



TC05269

Appeal numbers: TC/2014/03167
TC/2014/05187

INCOME TAX – NATIONAL INSURANCE CONTRIBUTIONS – employee given free bus pass by employer – whether exempt from tax under ITEPA s 243 as “financial or other support for a public transport road service” – link to non-cash voucher legislation – whether pre-enacting history can be considered – whether other contributions by employer to bus company satisfied statutory test – whether zonal bus tickets satisfy that test – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**(1) NOTTINGHAM CITY COUNCIL
(2) THOMAS STRAW**

Appellants

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Royal Courts of Justice on 10 May 2016

Mr Leslie Allen of Mishcon de Reya LLP for the Appellants

Ms Sadiya Choudhury of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In the tax year 2012-13, Nottingham City Council (“the Council”) provided a free bus pass to its employee, Mr Thomas Straw.

5 2. HM Revenue & Customs (“HMRC”) amended Mr Straw’s self-assessment (“SA”) return to include tax on the provision of the bus pass on the basis that it was a benefit in kind. It also issued the Council with a determination charging Class 1A National Insurance Contributions (“NICs”) on the provision of the benefit.

10 3. The Appellants submitted that the bus pass was exempt from tax by virtue of s 243 of the Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”) because it constituted “financial support...for a local bus service”. As a result, the bus pass was not a benefit in kind, so no income tax or Class 1A NICs were due on its provision.

15 4. In the alternative, the Appellants submitted that other financial support provided by the Council to the local bus operator, Nottingham City Transport Limited (“NCT”), was “financial support” within the meaning of s 243, so the statutory test was satisfied for that reason.

5. I decided that neither the bus pass nor the other support provided to NCT constituted “financial support...for a local bus service” within the meaning of ITEPA s 243.

20 6. One of the issues in dispute was whether a zonal bus pass could ever satisfy the exemption. I disagreed with HMRC on that issue, but this did not avail the Appellants. Their appeals are therefore refused and HMRC’s amendment to Mr Straw’s SA return and the Class 1A NICs determination on the Council were upheld.

Mr Straw’s non-attendance

25 7. Mr Straw did not attend the hearing. Mr Allen said he had been informed of the date and wanted the Tribunal to hear the case in his absence.

8. I considered Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”). I was satisfied that Mr Straw had been notified of the hearing, and that it was in the interests of justice to proceed.

30 The legislation

9. The legislation relevant to these appeals is set out in the Appendix. The main provision in dispute is ITEPA s 243, which reads:

“Support for public bus services

35 (1) No liability to income tax arises in respect of the provision of financial or other support for a public transport road service if

(a) in the case of a local bus service, conditions A and B are met...

(2) Condition A is that the service is used by employees of one or more employers for qualifying journeys.

(3) Condition B is that the service is available generally to employees of the employer (or each employer) concerned.

(4) ...

(5) In this section

5 'local bus service' means a local service (as defined in section 2 of the Transport Act 1985 (c 67)), and

'public transport road service' means a public passenger transport service provided by means of a road vehicle."

10 10. The parties referred to the precursor provisions, being Finance Act 1999, s 48 which introduced s 197AB into the Income and Corporation Taxes Act 1988 ("ICTA"), and the subsequent amendments made by Finance Act 2002, s 33. These provisions are also in the Appendix.

The evidence

11. The parties provided a helpful bundle of documents which included:

15 (1) the correspondence between the parties and between the parties and the Tribunal;

(2) Mr Straw's SA tax return for 2012-13;

(3) Mr Straw's contract of employment and related documents; and

20 (4) material relating to the salary sacrifice arrangement entered into between Mr Straw and the Council.

12. On the basis of the evidence provided, I find the following facts, none of which was in dispute.

The facts

25 13. The Council is the non-metropolitan district council for the unitary authority of Nottingham. It has around 13,000 employees who live in various parts of Nottingham and work at one or more of the Council's various sites throughout that city.

14. Although the Council originally had responsibility for local bus services, at some point these were privatised. The Council now gives various subsidies to NCT. In 2006-07 financial support of approximately £6.5m was provided.

30 15. In 2006, the Council considered whether to introduce salary sacrifice arrangements under which employees could sacrifice part of their salary and obtain a tax-free bus pass. It provided details of the proposed arrangements to HMRC, and asked for confirmation that they met the requirements of ITEPA s 243, so that there would be no tax or NICs liability arising from their provision. By letters dated 1 May 35 2007 and 19 July 2007, HMRC gave the requested confirmation.

16. At some point in 2007-08, the Council began operating those arrangements. As NCT did not issue bus passes for particular routes, but for instead for zones within the city, employees were provided with zonal bus passes.

17. In December 2009, HMRC revised its guidance on ITEPA s 243. The Council's bus pass arrangements did not satisfy some of the new conditions. As a result, it terminated the salary sacrifice arrangements and stopped providing free bus passes. However, it decided to test whether HMRC's view of the law was correct, if
5 necessary by bringing a case to the Tribunal.

18. On 6 April 2012, the Council implemented a new salary sacrifice arrangement for a single employee, Mr Straw, under which he entered into a salary sacrifice arrangement and was provided with a zonal bus pass (an Easyrider Nottingham City Card) which the Council purchased from NCT. The bus pass was valid for all routes
10 within the Nottingham City boundary, which included Mr Straw's journeys to and from work. Mr Straw was able to use the bus pass at other times, such as when he was on holiday, and also for other journeys within Nottingham.

19. Mr Straw's bus pass cost the Council £420, the price paid by a member of the public. It was valid until 11 April 2013.

15 20. On 15 April 2013, Mr Straw entered into a further salary sacrifice arrangement and was provided with a bus pass for a further year. That bus pass was not the subject of these appeals.

