



**TC02222**

**Appeal number: TC/2012/00947**

*NIC and Penalties – partnership business – employees’ private use of business car as benefit – whether “pooled” car exemption applicable – No – Section 167 Income Tax (Earnings and Pensions) Act 2003 – Appeal disallowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**1<sup>st</sup> STOP 2 SHOP**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE KENNETH MURE, QC  
MEMBER: IAN MALCOLM, BSc , BA, JP**

**Sitting in public at George House, 126 George Street, Edinburgh on Monday  
30 July 2012**

**Mr Stewart Tough, FCCA, and Barbara Ann Tough for the Appellant**

**William Kelly, instructed by the General Counsel and Solicitor to HM Revenue  
and Customs, for the Respondents**

## DECISION

### Introduction

1. The Appellant, Ahmed Bros, is a partnership business trading as “1<sup>st</sup> Stop 2 Shop” from premises at 32-34 Fintry Drive, Dundee. The Respondents are HMRC.
2. The Appeal relates to disputed NIC liabilities and related Penalties in respect of a car used by two of the business’ employees, Mr Mohammed Abdullah and his wife, Safina. They are respectively the son-in-law and daughter of one of the partners of the business. The circumstances relating to their use of the car came to light during a tax investigation into the partnership’s affairs.
3. In the case of employees whose earnings exceed £8,500 per annum, charges to tax and NIC are made in respect of *inter alia* the private use of cars and car fuel benefit. In determining whether the £8,500 margin is exceeded, the tax value of the benefit is included. It appears that in the relevant Years the earnings of both Mr and Mrs Abdullah exceeded £8,500.
4. The nub of the dispute is whether a Vauxhall Astra was a “pooled” car, and hence its use an exempt benefit for NIC purposes until its sale on 8 May 2007.

### The Law

5. Liability to Class 1A National Insurance Contributions arises on benefits provided for higher paid employees, broadly as defined *supra* in para 3. These are payable by the employer. P11D forms should be completed by the employer reporting on these benefits to HMRC. Penalties result for the employer in the event of failure to notify.
6. Private use of cars is treated as such a benefit and fuel benefit charges arise too. There is, however, an exception for *pooled* vehicles. Section 167(3) ITEPA 2003 provides that:-
- “In relation to a particular tax year, a car is included in a car pool for the use of the employees of one or more employers if in that year —
- (a) the car was made available to, and actually used by, more than one of those employees,
- (b) the car was made available, in the case of each of those employees, by reason of the employee’s employment,
- (c) the car was not ordinarily used by one of those employees to the exclusion of the others,
- (d) in the case of each of those employees, any private use of the car made to the employee was merely incidental to the employee’s other use of the car in that year, and

(e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.”

## 5 The Facts

7. The circumstances in which the disputed assessment arose did not bear to be controversial. No witness evidence was led. Rather, argument was focussed on the application of Section 167 in the circumstances accepted and acknowledged by Mr Tough in correspondence on behalf of the Appellant. On the basis of that  
10 correspondence and Parties’ submissions we make the following *findings-in-fact*:-

(i) The Appellant, the taxpayer, is a partnership which traded as “1<sup>st</sup> Stop 2 Shop” from premises at 32-34 Fintry Road, Dundee.

(ii) The partnership owned three vehicles during the Years in question including in particular a Vauxhall Astra until its sale on 8 May 2007.

15 (iii) The Ahmed family (or certain of its members) which owned and ran the business lived together at 93 Clepington Road, Dundee. In February 2006 Mr and Mrs Abdullah, respectively the son-in-law and daughter of one of the partners moved to a separate dwellinghouse at Craighall Court, Dundee. That address is equidistant from the shop premises and the family’s principal  
20 residence at Clepington Road.

(iv) Mr Abdullah was the main driver of the Astra, although he did not have the exclusive use of it. It was used privately by him and his wife for commuting purposes. That use totalled about 1,000 miles annually. Also, the vehicle was kept overnight at the house of Mr and Mrs Abdullah for security purposes  
25 (reference is made to Mr Tough’s letters of 24 March and 20 November 2009 and 14 June 2010 – respectively nos. 6/1, 16 and 45 of the Bundle).

(v) Fuel for the car was provided also by the partnership.

30 (vi) An assessment to Class 1A National Insurance Contributions and Penalties was made on the Appellant. This was subsequently confirmed on review. However, in light of further information provided on behalf of the Appellant these were reduced to assessments totalling £2,288.05 on both Mr and Mrs Abdullah for 2004/05 to 2007/08. The Penalties imposed were revised to £2,288.65. Reference is made to HMRC’s letter of 24 November 2011 (nos. 6/77-79 of the Bundle). These amounts are the subject of the present  
35 appeal.

## Submissions

8. Mr Tough spoke to the terms of his Grounds of Appeal. He acknowledged that Mr Abdullah was the main user of the Astra, although other family members working in the shop used it too. As a rule it was Mr Abdullah who opened the shop in the

morning. 93 Clepington Road was the family address where in fact the partners lived. That was consistent with the car being *pooled*. The Abdullahs' stayed there until February 2006, when they moved to Craighall Court. That was the Abdullahs' own address.

5 9. The vehicle, Mr Tough submitted, was a *pooled* vehicle. Furthermore, Mr and Mrs Abdullah each earned under £8,500 in the relevant Years, he claimed. In that case, Mr Tough continued, there was no duty to report any benefits received.

