



**TC05167**

**Appeal number: TC/2011/01065 (and 04891, 05288, 05289 and 04361)  
UT/2014/0042**

*Supplementary Decision*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**(1) JAMES H DONALD (DARVEL) LIMITED;                      Appellants  
(2) RICARDO TOGNERI;  
(3) GORDON DAVIES; and  
(4) REGINALD R DONALD**

**- and -**

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

**TRIBUNAL: JUDGE KENNETH MURE, QC  
MEMBERS: PETER SHEPPARD, FCIS, FCIB, CTA  
S A RAE, LLB, WS**

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday  
23 March 2016**

**Appellants: Philip Simpson, QC, CTA, with Nicholas Davis, Solicitor  
Respondents: Duncan Tebbet with Barry Marriott, Officers of HMRC**

## SUPPLEMENTARY DECISION

1. This is a supplementary Decision prepared by this Tribunal in response to the Direction of (the late) Lord Jones in the Upper Tribunal. It is additional to our decision dated 3 June 2014 and represents an elaboration by us of our views on the tax implications of the cars provided in terms of Plan 2 to Mr Reginald Donald, Mr Togneri, and Mr Davies. While we considered it inappropriate to have a re-hearing of the evidence, we were anxious to be addressed again by counsel in case further aspects had emerged and been the subject of argument at the hearing before the Upper Tribunal.

2. As a preliminary matter Mr Simpson, on behalf of the appellants, invited us to consider or express our views on the corporation tax liabilities which had arisen for the companies, James H Donald Company Services Limited (“Services”) and J H Donald (Retail) Limited (“Retail”). If the business were to be regarded as one entity, *viz* James H Donald (Darvel) Limited (“Darvel”), then it was chargeable in respect of the entire profits of the organisation, and that without an additional tax levy being imposed on “Services” and “Retail”. Mr Tebbet’s response was that this hearing should be confined to the matter of taxation of the cars. Services and Retail were not parties to the appeal in any event.

3. We agreed with Mr Tebbet that this hearing should be confined to the matter of taxation of the cars. That, as we interpret it, was the extent of the remit by the Upper Tribunal, and it was inappropriate that we should extend that.

### **Appellants’ Submission**

4. Mr Simpson referred us to the terms of various documents which had been produced. Very helpfully both parties had arranged separate Bundles of these pertinent to the matters arising in the Remit. Essentially Mr Simpson urged us to take these documents at face value. There were two subjects for consideration, *viz* the cars provided by Services for Mr Donald and, then, the cars provided by Reedon (the LLP) for Mr Donald, Mr Togneri and Mr Davies. He confirmed that no new arguments had been raised before the Upper Tribunal regarding Plan 2 and the provision of cars.

5. Mr Donald, Mr Simpson emphasised had acted as the company secretary of Services. He received no remuneration as such for that work other than the provision of a car. In Mr Togneri’s Witness Statement (App – tab 2) there was some discussion about the provision of cars (paras 24 *et seq*). However, in Mr Davies’ Witness Statement (tab 3) there was no specific reference to motor vehicles.

6. We were referred to tab 4, which showed a calculation of benefits-in-kind in relation to Mr Donald’s cars. Tab 5, p53, is an extract from Darvel’s cash records showing expenditure incurred in relation to the Mercedes SLK used by Mr Donald. Services’ accounts to 31 January 2001 (tab 6, p40-41) records motor vehicle expenditure and the deduction of a (maximum) Allowance of £3,000 for a car. Tab 7, p53, notes a cash contribution by Mr Donald of £2,800 towards the purchase of a car. Tab 8 contains a variety of invoices for cars submitted to Reedon, which, Mr Simpson submitted, tended to show that that entity had incurred the expense. Tab 9 includes several documents relating to cars attributable to variously Darvel, Services and Reedon.

7. Mr Simpson submitted that we should take the documentation produced largely at face value, and supporting the existence of Services and Reedon as distinct entities, having services rendered to them, and not to Darvel as a sole entity.

### **Respondents' Submission**

5 8. On behalf of HMRC Mr Tebbet submitted that the cars were surely supplied by Darvel and related to the employment of Messrs Donald, Togneri, and Davies with that company. The vehicles were owned and funded by Darvel. They were provided by reason of these three individuals' employments with Darvel. On a *Ramsay* or purposive interpretation the source of the vehicles was truly Darvel.

10 9. In relation to the two Mercedes cars used by Mr Donald, Mr Tebbet referred to Respondents/tab C, the sales invoice by Darvel to Services for the SLK model dated January 2002. That date was inconsistent with the terms of the next item, a letter from the Scheme's administrator dated May, recording that "a final decision had still to be made" about the car being in lieu of remuneration. When this car was replaced  
15 by the CLK model, there was a part-exchange, and a further £19,315 was paid. The source of these extra funds was unclear to Mr Tebbet. Curiously no purchase invoice had been produced for this vehicle although it cost in excess of £30,000. He suggested that the likely inference was that Darvel funded the extra cost.

20 10. Mr Tebbet queried the reference to "recharges" on tab E. This seemed inappropriate if the vehicles were registered as belonging to or provided by Services. In Reedon's profit and loss accounts to 2007, 2008 and 2009 (tab G) there are deductions for "motor expenses" but cars as assets are reflected only in the balance sheet as at 2010.

25 11. These, Mr Tebbet argued, were serious inconsistencies, which might have been resolved if vehicle registration books had been produced. These had not been exhibited to the respondents.

12. So far as Mr Davies's vehicles were concerned, a Vauxhall Zafira and a Mercedes Vito van, it seemed that these were owned and provided by Darvel (see Darvel's cash statements at tab I).