21. In 2012-13, the Council paid £6,267,000 to NCT to cover the cost of concessionary fares for the elderly, disabled and others, and a further £1,452,890 for
20 "tendered contracts". Neither party was able to assist the Tribunal with information about what was included under that heading, but I was assured that the Appellants were not relying on tendered contract payments in making their case. In this decision, I have referred to these sums as the "other payments".

22. On 16 May 2014, HMRC issued a determination to collect Class 1A NICs from
25 the Council in relation to the bus pass issued to Mr Straw. On 15 August 2014, HMRC amended Mr Straw's SA return to include the bus pass as a benefit in kind.

23. The Council and Mr Straw both appealed, and subsequently notified those appeals to the Tribunal. On 15 December 2014 the Tribunal directed that the appeals proceed together and be heard together.

30 **Issues not in dispute**

24. HMRC accepted that the bus service accessed by Mr Straw using his bus pass was "a local bus service" as defined in the Transport Act, s 2, imported into ITEPA s
35 243 by subsection (5). In particular, HMRC accepted that the maximum journey which a person could travel using an Easyrider Nottingham City Card was no more than 15 miles, measured in a straight line from beginning to end, see Transport Act 1985, s 2(2).

25. HMRC also accepted that Mr Straw's bus pass was used for qualifying journeys, being journeys between home and a workplace or between one workplace and another.

26. In her skeleton argument Ms Choudhury had submitted that, as Mr Straw's bus pass was funded by a salary sacrifice arrangement, there was in fact no cost to the Council, so it was providing nothing by way of financial support to local buses; instead it was making a NICs saving and Mr Straw was saving income tax. She stated that the arrangements were "an attempt to undermine the purpose of the legislation and gain a tax advantage instead". However, during the hearing, HMRC changed its position: Ms Choudhury withdrew her submission and said that HMRC no longer challenged any aspect of the salary sacrifice arrangements, and instead accepted that the position would have been no different had Mr Straw's bus pass been provided without any salary sacrifice arrangement. I have proceeded on that basis.

27. ITEPA s 243(3) sets out Condition B of the exemption, which states that the bus service must be "available generally to employees of the employer (or each employer) concerned". Here, Mr Straw was the only employee provided with a bus pass, but HMRC did not seek to argue that Condition B was not satisfied.

15 **Issues in dispute**

28. The main issue in dispute was whether Mr Straw's bus pass was exempt from tax under ITEPA s 243 because its provision constituted "financial or other support for a public transport road service".

29. If not, the subsidiary issue was whether the other payments made by the Council to NCT constituted support within the meaning of s 243.

30. If the answer to either of these questions was yes, the further issue was whether the statutory exemption only applied where the bus pass or ticket was for specific journeys (as HMRC argued), so that the type of zonal bus pass given to Mr Straw fell outside the exemption.

31. I deal first with the main issue and then with the other issues.

The main issue: submissions

Mr Allen's submissions on behalf of the Appellants

32. Mr Allen submitted as follows:

(1) The word "support" is defined in the Oxford Online Dictionary as "provide for the maintenance of, help to finance, bear the expense of, pay for". It is a wide definition.

(2) In reliance on that definition, the Council's purchase of a bus pass was "financial support" for local bus services, because each bus pass includes a profit element for NCT. The bus pass "supports" the bus service just as a person supports a local shop if he buys groceries from that shop rather than from a supermarket.

(3) Since the bus pass meets the "financial support" test, no tax or NICs liability arises from its provision.

(4) HMRC were wrongly focusing on the employer, and restricting the exemption to situations where "substantial" financial support had been

provided. The statute gives a tax exemption to employees, so its focus is on the individual.

(5) If the support had to be “substantial”, that would prevent employees of small employers from accessing the exemption, which cannot have been Parliament’s intention.

33. Mr Allen also said that the meaning of “support” was so wide that the test in *Pepper v Hart* [1992] STC 898 was satisfied, and recourse could be had to Hansard. Lord Browne-Wilkinson said at p 923 of his judgment in that case:

“I therefore reach the conclusion, subject to any question of parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where:

(a) legislation is ambiguous or obscure, or leads to an absurdity;

(b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect;

(c) the statements relied on are clear.

Further than this, I would not at present go.”

34. When ICTA s 197AB was introduced by FA 1999, s 48, the Minister, Miss Hewett, said that “the main thrust of the exemption” was “to exempt employees on their home-to-work journey from any tax on that benefit”, see the Hansard record for 6 July at Col 869. In Mr Allen’s submission, this showed that “the motivation behind the legislation [was to] provide individuals with a tax benefit”.

35. When Finance Bill 2002, clause 33, which amended ICTA s 197AB, was debated in Parliament on 16 May 2002, the Financial Secretary to the Treasury, Mr Boateng, said (cols 119-121):

“the measure will allow employers to subsidise local bus services that are used by their employees to get to work, knowing that they can enjoy free or reduced-price travel, tax-free. As several hon. Members will know, it is a continuation of a process that began last year of encouraging a form of behavioural change. The hon. Member for Cities of London and Westminster made a specific point about bus services provided by employers. We are going further this year to encourage people to adopt what I believe Members of all parties agree is a desirable behaviour change, which will promote sound environmental objectives...

The tax exemption is limited to local stopping bus services. We believe that that is the most cost-effective way to benefit the majority of bus commuters, and there will be knock-on benefits to local residents who use the same routes. They are likely to be better served by more regular buses and, possibly, extra stops. The right hon. Member for Fylde, one of my predecessors as Financial Secretary, gave an example from his constituency of someone who started their journey on a tram and ended it on a bus. It is perfectly true that, unlike subsidy of buses, subsidy of

5 trams will not attract the relief under the provision. Indeed, the provision is further limited in that the bus must provide a local bus service as defined by the Transport Act 1985. It must be available to the general public at separate fares. In the right hon. Gentleman's example, it would have to stop at least every 15 miles, so one could not get off a tram and get on a bus that went for 20 miles. That would be outside the definition...

