



**TC04467**

**Appeal number: TC/2011/07834 and TC/2011/07835**

*INCOME TAX, Schedule E – Car and Fuel benefits – whether or not  
prohibition on private use of cars – Held not – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MR MARK HOLMES AND MRS TRUDIE HOLMES      Appellants**

**- and -**

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

**TRIBUNAL: JUDGE PHILIP GILLETT  
JOHN ROBINSON**

**Sitting in public at Southampton on 12 May 2015**

**Mr Mark Holmes appeared both for himself and Mrs Trudie Holmes**

**Mr Darren Bradley, Officer of HMRC, for the Respondents**

## DECISION

1. This was a group of appeals against additional assessments to income tax raised  
5 under s29 Taxes Management Act 1970 on Mr and Mrs Holmes in respect of the use  
of various cars, the related fuel benefits and the benefit of the use of mobile phones  
for the years 2003-04 to 2006-07 inclusive.

2. These appeals had already been the subject of an internal HMRC review process  
which had varied the additional assessments for 2003-04 to 2005-06 and had reduced  
10 the additional assessment for 2006-07 to nil. The assessments in respect of the use of  
the mobile phones had been reduced to nil and this issue was not therefore considered  
by this tribunal.

3. In addition, as part of this review, the taxable benefit previously regarded as  
assessable on Mrs Holmes for the year 2005-06 was reduced to nil because Mrs  
15 Holmes's earnings during that year were less than £8,500 and she did not therefore  
fall within the ambit of the car benefits legislation in accordance with the provisions  
of s216 ITEPA. These benefits were however then reallocated to Mr Holmes on the  
basis that the car had been made available to a member of Mr Holmes's family by  
reason of his employment in accordance with s117 ITEPA.

### 20 *Background*

4. Mr Holmes was the owner and Managing Director of KMS Logistics (UK) Ltd  
("KMS") which carried on a trade of supplying and distributing high-end professional  
hair-dressing products to professional hair salons. Mrs Holmes was an employee of  
the company. We were informed that the company aimed to deal with the top 10% of  
25 hair-dressing salons in a particular area and that therefore the use of prestige cars in  
the business was an important aspect of the firm's marketing approach.

5. The business was carried on from a barn at Mr and Mrs Holmes's home address,  
where the product was stored, and from an office in their house. In addition Mr  
Holmes's secretary would take orders by telephone from a room in her home.

6. As set out in a schedule provided to HMRC by Mr Holmes, seven different cars,  
30 all of which were owned by the company, had been used by Mr and Mrs Holmes and  
other employees of KMS at various times during the years under review.

7. KMS went into liquidation in July 2008.

### *The Issues*

8. The issues before the tribunal were:

- (1) Were any of the cars available for the private use of Mr Holmes or Mrs  
Holmes by reason of their employment by KMS?

(2) Was there in existence a prohibition on the use of the cars for the private purposes of Mr Holmes or Mrs Holmes?

(3) Were the cars in fact never used for the private purposes of Mr Holmes or Mrs Holmes?

5 *The Legislation*

9. The legislation regarding the taxable benefits of cars made available to employees and company officers and their families is contained within s114 to s153 ITEPA.

10. Specifically s118(1) ITEPA states that:

10 For the purposes of this Chapter a car or van made available in a tax year to an employee or a member of an employee's family ... is to be treated as available for the employee's private use unless in that year-

(a) the terms on which it is made available prohibit such use, and

(b) it is not so used.

15 The Evidence

11. Mr Bradley referred us to notes of a meeting with Mr Holmes held on 9 January 2007 and notes of a meeting with Mr Holmes and Mr Holmes's external accountant, Mr M Ahmad, on 26 June 2007. From these notes there appears to have been some confusion at the meetings as to whether the cars in question were owned by the company or by Mr Holmes or Mrs Holmes personally, since some of the cars had been initially bought by Mr Holmes and his wife personally. However we were then referred to a summary of the submitted tax computations of the company which showed clearly that all the cars in question had been owned by the company.

12. Mr Bradley also referred the tribunal to notes of a meeting with Mr Holmes on 8 November 2012, the notes of which had been signed by Mr Holmes, during which Mr Holmes had been asked very detailed questions about possible private use of the cars. Although Mr Holmes consistently denied any private use of the cars during this meeting he did, in answer to a hypothetical question, acknowledge that there was a "possibility" that the cars may have been used incidentally for private use. Mr Bradley suggested that even though Mr Holmes had not admitted any actual private use, this implied that there was no actual prohibition of private use in place.

