



TC04760

Appeal number: TC/2014/01389

*TYPE OF TAX – income tax – PAYE – benefits in kind - whether car
amounted to a pool car – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALEXANDER JUBB

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
JANET WILKINS**

Sitting in public at Colchester on 24 June 2015

The Appellant appeared in person

Mr O'Grady, senior officer, of and for the Respondents

DECISION

Introduction

5 1. This is an appeal against an enquiry completion notice under s28A(1) & (2) Taxes Management Act 1970 (“TMA”) and a penalty determination issued under Schedule 24 Finance Act 2007.

2. The enquiry completion notice was issued following conclusion of an enquiry into the appellant’s 2008-2009 tax return. The notice set out HMRC’s decision that
10 the appellant’s 2008-2009 tax return was to be amended to include pay of £5,435.00, a car benefit of £10,119.00, a fuel benefit of £4,291.00 and other benefits of £354.00. HMRC’s conclusion was that these had been omitted from the return when it was originally submitted. The tax underpaid as a result was calculated to be £2,835.20.

3. The penalty determination follows from the amendment of the notice. HMRC
15 concluded that the errors had been careless and imposed the minimum penalty of 15% of the tax underpaid (noted above), such amount being £425.28.

4. The appellant (“Mr Jubb”) did not dispute the amendment in respect of pay of £5,435.00 and, during the hearing, accepted that the “other benefits” amendment of £345.00 was likely to have related to a health club membership benefit and did not
20 dispute it further. Accordingly, the only items in dispute to be considered by the tribunal are the car benefit and the associated fuel benefit, together with penalties thereon.

Background

5. During 2008-2009, Mr Jubb was a director of Joal Leisure Limited, a company
25 which supplied modular homes with suppliers and customers throughout Europe. The company went into liquidation in 2010.

6. HMRC opened an enquiry into his 2008-2009 tax return as a result of discrepancies between the information provided in that return and the information which had been included in Mr Jubb’s P11D by the company for that year. Mr Jubb
30 was asked to provide specific documentation relating to his employment with Joal Leisure Limited for the tax year 2008-2009.

7. No reply was received to this request and so HMRC issued a formal notice requesting this documentation to Mr Jubb on 28 May 2013 under para 1, Schedule 36, Finance Act 2008. Mr Jubb responded to this request to say that he had no such
35 documentation and that the company had been put into administration during 2009.

8. HMRC advised Mr Jubb of the discrepancy between his tax return and the P11D submitted by the company and asked him a series of questions about the preparation of the return. As no substantive reply was received to these queries, HMRC issued a

closure notice in respect of the amendments to Mr Jubb's 2008-2009 return on 21 October 2013.

9. Mr Jubb appealed to the Tribunal on 17 February 2014, stating that he "did not have a company car" and that he had "been unable to verify information within the 30 day timescale" as the company had gone into liquidation. HMRC have not challenged the lateness of the appeal.

10. The P11D was produced to the tribunal. It included details of two cars being made available to Mr Jubb during 2008-2009: firstly, a BMW which was provided from the beginning of the tax year up to and including 31 July 2008 and, secondly, a Jaguar XF saloon which was made available from 1 August 2008 for the rest of the tax tax year. The P11D includes the information that free fuel was available for both cars and that Mr Jubb did not pay any amounts for private use of either car, nor had he contributed any capital amounts towards the cost of either car.

Mr Jubb's evidence

11. Mr Jubb gave evidence at the hearing. He stated that the P11D was incorrect and that both the cars were, in that tax year, pool cars of the company as the company was in "terminal decline" because of problems with contracts, and the company was pooling vehicles to save money.

12. The P11D had been prepared by a temporary accountant engaged by the company when the previous accountant had left the business, and the temporary accountant had simply replicated information on previous P11Ds and had not enquired as to the correct position.

13. Mr Jubb had been too busy trying to keep the company afloat to look at the paperwork being produced by the accountant at the time and had not been aware that the car information had been included in the P11D for 2008-2009. Mr Jubb was not aware of having had a copy of the P11D, as he left tax matters to others to deal with. He described himself as "not the best administrator in the world".

14. Mr Jubb said that the company had, in the 2008-2009 tax year, "about fourteen" cars, used by employees. He explained that the BMW referred to in the P11D had been one of the first cars acquired by the business. It had been acquired a number of years earlier and was used for sales trips in order to provide a good image of the company. The Jaguar had been acquired to replace the BMW as a result of Mr Jubb being strongly persuaded by other members of the team that a newer car was necessary to show that the company was successful. Both cars were used by other employees, particularly those in the sales team.