10 The extended tax exemption is another modest, but important, step in our fight against congestion and traffic pollution. It will encourage employees to leave their cars at home. It will encourage employers to take advantage of the opportunity provided to make a real contribution not only to the environment, but the welfare of their employees and the immediate local community.”

15 36. Mr Allen drew the Tribunal’s attention to Mr Boateng’s reiteration of the fact that the exemption was designed as a “green” measure, to encourage employees to use public buses. He said that HMRC’s restrictive interpretation of the section would make it impossibly difficult for employees to benefit from the exemption.

Ms Choudhury’s submissions on behalf of HMRC

20 37. Ms Choudhury said that s 243 should be seen in the context of s 242, which provides that employees are not taxable on the benefit of being able to use a “works bus”. Sections 242 and 243 were introduced at the same time, by FA 1999, s 48. Ms Choudhury said that they both “envisage the employer taking some responsibility, financial or otherwise, for running the service. Merely buying a bus pass is not sufficient.”

25 38. In relation to the purpose of the provision, she submitted that reliance could be placed on the Explanatory Notes to FA 1999: in *R (Westminster CC) v National Asylum Support Service* [2002] 1 WLR 2956 Lord Steyn said at [5]:

30 “In so far as the explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction...The object is to see what is the intention expressed by the words enacted.”

39. Ms Choudhury relied on the first paragraph of the Notes to the relevant clause, which said (emphasis added):

35 “This clause exempts, from 6 April 1999, the benefit to an employee of a free or low cost works bus service provided by the employer, or of a *subsidy paid by the employer* to a local public bus service, to bring employees to and from work.”

40. Ms Choudhury also relied on the following paragraph:

40 “where an employer lays on a works bus, or provides a subsidy to a local bus service - for example to enable the service to continue or to make a stop near the employers workplace – in order to bring the

employees to and from work, a tax charge can arise on the employees who use the travel facility...”

41. She said that this supported HMRC’s case that the financial support had to be “substantial” and not merely the purchase of a bus pass. She accepted that not all employers would be able to provide substantial support, so small employers would not be within the scope of the provision.

42. She shared Mr Allen’s view that Hansard could be considered, and relied on Mr Boateng’s statement that other bus users “are likely to be better served by more regular buses and, possibly, extra stops”. She also said that, had Parliament intended to provide a subsidy for bus tickets and passes, it would have done so explicitly.

The structure of the legislation

43. I asked the parties to consider how the exemption provided by s 243 fitted within the structure of ITEPA. Having taken instructions, Ms Choudhury said that:

(1) The term “employment income” is defined as including “any amount treated as earnings under the benefits code”, see s 7(3) and (5).

(2) The term “earnings” is defined by s 62 to include “any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money’s worth” and “money’s worth” includes “something of direct monetary value to the employee”.

(3) Part 3 of ITEPA is headed “Employment income: earnings and benefits etc treated as earnings” and Chapter 10 of that Part states that it applies to “employment-related benefits”. These are benefits provided for an employee or a member of his family, by reason of his employment, see s 201.

(4) Section 203 provides that it is the “cash equivalent” of an employment-related benefit which is treated as earnings; this is normally the cost of the benefit (less any part made good by the employee). Section 204 sets out the basic rule used to establish the cost of the benefit, namely “the expense incurred in or in connection with provision of the benefit”.

(5) Part 4 of ITEPA then sets out “employment income exemptions” which prevent liability to tax arising in respect of employment income. Both s 242, works buses, and s 243, support for public bus services, come within Part 4.

44. Mr Allen did not dissent from this analysis, and I agree it is correct.

The main issue: discussion and decision

The meaning of the word “support”

45. The parties disagreed on the meaning of the word “support” in ITEPA s 243. As stated above, Mr Allen’s view was that it has a wide meaning, so that a person who uses a neighbourhood shop rather than a supermarket can be said to be “supporting” local business. Similarly, he said, buying bus passes provides “support” to the local bus service. Ms Choudhury argued for a narrower meaning, saying that

the employer must “take some responsibility, financial or otherwise, for running the service” and that the support must be “substantial”.

46. The Oxford English Dictionary gives the primary meaning of “support” as “the action or result of supporting”, and states that this is “the action or an act of helping a person or thing to hold firm or not to give way; provision of assistance or backing”. In some contexts it means “the provision or availability of services that enable something to fulfil its function or help to keep it operational”. The word’s secondary meaning is “bearing or defraying a charge or expense”.

47. When the word is considered in isolation, Mr Allen is therefore right: buying a bus pass does “support” the local bus service. But both parties accepted that more was required. As Lord Bingham said in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]:

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulties.”

48. Mr Allen said that if a word was ambiguous, recourse could be had to Hansard. Ms Choudhury also sought to rely on statements of the relevant Minister, Mr Boateng, in the course of parliamentary debate.

49. There are, however, a number of approaches to statutory interpretation which must be used before recourse can be had to Hansard, which can only be referred to if “legislation is ambiguous or obscure, or leads to an absurdity”. The first of these approaches is to consider the disputed word in its statutory context.

The statutory context

50. The statutory context of s 243 can only be understood by considering how it fits within the structure of ITEPA. As the analysis set out at §43 makes clear, absent an exemption or other relieving provision, an employee is taxable on the cash equivalent value of a benefit or facility provided by reason of his employment, and the cash equivalent is the cost to the employer of providing the benefit.