13. During the Employer Compliance Review carried out by HMRC Mr Holmes had provided a schedule setting out the details and the use of 7 cars which had been owned by the company during the relevant periods: a BMW, a Toyota, a Mercedes E55, an Audi TT, a Ford Fiesta, a Mercedes 180 and a Volkswagen. The schedule also included details of 2 other cars but these were agreed to be of no relevance to the current appeal.

14. No specific mileage records had been maintained in respect of any of the cars included on the schedule other than in respect of the Ford Fiesta and the Mercedes

180, for which the schedule showed private mileage of 130 miles and 312 miles respectively. Mr Holmes explained that these cars were for the prime use of 2 employees of the company, who had been with the company for brief periods in 2003 and 2004, and that although the schedule had shown Mr Holmes as a user of these cars this would only have been for the purposes of specific business journeys and he did not otherwise have any use of these cars. These cars would ordinarily have been kept overnight at the homes of these 2 employees.

15. The calculation of the various car and fuel benefits was varied as a result of the HMRC internal review but all the calculations were based on list prices and figures from Glass's Guide and none of the calculations had been challenged by Mr Holmes.

16. Mr Bradley then referred us to a letter from Mr Holmes dated 5 September 2009 during which Mr Holmes stated he accepted that the cars were *available* for private use (Mr Holmes's emphasis), although he then went on to ask for clarification of the meaning of available for use, which suggested to us that he was not necessarily accepting that the cars were available for use in any technical sense of the word, as defined in s118. It did however suggest to us that there was no prohibition on private use in place, either in writing or in Mr Holmes's mind.

17. This letter also confirmed that all running costs of the cars in question had been met by the company. There was no suggestion that any fuel costs had been made good to the company by any employees.

18. Car and fuel benefits had been declared by Mr Holmes in his tax returns for the periods 1999-00 to 2001-02. In addition a figure simply described as expenses received had been included in Mr Holmes's tax return for 2002-03, but it was of a similar amount to the car and fuel benefits declared in the previous years and Mr Bradley suggested that this was in fact in respect of car and fuel benefits. No such car and fuel benefits were included on the tax returns for the subsequent years which are the subject of this appeal. Mr Bradley submitted on behalf of HMRC that there had been no change in the use of these cars, merely that the benefit had been omitted in the subsequent years.

19. No car and fuel benefits had been declared in Mrs Holmes's tax returns for any of the periods 1999-00 to 2002-03 or for the subsequent years which are the subject of these appeals.

20. Mr Holmes said that he and his wife had four children and six dogs and that therefore the family car, a Mercedes estate which was used to transport the children and the dogs and which was not owned by the company, was not usually in a suitable condition for visiting clients, or taking them out to lunch. In contrast the company cars had been kept in pristine condition, in order to present the right image to the company's customers.

21. Mr Holmes explained that he and his wife had received advice from their accountant that it would be more tax efficient if they did not use the company cars for private use. He could not however say when this advice was received, but he

suggested that it was likely that this was around the time when he stopped reporting the benefit on his tax returns.

22. Mr Holmes also stated in his evidence that both he and his wife were aware of the need for there to be a prohibition on the private use of the cars although he  
5 acknowledged that this statement was somewhat at odds with his letter of 5 September 2009 in which he had accepted that the cars were available for the private use of Mr and Mrs Holmes.

### *Discussion*

23. The tribunal was referred to the following cases:

- 10 (1) *Gilbert v Hemsley* 55 TC 419 (High Court)  
(2) *New Image Training Ltd v HMRC* [2012] UKFTT (469) (TC)  
(3) *Golding v HMRC* [2011] UKFTT 232 (TC)

24. The judgement in the case of *Gilbert v Hemsley* makes it clear that it is not  
15 necessary for any prohibition of private use to be in writing and that in the appropriate circumstances a verbal prohibition would be sufficient. That case however concerned a managing director giving verbal instructions to another director who was subordinate to him.

25. The case of *New Image Training* was possibly of more help to the tribunal in  
20 that it was accepted in that case that Mr Ellis, who was described as the Company Secretary but in fact was in overall control of the business, had given clear instructions both to his other staff and to himself that private use of the car in question was prohibited. We have some difficulty with the concept of an individual giving verbal instructions to himself but accept that this must turn on the specific facts of the case in question.