30 13. Mr Tebbet adopted the principle in *Hochstrasser v Mayes*, 38 TC 673, that the *substance* of the plans had to be identified and distinguished from the *form*, which should not distract. Moses LJ in *P A Holdings Limited v CIR* [2012] STC582, had stressed the identification of the *source* of the benefit in determining its liability to taxation. In substance the vehicles were benefits from Darvel. Mr Togneri's and  
35 Mr Davies' work, servicing and debt collecting, was ultimately for Darvel. Indeed, Mr Tebbet continued, it did not matter who actually owned the vehicles, rather their taxation depended on the employment for which they had been provided. All work done for Reedon was for Darvel, he stressed.

40 14. Mr Tebbet then referred to his *Ramsay* argument. These transactions were all parts of a tax avoidance scheme. One should look at the reality and not be blinkered by form. This approach had been adopted in three further decisions, post-dating the original hearing, and all considered schemes to circumvent income tax and NIC liabilities. The cases noted were *UBS AG and DB Group Services (UK) Limited v HMRC* [2016] UKSC 13; *Aberdeen Asset Management plc v HMRC* [2013] CSIH 84;  
45 and the *Advocate General for Scotland v Murray Group Holdings Limited and Others*

[2015] CSIH 77. The approach favoured by the Supreme Court and the Court of Session in these cases had been to have regard to the practical and financial reality of artificial arrangements to avoid tax and NIC liabilities. There was no genuine commercial background to these arrangements. The object was the frustrating of the purposes of the benefits in kind legislation.

15. For these reasons Mr Tebbet moved us to draw the same conclusion in respect of the cars as we had in relation to the other parts of the Scheme.

16. In a brief reply Mr Simpson suggested that inevitably certain clerical errors could occur in invoices and other documentation. That, he suggested, was not sinister. We should find that the car provided for Mr Donald by Services was paid for by that company and related to his work for it as an independent entity. Similarly in relation to the cars provided for Messrs Donald, Togneri and Davies by Reedon we should find that Reedon bore all the relative costs as owners of the vehicles in the course of its independent business.

## 15 **Conclusion**

17. This was one business, controlled by one person, *viz* Mr Reginald Donald. The company, J H Donald of Darvel Limited (“Darvel”) was the principal entity. We confirm our view that the other companies, “Services” and “Retail” and the LLP, Reedon, were mere ciphers of Darvel and under the control of Mr Donald.

18. The vehicles supplied for Mr Davies can be dealt with in short course. The Vauxhall Zafira and the Mercedes Vito van, were apparently owned directly by Darvel. Their purchase is noted in Darvel’s accounts (Respondents – I). The other vehicles ie the Mercedes cars used by Mr Donald and Mr Togneri’s cars were owned by Darvel ultimately in our view. Whatever regard is paid to the documentation, the cars were provided ultimately by the core entity, Darvel. To the extent that any benefits-in-kind result for the recipients, these related to services rendered to Darvel. There is an obviously suspect artificiality about the documentary records produced. In the case of the Mercedes cars used by Mr Donald, the arrangements bear to be contrived so as to avoid or minimise tax liabilities. As a “company secretary” rather than a “director” Mr Donald would not be taxable on benefits-in-kind totalling less than £8,500. Here, we note (See ...??)

19. Crucially, we do not accept that Mr Donald performed duties – or work of any value – for Services. Services was at most an operating limb of Darvel. It was not in our view a genuinely separate entity. In any event we do not consider that Mr Donald performed any real work for Services. What he did, in our view, was a parody of what might be expected of a competent company secretary. Company meetings were not properly convened. Notices were deficient. Former employees who had retired but remained “shareholders” were not notified of meetings. Company records were not adequately maintained. We found Mr Donald’s evidence on these matters wholly unsatisfactory.

20. We have noted again what Mr Togneri states in the concluding paragraphs (24 *et seq*) of his Witness Statement. He refers to the provision of cars by the LLP, Reedon, although insurance cover was under the Darvel master policy. Reedon, however, is simply another “arm” of Darvel and not in itself genuinely independent. Any work done in name of Reedon was done for Darvel.

21. In short all the motor vehicles were owned or provided by Darvel. Such benefits as were derived for their use arose from services performed for Darvel. Mr Donald was the “controlling mind” of one integrated business. The work done by him, Mr Togneri and Mr Davies were for that same business. We confirm our  
5 Finding-in-Fact and Law no. (xiii) –

“The cars used by Mr Donald, Mr Togneri and Mr Davies, purportedly supplied in terms of Plan 2 were truly provided to them and funded ultimately by Darvel. They were referable to their employments with Darvel.”

22. Subsequent to the further Hearing HMRC sent to the Tribunal a letter dated  
10 15 April 2016 and an accompanying Schedule with calculations, seeking a determination of assessments to tax on the principal appellant, James H Donald (Darvel) Limited. We did not request this, and while a copy has been sent (we understand) to the appellants’ representatives, we are not aware of their views. In any event for the reasons explained in the introductory paragraphs in this Supplementary  
15 Decision, we consider that this issue goes beyond the bounds of our remit. Mr Tebbet’s stance as we have noted it in para 2 seems inconsistent with this recent letter. The remit, as we understand, is restricted to the taxation of the cars provided for Messrs Donald, Togneri, and Davies in terms of Plan 2. We addressed this issue in an earlier Procedural Note to the Upper Tribunal dated 22 December 2014.

20 23. 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  
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**KENNETH MURE QC**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 14 June 2016**