51. Absent the exemption in s 243, an employer who supported a public bus service may have provided his employees with a “benefit or facility” by reason of their employment. For example, if an employer paid for an extra bus to run from the city centre to a workplace so to arrive at 8.30 am, and another to make the return journey at 5.15pm, employees would be taxable on the cost to the employer of providing or supporting those extra bus services.

52. Exactly how that cost would be apportioned between employees (so as to produce a figure for their P11Ds) would not be straightforward. It would become even more difficult where the support was given by providing bus stops, bus shelters or bus lanes.

53. The purpose of s 243 is to remove both that tax charge and, with it, the very difficult task of trying to work out each employee's benefit in kind.

54. ITEPA Part 3 Chapter 4 sets out the non-cash voucher legislation. A non-cash voucher includes a "transport voucher", defined at s 84(3) as "a ticket, pass or other document or token intended to enable a person to obtain passenger transport services". If an employer provides an employee with a bus pass, the cash equivalent of the cost of provision is normally a benefit in kind.

55. However, s 266(2) provides:

10 "No liability to income tax arises by virtue of Chapter 4 of Part 3 (taxable benefits: vouchers and credit-tokens) in respect of a non-cash voucher if the voucher evidences the employee's entitlement to use anything the direct provision of which would fall within

(a) section 242 (works transport services),

(b) section 243 (support for public bus services),..."

15 56. Thus, an employer who provided support for a local public bus service within the meaning of s 243, can also provide his employees with a free bus pass to use the service he has supported.

57. In my judgment the natural reading of ss 243 and 266, taken together, is that

20 (1) to satisfy the exemption at s 243 the employer has to provide some support for the local bus service other than buying bus passes, because

(2) it is *a consequence of that support* that his employees are not taxable on the benefit of a free or discounted bus pass.

25 58. In other words, the tax-free nature of the bus pass follows from and is the result of some support given by the employer to the bus company; it cannot itself constitute that support.

30 59. If, as the Appellants argued, the mere purchase of a bus pass were sufficient to constitute "support", all employer-provided bus passes would be tax-free as long as they were for local services. Had Parliament intended that outcome, it would have been a simple matter to have amended the voucher rules. Instead, those provisions remain in place generally, with an exception being made only where an employer had provided "support" for the bus service.

Decision on the main issue

35 60. It follows that the purchase of a bus pass by an employer is not "support" within the meaning of s 243. Something more is required. I return briefly to the question of the "something more" at §80.

Whether the pre-enacting history should have been considered

61. As clear from the previous paragraphs, in my judgment it is not necessary to consider the pre-enacting history of ITEPA s 243, because the statute itself makes the

position clear. In taking that approach I rely on the House of Lords' decision in *Farrell v Alexander* [1976] 2 All ER 721, where Lord Wilberforce (with whom Lord Simon of Glaisdale and Lord Edmund-Davies concurred) said at p 725-6:

5 "I...endorse the principle that it is quite wrong that, in every case
where a consolidation Act is under consideration, one should
automatically look back through the history of its various provisions,
and the cases decided on them, and minutely trace the language from
Act to Act... In recent times, because modern statutes have become so
10 complicated, the courts, myself included, (cf *Inland Revenue Comrs v Joiner*),
rather too easily accept this process, whether under persuasion
of counsel or from their own scholarly inclinations. But, unless the
process of consolidation, which involves much labour and careful
work, is to become nothing but a work of mechanical conveniences, I
15 think that this tendency should be firmly resisted; that self-contained
statutes, whether consolidating previous law, or so doing with
amendments, should be interpreted, if reasonably possible, without
recourse to antecedents, and that the recourse should only be had when
there is a real and substantial difficulty or ambiguity which classical
methods of construction cannot resolve."

20 62. The long title of ITEPA states that it is "an Act to restate, with minor changes,
certain enactments relating to income tax on employment income, pension income
and social security income; and for connected purposes". Although not a "pure"
consolidation Act, it is nevertheless within Lord Wilberforce's description of a "self-
25 contained" statute with amendments. The Tribunal can therefore only consider ICTA
s 197AB if there is a "a real and substantial difficulty or ambiguity" which cannot be
resolved by the normal process of statutory interpretation. As I have already stated,
in my judgment there is no difficulty or ambiguity here.

30 63. However, this was not the view of either party. Ms Choudhury sought to rely
on the Explanatory Notes to Finance Bill 1999; Mr Allen submitted that recourse
could be had to the Hansard debate on the 1999 and 2002 Finance Bills and Ms
Choudhury also referred to the latter. Because of the way the parties put their case,
and because this appeal may go further, I considered whether the outcome would be
different, had I taken any of the pre-enacting history into account.

The earlier statutory provisions

35 64. When ICTA s 197AB was originally introduced in 1999, subsection 3(a)
provided that "the terms on which the service is available to the employees...must not
be more favourable than those available to other passengers." In other words, as
originally enacted the section did not allow the employer to provide free bus travel, so
Parliament clearly did not intend that providing a free bus pass would constitute
40 "support for a public transport road service".

65. When FA 2002, s 33 amended ICTA s 197AB, the requirement that the
employees should pay the same price as other passengers when travelling on local bus
journeys was removed, opening the door to free bus travel. In order to ensure that this
relaxation did not trigger a tax charge under the voucher provisions, FA 2002, s 33(5)
45 provided:

“if under this section there is no charge to tax under section 154 [because of the exemption in s 197AB]...there is no charge to tax under s 141 (non-cash vouchers) in respect of a voucher evidencing the employee’s entitlement to use the service.”