10. Finally, any Penalty, if imposed, should be mitigated as reasonable care had been taken in relation to managing the business' tax affairs.

10 11. In reply for HMRC Mr Kelly confirmed that the issue between himself and Mr Tough was whether the five conditions of Section 167(3) ITEPA were satisfied so as to categorise the Astra as a *pooled* car. If not, there was a charge to tax, or more particularly in the present case to NIC in respect of the beneficial use of the vehicle and car fuel benefits. The charge would not apply to employees whose earnings  
15 (when aggregated with such benefits) were less than £8,500 in the Year in question. In calculating the amounts which HMRC considered were due regard had been paid to the earnings of each of Mr and Mrs Abdullah for each Year individually. (The original assessments were set out at Folio 6A-10.) The price of the car affected the calculation of car benefit (Sections 114 and 148 ITEPA) and its CO2 emissions  
20 determined the fuel charge, where provided (Sections 149-153). HMRC had in forming their view relied on Mr Tough's fax letter of 24 March 2009 (Folio 6/1-2) as significant since it had been sent before the tax investigation started. They had relied also on his later fax letter of 14 June 2010 (Folio 6/45). Mr Kelly explained that HMRC had experienced delays and difficulties in recovering full information from  
25 Mr Tough about the partnership's affairs. In light of information obtained late HMRC had reduced their original assessment. The revisals were explained and set out at Folio 6/76, 77-79. The NIC sought was now £2,288.65 together with Penalties for the same amount.

30 12. Mr Kelly relied on both paras (d) and (e) of Section 167(3) in submitting that the Astra was not *pooled*. It had been acknowledged by Mr Tough in the correspondence referred to that there had been private use of the car, including for purposes of commuting. In amount (over 1,000 miles *per annum*) it was not "incidental". Para (e) had not been satisfied either, Mr Kelly argued, as the vehicle had since February 2006 been kept at the Abdullahs' home at Craighall Court. Earlier  
35 it had been kept at the family home at 93 Clepington Road. (Mr Kelly did not discuss the implications of one or more of the partners of the business residing there in relation to the wording of that provision).

40 13. Finally, Mr Kelly sought Penalties for a failure exceeding 12 months to submit the appropriate returns, capped at the total of the NIC sought. Penalties, he submitted, could not be mitigated having regard to Section 81(2)(b) of the Social Security (Contributions) Regulations 2001.

## Conclusion

14. We considered the stance of HMRC well-founded in deciding that the Astra was not a *pooled* car, for purposes of Section 167.

5 15. The preliminary issue for us to consider was whether each of the employees' earnings (including the value of the car use and fuel) exceeded £8,500 for the individual Years in question. While Mr Tough on behalf of the taxpayer seemed to challenge this in his Grounds of Appeal, he did not produce any alternative figures for taxed income to compare with those produced by HMRC at Folio 6/8-10 and as revised at Folio 6/71-79. The *onus* of proof rests, of course, on the taxpayer, and  
10 Mr Tough did not lead any contradictory evidence. In these circumstances we consider it appropriate to proceed on the basis of HMRC's figures. Therefore, for the Years in relation to which these assessments are made Mr and Mrs Abdullah were not in excluded employments for benefit purposes, and the NIC liability extends to the car and related benefits.

15 16. The real issue which emerged as the hearing developed, was whether the Astra was a *pooled* car for the purposes of Section 167 ITEPA. The five conditions prescribed there are cumulative with the result that the availability of the exclusion is severely limited. We agree with Mr Kelly that all of these are not satisfied. By admission in the correspondence from Mr Tough the employees did enjoy an element  
20 of private use of the vehicle, although it was used also for business purposes. That private use included commuting between home and work and totalled about or over 1,000 miles *per annum*. That cannot, in our view, be regarded as incidental for the purposes of para (d) of Section 167(3). We note particularly the terms of Mr Tough's faxed letters of 24 March 2009 and 14 June 2010 (Folio 6(1) and (45)). Further, the  
25 correspondence acknowledges also that it was kept overnight regularly near Craighall Court which was Mr and Mrs Abdullah's own home from February 2006. Earlier, of course, it was kept at 93 Clepington Road, the family home where apparently at least one partner of the business resided. An argument to the effect that the car was "... being kept overnight on premises occupied by the person making the car available to  
30 [the employee]" was perhaps suggested by Mr Tough but not developed. *Quaere* whether para (e) would have been satisfied if one or more of the partners resided at 93 Clepington Road together with Mr and Mrs Abdullah? In any event we consider that the private use element alone, noted in para (d) is sufficient to disqualify the Astra from being *pooled*. In these circumstances we consider that Section 167 is not  
35 satisfied and the car is not a *pooled* vehicle.

17. The calculation of tax liability for private use of the car and fuel tax benefit was not challenged by Mr Tough. The original figures assessed were revised downwards in light of further information produced by Mr Tough to an NIC liability of £2,288.65 and Penalties for the same amount. These were in respect of the Years 2004/05 to  
40 2007/08 inclusive for Mr Abdullah and for 2007/2008 only for Mrs Abdullah.

18. We accept these revised figures as being correct and consider that the assessment should stand. Further, we do not consider that we have a discretion which might enable us to modify the penalty provision. Accordingly we dismiss the Appeal.

19. Finally, we record our thanks to both Mr Tough and Mr Kelly for the helpful way in which they presented their submissions.

20. 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.

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**KENNETH MURE, QC  
TRIBUNAL JUDGE**

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**RELEASE DATE: 28 August 2012**