25 26. In the present case we have considered this issue in the context of the mindset of the individual concerned, Mr Holmes, and whether or not he was clear in his own mind, during the relevant periods, that all private use of the cars was prohibited. He said that he had been advised at some time that there should be no private use of the cars, and he stated in evidence that he was aware of this, but s118(1) contains two  
30 conditions, which require that all private use must be prohibited and that there should be no such use. Both of these conditions must be fulfilled in order to avoid taxation under Chapter 6 ITEPA, and we believe that, in the context of a managing director giving instructions to himself, these two conditions taken together require a higher standard than mere awareness that there should be no private use.

35 27. At no time during his meetings with HMRC of 9 January 2007 or 26 June 2007, or in his letter of 5 September 2009, did Mr Holmes or his accountant express the view that there was in existence a prohibition on the private use of the cars. Indeed, in his letter of 5 September 2009 Mr Holmes conceded that the cars were available for private use, although he possibly did not make that concession with a full  
40 understanding of the technical use of the word “available”.

28. We would also observe from the notes of the meeting of 9 January 2007 that Mr Holmes did not seem to be fully aware of the potential issues concerning the use of the cars and, according to the notes, he had said that he thought that his accountant would have dealt with this. This does not suggest that Mr Holmes was aware at that  
5 time of the need to avoid any private use of the cars, let alone an understanding that there needed to be a complete prohibition on such use.

29. The notes of the meeting held on 27 June 2007 state that Mr Holmes was not even sure who owned the cars. Indeed it appears that at that time he believed that the cars were owned personally by himself and his wife, and it was suggested by HMRC  
10 in the meeting that the reimbursement by the company of the running expenses of the cars should be treated as additional taxable income. This suggests strongly to us that throughout the period under consideration Mr Holmes was not clear in his own mind that the cars were owned by the company let alone that they should not be used for private purposes, or that there was any prohibition on their private use.

15 30. In contrast, at the meeting held on 8 November 2012, Mr Holmes was very clear that the cars should not have been used for private purposes and had not been so used. He had given very clear and consistent answers to the detailed questions posed by HMRC, but this was of course significantly later than the periods in question.

#### Decision

20 31. Having considered the evidence presented to us and the issues discussed above, we came to the conclusion that in respect of the BMW, the Toyota, the Mercedes E55, the Audi TT and the Volkswagen:

(1) there was no effective prohibition of private use in place throughout the years under consideration, and

25 (2) it was likely that, on the balance of probabilities, there had been private use of the cars by Mr and Mrs Holmes during this period.

32. We therefore decided that the additional assessments in respect of these cars, as varied by the HMRC internal review, should stand.

30 33. As regards the Ford Fiesta and the Mercedes 180 however we decided that these had been conventional company cars provided to other employees of the company and that in effect therefore they had not been available for the private use of Mr Holmes or his wife and that any use of them by Mr Holmes was entirely for business purposes. We therefore decided that the additional assessments in respect of these cars should be reduced to nil.

35 34. We understand that at an earlier stage of negotiations it had been suggested by Mr Holmes's former adviser that the cars might be pool cars within the provisions of s167 ITEPA. This suggestion had not however been followed up. No such arguments were put to us at the hearing by Mr Holmes and Mr Bradley said that no such arguments had been advanced to HMRC and that he had not therefore addressed  
40 them. The tribunal therefore decided that it was not in a position to consider any such arguments.

35. As regards the additional assessments on Mr Holmes the tribunal therefore decided to vary the assessments as below:

(1) The additional taxable income for 2003-04 should be reduced from £28,390 to £25,099, in line with the findings of the HMRC internal review but with a further reduction of £729, being the additional taxable income relating to the Ford Fiesta,

(2) The additional taxable income for 2004-05 should be reduced from £41,313 to £32,999, in line with the findings of the HMRC internal review but with a further reduction of £859, being the additional taxable income relating to the Mercedes 180,

(3) The additional taxable income for 2005-06 should be reduced from £16,081 to £16,006, in line with the findings of the HMRC internal review, and

(4) The additional taxable income for 2006-07 should be reduced from £6,097 to nil, in line with the HMRC internal review.

36. As regards the additional assessments on Mrs Holmes the tribunal decided to vary the assessments as below:

(1) The additional taxable income for 2003-04 should be reduced from £14,259 to £13,731, in line with the findings of the internal HMRC review,

(2) The additional taxable income for 2005-06 should be reduced to nil, in line with the findings of the internal HMRC review, and

(3) The additional taxable income for 2006-07 should be reduced to nil, in line with the findings of the internal HMRC review.

37. As regards the additional assessment on Mrs Holmes for 2004-05, the tribunal decided that this appeal should be dismissed.

38. 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.

**PHILIP GILLETT  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 MAY 2015**