5 66. The section therefore introduced an exemption for employer-provided bus
passes, which applied only where the employer had also provided support for the
public bus service so as to trigger the exemption at s 197AB. It was therefore
consequential upon providing “support for a public transport road service”, just as the
current bus pass exemption in ITEPA s 266(2) is consequential upon the same
10 condition in s 243 having been satisfied.

The Explanatory Notes to FA 1999

67. The Explanatory Notes to FA 1999 say:

15 “where an employer lays on a works bus, or provides a subsidy to a
local bus service...a tax charge can arise on the employees who use the
travel facility. Each employee is taxable on a proportion of the cost to
the employer of providing the service or the subsidy.”

68. The Notes are therefore consistent with my analysis of the purpose of new
section 197AB, namely to remove from the employees the administratively onerous
and probably disproportionate tax charge which would otherwise apply where an
20 employer provides support for a public bus service.

The heading to FA 2002, s 33

69. Headings and side-notes in statutes are admissible aids to construction, see *R v*
Montila [2004] UKHL 50 at [33]-[36]. FA 2002, s 33 is headed “employer-
subsidised public transport bus services”. The purchase of bus pass cannot reasonably
25 be regarded as a “subsidy” to the bus company, so this heading also supports the
conclusion I have drawn from the current legislation.

Hansard

70. It is clear to me that there is no basis for relaxing the exclusionary rule so as to
allow consideration of Hansard. But were that permissible, the cited extracts do not in
30 any way change my decision.

71. Mr Allen relied on Miss Hewett’s statement, in 1999, that “the main thrust of
the exemption” was to “exempt employees on their home to work journey from any
tax on that benefit”. However, Miss Hewett was referring to the benefit in kind which
would otherwise arise as a result of the support being provided by the employer for
35 the bus service; she cannot have been not referring to free bus travel, because, as
already noted, FA 99 s 48 specified that employees using the supported bus service
must pay the same price as other travellers.

72. In 2002 Mr Boateng said, with reference to the changes to the legislation:

40 “the measure will allow employers to subsidise local bus services that
are used by their employees to get to work, knowing that they can
enjoy free or reduced-price travel, tax-free.”

73. Again, there is a clear distinction between the subsidy on the one hand, and allowing employees to travel on those subsidised buses without further payment on the other.

The Council's other payments to NCT

5 74. In 2012-13 the Council paid NCT paid £6,267,000 to cover the cost of concessionary fares for the elderly, disabled and others and a further £1,452,890 for “tendered contracts”, see §21.

75. Mr Allen submitted that these payments constituted “support” within the meaning of s 243. Ms Choudhury countered by stating that this argument had not
10 been made in his skeleton argument or the grounds of appeal and in any event there was no, or insufficient, evidence of the nature of the payments.

76. I agree that this submission was made late, and with little supporting evidence. However, in the light of my conclusion on the bus pass, I thought it right to consider whether the other payments might satisfy the exemption.

15 77. Concessionary fares are given by NCT to all those who satisfy certain criteria, such as age or disability. Although funding is provided by the Council, and some of the Council's 13,000 employees benefit from these fares, the provision is not “by reason of the employment” but because of age, disability etc.

78. No benefit in kind would therefore be chargeable on employees who received
20 concessionary fares. As a result, there is nothing to exempt under s 243, so the section is not engaged. Section 266 is similarly not in point. It follows that the Council's payment of £6,267,000 does not change the answer in this appeal.

79. I have been given no information about the payment for “tendered contracts” and so am unable to consider this at all.

25 Substantial support?

80. I have found that the purchase of a bus ticket or pass by the employer does not
30 constitute “support” within the meaning of s 243. The more difficult question is how much support is required to satisfy the section. Ms Choudhury argued that that the support had to be “substantial” in that the employer must “take some responsibility, financial or otherwise, for running the service”.

81. There is, however, no such requirement in the legislation. By way of contrast, the exemption for employer-provided childcare, at ITEPA s 318, is only satisfied if the employer provides the premises or is “wholly or partly responsible for financing and managing the provision of the care”.

35 82. It will be for another Tribunal, with different facts, to decide how much support must be given to a bus company in order for employees to benefit from the ITEPA s 266 tax exemption for bus tickets or passes.

Specific journeys or zonal tickets?

83. Both parties made extensive submissions on whether or not a zonal bus pass was within the exemption. Although, for the reasons already set out, I have found that Mr Straw's bus pass was not exempt, I here summarise the parties' submissions and my analysis.

84. HMRC published a series of Frequently Asked Questions ("FAQs") on "Employer-Supported Local Bus Services". FAQ 9 reads:

"What do you mean by supported service?"

The support has to apply to a specific service which stops at or near workplace. An employer can, of course, support more than one service, but the same condition must apply. Support cannot be given for regional or zonal journeys."

85. Ms Choudhury said that HMRC's position was as set out in the FAQs, so that the exemption only applies where it is for a particular route. A zonal bus pass did not satisfy the statutory requirements. Her skeleton argument said:

"The focus of the support must be on the service for the route or routes used by a particular employee on his or her commute to and from work. The aim is to make an employee less likely to drive to work because of the support provided by the employer to his route to work. The purchase of a bus pass for use generally on the operator's network therefore falls outside section 243 because there is no support for that particular route."

86. Mr Allen argued that there is no such restriction in the legislation.

87. I agree with HMRC that the bus passes are only within s 266 if:

- (1) the employer has provided support for buses which follow routes used by employees for qualifying journeys; and
- (2) the bus pass gives the employees free or discounted travel on those buses.

88. However, that is not the whole answer. Mr Allen submitted, and Ms Choudhury did not dispute, that ticketing in the UK is now on a zonal basis, not a route basis. If zonal tickets are outside the exemption, no employee will be able to benefit from s 266, even though the employer provided funding within the meaning of s 243.