15. Mr Jubb accepted that the BMW had been included on his previous P11Ds and that he had paid tax on the car benefit in previous years. He confirmed that he had used the BMW for personal use as well as business use prior to 2008-2009 because he had no other car available to him at that time. He subsequently acquired another car personally and Mr Jubb stated that he then had no need to use the BMW for person

use. He said that the Jaguar was always intended to be a status vehicle, to set the scene and make the company appear successful in a competitive market.

16. The cars were registered in the company's name. They had generally been kept at Mr Jubb's house as it was considered to be more secure than the company's original premises. Once the company moved to new premises, Old Chase Farm, in October 2008 the cars were kept at those premises as they were considered to be secure. On occasion the cars would be kept at employee's houses overnight where it made logistical sense to do so, if the employee was using the car for work.

17. When asked whether he used either car privately, Mr Jubb confirmed that he was not prohibited from so using the cars.

HMRC's submissions

18. Mr O'Grady submitted for HMRC that the P11D should be taken to be correct and Mr Jubb should be subject to tax accordingly. The burden of proof was on Mr Jubb to demonstrate that he was overcharged by the assessment and that he had not succeeded in so demonstrating as he had confirmed that the cars were available to him for personal use.

19. Mr O'Grady confirmed that, with regard to the penalty, the burden of proof is on HMRC to show that Mr Jubb was careless in failing to include the details of the car and the fuel benefit on his tax return. Mr O'Grady submitted that omission of these details from Mr Jubb's tax return could only be regarded as careless, and so subject to penalty, given that the information was included on Mr Jubb's P11D and so was information available to him in preparing his return, and that Mr Jubb had not succeeded in demonstrating that the P11D was incorrect. Mr O'Grady noted that HMRC had nevertheless made the maximum abatement available to a penalty for careless error.

Mr Jubb's submissions

20. Mr Jubb submitted that the cars should be regarded as pool cars, and so not subject to tax as a benefit on him. He submitted that there was no evidence that the car was not used as a pool car and it was iniquitous that he should be taxed on something that was not the case.

Findings of fact

21. We find, based on Mr Jubb's evidence, that both the BMW and the Jaguar referred to on his P11D for 2008-2009 were made available to Mr Jubb for the better performance of his duties to the company and we also find that the cars were available for his private use as, on being asked whether he used the cars privately, he confirmed that such use was not prohibited by the company.

22. We find that the BMW was normally kept overnight at Mr Jubb's house whilst it was in the company's possession and that the Jaguar was also kept at his house overnight until at least October 2008.

Discussion

5 23. It is well-established that the burden of proof is on the appellant, Mr Jubb, to show why the assessment to tax is incorrect. We consider, however, that Mr Jubb has failed to discharge that burden of proof.

24. Mr Jubb does not dispute that the BMW and the Jaguar were made available to him, but submits (in summary) that the cars referred to on his P11D should not be
10 treated as a taxable benefit for 2008-2009 because he no longer needed the car for personal use as he had acquired his own car, and the car was used by other employees.

25. The definition of a pool car for these purposes is set out in s167 ITEPA 2003. That definition does not include any consideration of whether private use of the car is necessary to the employee. The definition is also not met simply because the car is in
15 fact used by more than one employee.

26. In order to be a pool car within the definition in s167 ITEPA 2003, it is necessary that – in addition to the car being made available to more than one employee – any private use of the car by an employee must be merely incidental to the employer's other use of the car during that year, and the car must not normally
20 have been kept overnight on or in the vicinity of an employee's residence.

Decision

27. We find that the BMW and the Jaguar detailed in Mr Jubb's P11D for 2008-2009 were not pool cars, as Mr Jubb has not demonstrated that the statutory definition of a pool car is met in respect of either car. The BMW was normally kept overnight at
25 his residence throughout the period in the tax year that it was available to him, the Jaguar was also kept at this address for a substantial period of time, and his evidence is that his private use of both cars was not prohibited and was not merely incidental to his other use of the the cars during the tax year 2008-2009.

28. The other amendments to the return were not disputed and so we are not
30 required to address them.

29. We further find that Mr Jubb's omission of the benefits from his tax return was a careless error as Mr Jubb's own evidence is that he did not pay particular attention to dealing with tax matters.

30. The appeal against the closure notice and the penalty determination is therefore
35 dismissed.

31. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

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RELEASE DATE: 2 December 2015