



TC04234

Appeal number: TC/2012/03882

Income tax - Income Tax (Earnings & Pensions) Act 2003 (ITEPA) 2003 Part 3 - Earnings and benefits treated as earnings - whether Appellant could offset claimed but unproven credit balance on directors loan account - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DENNIS WHITE

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 MR DEREK ROBERTSON**

**Sitting in public at Darlington County Court, 4 Coniscliffe Road, Darlington on
10 October 2014**

The Appellant did not attend and was not represented

Mr Alan Hall Officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

- 5 1. This is an appeal by Mr Dennis White (“the Appellant”) against assessments for the years 2006-07, 2007-08 and 2008-09 issued by HMRC on 16 February 2011.
2. This is a late notification of an appeal to the Tribunal, the appeal having been made on 6 March 2012. The assessments were upheld on review by HMRC on 8 December 2011. The Appellant did not appeal to the Tribunal within 30 days of that date and therefore the assessments were treated as settled by agreement under s 54(1) Taxes Management Act 1970.
- 10 3. The Appellant did not attend the hearing. The Tribunal was however satisfied that he had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

Background

- 15 4. The issue before the Tribunal is whether:
- (a) private expenses incurred by the Appellant and paid by RSL (North East) Limited (“the Company”) should be assessed on him as benefits in kind, and if so, the quantum of those benefits.
 - (b) the Appellant should be allowed to rewrite his Director’s loan account to in effect make good those benefits and also be allowed a credit for monies which he says he paid into his capital account.
- 20 5. HMRC contends that there is a tax charge in respect of the benefits, whereas the Appellant maintains that there is none.
6. The Company was incorporated on 17 February 2003, with an accounting date to 31 March each year. The Appellant was a working Director of the Company. The other Director was Mr Frederick Roberts, and together they controlled the Company. The Company was placed into Voluntary Liquidation on 8 March 2011. Unsecured creditors, as per the liquidator’s statement of affairs totalled £252,772. There were insufficient funds to pay a dividend to any class of creditor.
- 25 7. No benefits were declared on the Appellant’s Self-Assessment Tax Returns in each of the years 2006-07, 2007-08 or 2008-09.
8. HMRC undertook a check into the Employer and Contractor’s records of the Company in June 2009. The check included a review of the benefits and expenses relating to the Directors and their family, and as part of this HMRC asked for details of the Director’s Loan Account.
- 30 9. The findings of Employer Compliance check showed that the Company’s credit card was used for both business and private expenditure of the Directors, and that the Director’s Loan Accounts were incorrect.
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10. The Directors accepted that the Company's record keeping system was inadequate and that records were not kept correctly. The Company had no system in place to identify how indebted to the Company the Directors were, which was estimated to be in excess of £200,000.

5 11. The sources charged to tax can be categorised as:

- Credit card expenditure:

HMRC say that the Company credit card was used for private (non-business) expenditure, for each of the years 2006-07, 2007-08 and 2008-09. HMRC contend that this is taxable as remuneration.

10 • Motor expenses:

Personal motoring expenses of the Appellant and his family were met by the Company in each of the years 2006-07, 2007-08 and 2008-09. HMRC contend that these too are a taxable as meeting the personal pecuniary liabilities of the Appellant and his family.

15 12. The amounts assessed were as follows:

Year	Category	Amount	Total	Duty assessed
2006-07	Credit card expenses	£13,021		
	Motor expenses	£11,784	£24,805	£8537.12
2007-08	Credit card expenses	£10,590		
	Motor expenses	£12,512	£23,102	£5,082.44
2008-09	Credit card expenses	£7,932		
	Motor expenses	£14,333	£22,265	£4,453

13. Assessments the years 2006-07, 2007-08 and 2008-09 were issued on 16 February 2011, and appeals were made by the agent on 10 March 2011.

Evidence before the Tribunal

20 14. The evidence before the Tribunal consisted of seven lever arch files of documents. These contained copy correspondence between HMRC and the Appellant's agent, notes of meetings, copy returns and assessments, spreadsheets of benefits enjoyed by the Appellant, copy personal bank statements and the business bank account statements; an analysis of the director's loan account between 17

February 2003 and 1 April 2009 as estimated by the Appellant's agent; copy report relating to the creditors voluntary liquidation of the Company and relevant legislation.

Appellant's contentions

5 15. In the Appellant's Notice of appeal to the Tribunal he states, 'See letter attached'. It is not clear however as to what is being contended by the Appellant, who does not provide further explanation. Extracts in the attached correspondence relate to periods and issues arising for years earlier than those before the Tribunal.

16. In summary however, the agent in correspondence maintained that:

10 i. Capital injected into the Company by the Directors outweighed their withdrawals. Monies were injected into the business during each of the years ended 31 March 2009 and 2010.

ii. Under Section 203(2) ITEPA the Directors have a right to retrospectively make good a benefit in kind once they become aware of it.

15 iii. There are "mileage allowances" based on 27,000 miles per year for each Director, totalling a credit of £115,500. The Appellant's agent said that his client provided labour in most of the oil producing areas of the world. The Company's major customer was based in the Netherlands and the Appellant was obliged to travel mostly by air to meet the client or deal with problems arising in fairly remote points of the world. He agreed that the Appellant was
20 'remiss in not keeping travel receipts but the facts of their business speaks for themselves'.

iv. There is an expenses claim for items paid for by the Director.