89. One of the principles of statutory construction is that "the statute is always speaking". This was explained by Lord Bingham in *Quintavalle* at [9] as follows:

"There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs it could not properly be interpreted to apply to cats: but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of "cruel and unusual punishments" has not changed over the years since 1689, but many punishments not then

thought to fall within that category would now be held to do so. The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language...”

5 90. In *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 the Court considered whether same sex partners could be members of one another's “family” for the purpose of succession to tenancies. Lord Slynn explained at p 35:

10 “It is not an answer to the problem to assume ... that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been ‘No’. That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word ‘family’.

15 An alternative question is whether the word ‘family’ in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920...”

91. The key question in *Fitzpatrick* was whether an updated meaning was consistent with the statutory purpose, which in that case was providing a secure home for those who share their lives together.

20 92. Here, the statutory purpose is that employees should not be taxed on the benefit that would otherwise arise from bus passes used to travel to and from work, provided the employer has provided funding to support that bus route. It would frustrate the statutory purpose if no employee could ever qualify for the s 266 exemption because bus passes are no longer issued for single routes.

25 93. Moreover, s 266(5) applies to a bus pass which “evidences the employee’s entitlement” to use the service. A zonal bus pass does, of course, evidence the employee’s entitlement to travel on that particular route to and from work, although it also allows him to make other journeys within the same zone.

30 94. Taking into account both the principle that the “statute is always speaking” and the statutory requirement that the bus pass “evidence[s] the employee’s entitlement” to use the service, I find that a zonal bus pass, which includes the service for which support is given under s 243, does satisfy the exemption in s 266.

HMRC’s other submissions on zonal passes

35 95. In coming to that conclusion I have also considered the other submissions made by Ms Choudhury on zonal bus passes. In particular, she sought to rely on Sch 6 to the Transport Act, which she said “suggests that a local service means a single route as it provides that such a service is improved if there is an increase in the length of its route”.

96. I do not accept that, for the following reasons:

40 (1) Section 243 refers only to the Transport Act definition of local bus service there is no general importation of other terms from that Act;

(2) Sch 6 is headed “transitional provisions and savings”. It therefore had the narrow purpose of transitioning between the earlier Acts, including the Public Passenger Vehicles Act 1981, and the Transport Act;

5 (3) paragraph 6(3), on which she seeks to rely, refers to conditions which must be met before a local service is improved, but those conditions are expressly stated to apply “For the purposes of paragraph 8 below”; they have no more general application; and

10 (4) paragraph 8 is headed “Variation and cancellation of registrations during transitional period” and the “transitional period” is defined as ending on 25th October 1986.

97. When interpreting “public transport road service” in s 243(5), Ms Choudhury also sought to rely on a definition of “public passenger transport services” set out in Transport Act s 63(10)(a). To see why this cannot be right, it is worth restating s 243(5), which reads:

15 “In this section
‘local bus service’ means a local service (as defined in section 2 of the Transport Act 1985 (c 67)), and
‘public transport road service’ means a public passenger transport service provided by means of a road vehicle.”

20 98. Parliament has expressly cross-referred to the Transport Act when defining “local bus service” but has not done so when defining “public transport road service”. That cannot be accidental. There is no basis seeking a definition of “public transport road service” in the Transport Act.

99. Ms Choudhury also said that HMRC stood by FAQ 13, which says:

25 **“Why don’t you allow zonal or regional ticketing?”**
That would go beyond support for a particular service and would really be support for ordinary commuting, which is not the Government's intention.”

30 100. However, s 243 *only* has application where the journeys are either between one workplace and another or “between the employees’ home and his workplace”. The latter is “ordinary commuting”, both as a matter of ordinary usage and as defined at ITEPA s 338(3).

35 101. I also considered one further point, not relied on by HMRC. This is that the definition of “local service” from Transport Act s 2, imported into s 243 by subsection 5, says that it means (emphasis added) “a service, using one or more public service vehicles, for the carriage of passengers by road *at separate fares*” other than certain exceptions, none of which are relevant here.

40 102. In the absence of authority, it would be possible to read “at separate fares” as meaning a fare for each journey, so that a zonal bus pass would fall outside the exemption. However, in *Albert v Motor Insurers’ Bureau* [1971] 2 All ER 1345 the

House of Lords considered the identical phrase used in the Transport Act definition of a taxi, and found that it meant a payment *by each passenger*, not *for each journey*. That judgment cites earlier case law relating to both taxis and buses, which consistently makes the same point.

5 *Conclusion*

103. Had the Council given support to NCT to fund the public bus system used by its employees, a zonal bus pass given free to employees would not have been subject to income tax. However, on the facts of this case, there is no evidence of any such support: neither the purchase of Mr Straw's bus pass, nor the other payments, come within s 243.

Decision and appeal rights

104. For the reasons set out in the main body of this decision, I find that the bus pass is not within the exemption at ITEPA s 266 and so is taxable on Mr Straw as a benefit in kind.

15 105. The Council has been assessed to Class 1A NICs under Social Security (Contributions and Benefits) Act 1992, s 10A(1) on the basis that (a) the provision of the bus pass for Mr Straw is "general earnings" within the meaning of ITEPA, but (b) is left out of account when calculating the Class 1 NICs because it is a benefit in kind, see Social Security (Contributions) Regulations, Sch 3, para 1. Since the provision of
20 the bus pass was taxable on Mr Straw, it follows that the Council is subject to Class 1A NICs on its provision.

106. The appeals of both Appellants are therefore dismissed.

107. 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
25 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.

