselves in agreement with Mr Ewart's submission that if receipts were necessary irrespective of the subsistence scale rates applying, then one wonders what benefit would be derived from having the scale rates at all. Those rates were supposed to be an administrative convenience for employers, employees, and HMRC. But the processes apparently demanded by HMRC might arguably be more onerous than claiming deductions against tax for expenses in the amounts substantiated by the receipts. That cannot be what Parliament intended when implementing the s.65 regime, and our construction of the regime and its effects are informed by that view.

94. For those reasons, we conclude that NWMSL did meet the purported "qualifying conditions" in the Dispensation.

**Issue 5 – Whether a breach of the "Qualifying conditions" could lead to the Determinations and Decisions**

95. In the event that our decision at [94.] is incorrect, we now go on to consider whether any breach by NWMSL of the "qualifying conditions" in the Dispensation would enable HMRC to issue the Determinations and Decisions, as they say, or whether, as Mr Ewart argues, the only remedy for a breach is the revocation of the Dispensation under s.65(6)-(8). This point was not specifically developed in either HMRC's written or oral arguments.

96. We consider that there is some possible support for the view that a breach of the conditions of a dispensation could give rise to the ability of HMRC to assess the relevant payments to tax from the *dictum* in *Reed* at [336] (quoted at [63.] above). That passage includes the statement that dispensations would be "fully effective *according to their terms*

unless and until revoked" (our emphasis). On one reading, this might be taken to imply that that any conditions included within a dispensation must be met for s.65 to apply.

97. However, whilst a decision of the Upper Tribunal, of which this Tribunal must naturally be respectful, the comment is *obiter*, and made in the context of a hypothetical scenario which was not determinative of that appeal. The relevant four words italicized above are just a small part of a short sentence in a much larger context. It is also true to say that the Upper Tribunal in *Reed* does not seem to have given this isolated point as much consideration as it has received here.

98. If the above reading of *Reed* is correct, and as it is not binding on us on this point, we would respectfully depart from it in favour of our own judgment, which is that HMRC's remedy for a breach of a dispensation is the revocation of that dispensation as provided for in s.65. It is not open to HMRC to issue a determination or assessment to tax for a given period without first revoking any dispensation previously covering that period.

99. Absent such a revocation, it follows from our construction of s.65, supported by other *dicta* in *Reed* and *Reed FTT* (as quoted and applied at [63.]-[68.] above), that the effect of a dispensation is to remove relevant payments entirely from the scope of taxation. We therefore conclude that unless and until a dispensation is revoked, it is not open to HMRC to assess to tax any payment purportedly made under it. In this case, the parties were agreed that the Dispensation was never revoked by HMRC. Accordingly, even if HMRC were right to say that NWM was in material breach of the conditions in the Dispensation, they could not issue the Determinations and Decisions, and it would have been irrelevant even if NWMSL was found to be in material breach of the conditions purportedly contained in the Dispensation.

**SUMMARY**

100. On the facts we have found, and on the basis of our construction and application of the law, we have determined each of issues 1, 2, 4, and 5 against HMRC and in favour of NWMSL. It follows that NWMSL's appeal must be allowed.

**DISPOSAL**

101. We allow the appeal in full and we set aside the Determinations and Decisions.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

102. 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.

**JAMES AUSTEN**
**TRIBUNAL JUDGE**

**Release date: 11th MAY 2023**

## APPENDIX

The Tribunal is conscious of the considerable length of time between the hearing of this appeal and the publication of its decision. This delay was, most regrettably, caused by the onset of illness during the Covid-19 pandemic and its lingering after-effects. Once it was appreciated that this decision would be so considerably delayed, the parties were offered the possibility of the appeal being re-heard by a differently constituted Tribunal. In the event, they decided to refuse that offer, and to await the release of this decision. The Tribunal wishes to record its gratitude to the parties for their patience and forbearance during that period.