25 v. The Directors Loan accounts should be rewritten. The Appellant's agent prepared a schedule which he said set out the correct balances to the Directors loan accounts as at 31 March 2010, being effectively the last date to which accounts had been prepared and that the total amount due to the Directors was £220,997.

30 17. The agent says: "On a without prejudice basis, my clients are prepared to forego their entitlement to a claim under Section 253 CGTA 1992 for the loss of monies totalling £150,000. We are not suggesting that benefits and payments total such an amount."

Relevant legislation

35 18. The relevant legislation relating to earnings and benefits is in ITEPA 2003 Part 3, which states that all sums paid in respect of expenses to a director or employee whose employment is not an excluded employment, by reason of their employment, have to be treated as earnings chargeable to tax unless they are exempt or are paid in respect of expenses incurred in connection with a van or car to which a van or car benefit applies and or an Inspector has issued a dispensation in respect of them. A

sum paid in respect of expenses includes any sum put at an employee's disposal (s 72(1) ITEPA 2003).

19. "Benefit" means a benefit or facility of any kind.

20. The amount of a benefit which is chargeable as earnings is the "cash equivalent" of the benefit (s 203(1) ITEPA 2003). The rules for calculating the cash equivalent vary according to the nature of the benefit, but generally it is the cost to the person who provides the benefit, less any amount made good by the employee (s 203(2)).

HMRC's submissions

21. The Company's credit card was used for both business and private expenditure and there were no systems or controls in place to quantify the private amount. Consequently no adjustments were made, and no figures shown on the Self Assessment Tax Returns as submitted to HMRC.

22. No evidence was provided to show that the private expenditure has ever been appropriately reimbursed to the Company by the Directors.

23. Details of the Directors Loan Accounts as used to draw up the Company accounts in later years have been requested, but not supplied.

24. Invoices relating to expenditure were not all retained.

25. In view of the above, HMRC have made assessments based on an analysis of the papers that were provided to HMRC.

26. The references to credit card expenses in the schedule (at paragraph 12 above) refers to payments made by way of the Company credit card, which HMRC contend were used to meet the Directors personal pecuniary liabilities. It will be seen that the unagreed areas of contention are flights and other items.

Flights:

Analysis of the credit card statements showed that flights were purchased, but invoices and travel receipts were not kept. HMRC reviewed the payments and accepted that certain flights were for the business: these are excluded from the schedules. It is also agreed that certain flights were personal. HMRC contend that the remainder of the expenditure is to be regarded as being personal where no evidence has been submitted as to the nature and purpose of the journey.

Other Items

This category includes everything else, such as trips at the Grand Canyon USA, and wine. HMRC have made adjustments based on figures provided by the Directors during the review of the records.

27. HMRC contend that their estimates are correct based on evidence provided to HMRC and credit card statements. Against this, the agent is effectively claiming that there are other adjustments which should be taken into account, as set out in the “Appellant’s contentions” (paragraphs 15 and 16 above), and which may then be used to cancel HMRC’s figures.

28. To address the Appellant’s contentions in turn:

i) HMRC have not been given documentary evidence to show that further capital was injected into the Company, and so cannot consider that point further.

ii) Section 203(2) ITEPA does not grant any right to retrospectively make good a benefit. Income tax is an annual tax, and the value of the benefit depends upon what is made good in that tax year.

iii) Mileage allowances at a rate of 27,000 miles per year is unsupported by documentation, and contradicts documents previously supplied to HMRC.

iv) With regard to the expense claim paid for by the Directors, no details have been given as to the years involved.

v) The Directors Loan accounts for the later years were not provided to HMRC. In any event any “rewriting” would have retrospective effect on the Company accounts and it would therefore be for the liquidator to consider the implications of that.

29. With regard to the intimation that a “claim under Section 253 CGTA” could be made, as no such claim has been made, HMRC do not address that point.

Conclusion

30. The issues for the Tribunal to decide are whether private expenses incurred by the Appellant and paid by way of the Company’s credit card and bank account should be assessed on him as a benefit in kind, and if so, the quantum of those benefits. We must also consider the refusal by HMRC to allow the Appellant to rewrite his Director’s loan account to in effect make good those the amounts in question.

31. During the years under appeal the Appellant held a company credit card which was used for both business and private expenditure. There were no systems or controls in place to quantify the private amount.

32. No evidence has been provided to HMRC to support the Appellant’s contention that the private element of expenditure has ever been reimbursed to the Company. The Appellant’s agent has acknowledged the personal element to the expenses but contends that the intention was to deduct these amounts from the Appellant’s Director’s loan account.

33. The Directors Loan accounts for the years under appeal were not provided and HMRC contend that, from the records seen, there is no indication or any systems in place to suggest that the re-writing of the Directors loan account was ever intended or indeed possible. The Directors have not been able to verify the amounts involved.

5 34. At common law, the onus of proof rests with the person making the assertion and this is reinforced by s 50(6) TMA. The standard of proof is the ordinary civil standard of the balance of probabilities. The Appellant must not only show by satisfactory evidence that the assessments are wrong, but also what correction should be made to make them right or nearly right, if they are to be reduced or set aside.

10 35. No documentary evidence has been provided by the Appellant to show that HMRC's assessments are not reasonable.

15 36. This is a late notification of an appeal to the Tribunal, the decision having been made on 16 February 2011 and the appeal having been submitted to the Tribunal on 6 March 2012. Although permission to bring the late appeal is granted, for the reasons given above we conclude that the assessments as made by HMRC reflect the benefits enjoyed by the Appellant and should be upheld.

18 49. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 19 January 2015