30

**ANNE REDSTON
TRIBUNAL JUDGE**

35

RELEASE DATE: 29 JULY 2016

APPENDIX

Finance Act 1999

48. (1) In Chapter IV of Part V of the Taxes Act 1988 (provisions relating to the Schedule E charge: exemptions and deductions), after section 197A insert—

5 197AA. (1) There is no charge to tax under section 154 (taxable benefits: general charging provision) in respect of the provision for employees of a works bus service...

 (6) if under this section there is no charge to tax under section 154...there is no charge to tax under s 141 (non-cash vouchers) in respect of a voucher evidencing the
10 employee's entitlement to use the service...

197AB. (1) There is no charge to tax under section 154 (taxable benefits: general charging provision) in respect of financial or other support for a public transport road service used by employees of one or more employers for qualifying journeys.

15 (2) For this purpose—

 'public transport road service' means a public passenger transport service provided by means of a road vehicle; and

 'qualifying journey', in relation to an employee, means a journey—

 (a) between his home and workplace, or

20 (b) between one workplace and another, in connection with the performance of the duties of the employment.

 (3) The exemption conferred by this section is subject to the following conditions—

 (a) the terms on which the service is available to the employees referred to in subsection (1) above must not be more favourable than those available to
25 other passengers;

 (b) the service must be available generally to employees of the employer (or each employer) concerned...

Finance Act 2002

30 **33. Employer-subsidised public transport bus services**

(1) In Part 5 of the Taxes Act 1988 (provisions relating to the Schedule E charge), section 197AB (exclusion of tax charge in respect of support for certain transport services) is amended as follows.

35 (2) In subsection 2 (main definitions), in the definition of "qualifying journey" after "means" insert "the whole or part of".

(3) For subsection (3) (conditions of exemption) substitute –

 “(3) Except in the case of a local bus service, the exemption conferred by this section is subject to the condition that the terms on which the service is available to the employees mentioned in subsection (1) must not be more favourable than those
40 available to other passengers.

(3A) The exemption conferred by this section is in every case subject to the condition that the service must be available generally to employees of the employer (or each employer) concerned.

(4) In subsection 4 (minor definitions) at the appropriate place insert –

“local bus service” means a local service as defined by section 2 of the Transport Act 1985;”.

(5) After that subsection insert –

5 (5) if under this section there is no charge to tax under section 154...there is no charge to tax under s 141 (non-cash vouchers) in respect of a voucher evidencing the employee’s entitlement to use the service.”....

Income Tax (Earnings and Pensions Act) 2003

Part 2: Employment income: charge to tax

Chapter 1: Introduction

10 **3 Structure of employment income Parts**

(1) The structure of the employment income Parts is as follows–

this Part imposes the charge to tax on employment income, and sets out--

- (a) how the amount charged to tax for a tax year is to be calculated, and
- (b) who is liable for the tax charged;

15 Part 3 sets out what are earnings and provides for amounts to be treated as earnings;

Part 4 deals with exemptions from the charge to tax under this Part (and, in some cases, from other charges to tax);...

(2) In this Act "the employment income Parts" means this Part and Parts 3 to 7A

4-6 ...

20 **7 Meaning of "employment income", "general earnings" and "specific employment income"**

(1) This section gives the meaning for the purposes of the Tax Acts of "employment income", "general earnings" and "specific employment income".

(2) "Employment income" means

- 25 (a) earnings within Chapter 1 of Part 3,
- (b) any amount treated as earnings (see subsection (5)), or
- (c) any amount which counts as employment income (see subsection (6)).

(3) "General earnings" means

- (a) earnings within Chapter 1 of Part 3, or
- 30 (b) any amount treated as earnings (see subsection (5)),

excluding in each case any exempt income.

(4) ...

(5) Subsection (2)(b) or (3)(b) refers to any amount treated as earnings under

- (a) ...
- 35 (b) Chapters 2 to 11 of Part 3 (the benefits code),

(6) ...

Part 3: Employment income: earnings and benefits etc treated as earnings

Chapter 1: Earnings

62 Earnings

- (1) This section explains what is meant by "earnings" in the employment income Parts.
- 5 (2) In those Parts "earnings", in relation to an employment, means--
- (a) any salary, wages or fee,
 - (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
 - (c) anything else that constitutes an emolument of the employment.
- 10 (3) For the purposes of subsection (2) "money's worth" means something that is--
- (a) of direct monetary value to the employee, or
 - (b) capable of being converted into money or something of direct monetary value to the employee.

Chapter 3: Taxable benefits: vouchers and credit-tokens

15 **84 Meaning of "non-cash voucher"**

- (1) In this Chapter "non-cash voucher" means...
- (b) a transport voucher, or...
- (3) In this Chapter "transport voucher" means a ticket, pass or other document or token intended to enable a person to obtain passenger transport services (whether or not in exchange for it).
- 20 ...

87 Benefit of non-cash voucher treated as earnings

- 25 (1) The cash equivalent of the benefit of a non-cash voucher to which this Chapter applies is to be treated as earnings from the employment for the tax year in which the voucher is received by the employee.
- (2) The cash equivalent is the difference between
- (a) the cost of provision, and
 - 30 (b) any part of that cost made good by the employee to the person incurring it.
- (3) In this Chapter the "cost of provision" means, in relation to a non-cash voucher, the expense incurred in or in connection with the provision of
- (a) the voucher, and
 - (b) the money, goods or services for which it is capable of being exchanged,
- 35 by the person at whose cost they are provided....
- (4) In the case of a transport voucher, the reference in subsection (3)(b) to the services for which the voucher is capable of being exchanged is to the passenger transport services which may be obtained by using it.

40

Chapter 10: Taxable benefits: residual liability to charge

201 Employment-related benefits

(1) This Chapter applies to employment-related benefits.

(2) In this Chapter

5 "benefit" means a benefit or facility of any kind;

"employment-related benefit" means a benefit, other than an excluded benefit, which is provided in a tax year

(a) for an employee, or

(b) for a member of an employee's family or household,

10 by reason of the employment.

For the definition of "excluded benefit" see section 202.

202 ...

203 Cash equivalent of benefit treated as earnings

15 (1) The cash equivalent of an employment-related benefit is to be treated as earnings from the employment for the tax year in which it is provided.

(2) The cash equivalent of an employment-related benefit is the cost of the benefit less any part of that cost made good by the employee to the persons providing the benefit.

(3) The cost of an employment-related benefit is determined in accordance with section 204 unless

20 (a) section 205 provides that the cost is to be determined in accordance with that section, or

(b) section 206 provides that the cost is to be determined in accordance with that section.

204 Cost of the benefit: basic rule

25 The cost of an employment-related benefit is the expense incurred in or in connection with provision of the benefit (including a proper proportion of any expense relating partly to provision of the benefit and partly to other matters).

Part 4: Employment income: exemptions

Chapter 1: Exemptions: general

227 Scope of Part 4

(1) This Part contains

(a) earnings-only exemptions, and

35 (b) employment income exemptions.

(2) ...

(3) In this Act "employment income exemption" means an exemption from income tax which prevents liability to tax arising in respect of employment income of any kind at all.

Chapter 3: Exemptions: other transport, travel and subsistence

...

242 Works transport services

5 (1) No liability to income tax arises in respect of the provision for employees of a works transport service if

(a) the service is available generally to employees of the employer (or each employer) concerned,

(b) the main use of the service is for qualifying journeys by those employees, and

(c) the service

10 (i) is used only by the employees for whom it is provided or their children, or

(ii) is substantially used only by those employees or children.

(2) In this section

"children" includes stepchildren and illegitimate children but does not include children aged 18 or over, and

15 "works transport service" means a service which is provided by means of a bus or a minibus for conveying employees of one or more employers on qualifying journeys.

(3) For the purposes of this section

(a) "bus" means a road passenger vehicle which has a seating capacity of 12 or more, and

20 (b) "minibus" means a vehicle constructed or adapted for the carriage of passengers which has a seating capacity of 9, 10 or 11.

(4)-(6)...

243 Support for public bus services

25 (1) No liability to income tax arises in respect of the provision of financial or other support for a public transport road service if

(a) in the case of a local bus service, conditions A and B are met, or

(b) in any other case, conditions A to C are met.

(2) Condition A is that the service is used by employees of one or more employers for qualifying journeys.

30 (3) Condition B is that the service is available generally to employees of the employer (or each employer) concerned.

(4) Condition C is that the terms on which the service is available to the employees of the employer (or each employer) concerned are not more favourable than those available to other passengers.

35 (5) In this section

"local bus service" means a local service (as defined in section 2 of the Transport Act 1985 (c 67)), and

"public transport road service" means a public passenger transport service provided by means of a road vehicle.

249 Interpretation of this Chapter

In this Chapter...

"qualifying journey", in relation to an employee, means the whole or part of a journey

- 5 (a) between the employee's home and workplace,
 (b) between one workplace and another,

in connection with the performance of the duties of the employment.

Chapter 6: Exemptions: non-cash vouchers and credit-tokens

...

10 **266 Exemption of non-cash vouchers for exempt benefits**

(1) ...

- (2) No liability to income tax arises by virtue of Chapter 4 of Part 3 (taxable benefits: vouchers and credit-tokens) in respect of a non-cash voucher if the voucher evidences the
15 employee's entitlement to use anything the direct provision of which would fall within

- (a) section 242 (works transport services),
(b) section 243 (support for public bus services),...

Transport Act 1985

2 Local services

- 20 (1) In this Act "local service" means a service, using one or more public service vehicles, for the carriage of passengers by road at separate fares other than one--

- (a) which is excluded by subsection (4) below; or
(b) in relation to which (except in an emergency) one or both of the conditions mentioned in subsection (2) below are met with respect to every passenger using the
25 service.

(2) The conditions are that--

- (a) the place where he is set down is fifteen miles or more, measured in a straight line, from the place where he was taken up;
(b) some point on the route between those places is fifteen miles or more, measured in
30 a straight line, from either of those places.

(3) Where a service consists of one or more parts with respect to which one or both of the conditions are met, and one or more parts with respect to which neither of them is met, each of those parts shall be treated as a separate service for the purposes of subsection (1) above.

(4) A service shall not be regarded for the purposes of this Act as a local service if--

- 35 (a) the conditions set out in Part III of Schedule 1 to the 1981 Act (trips organised privately by persons acting independently of vehicle operators, etc.) are met in respect of each journey made by the vehicles used in providing the service; or
(b) every vehicle used in providing the service is so used under a permit granted under section 19 of this Act.

- 40 (5) Subsections (5)(b), (c) and (6) of section 1 of the 1981 Act (meaning of "fares") shall apply for the purposes of this section.

63. Functions of local councils with respect to passenger transport in areas other than integrated transport areas and passenger transport areas

(1)-(9) ...

(10) In this Act—

- 5 (a) "public passenger transport services" means all those services on which members of the public rely for getting from place to place, when not relying on private facilities of their own, including school transport but not—
- 10 (i) services provided under permits under section 19 of this Act, other than services provided wholly or mainly to meet the needs of members of the public who are elderly or disabled; or
- (ii) excursions or tours; and...

Schedule 6: Transitional Provisions and Savings
Road service licensing during transitional period

- 15 **1** (1) In this paragraph " the transitional period " means the period beginning with the day on which this paragraph is brought into force and ending with 25th October 1986.
- (2) During the transitional period, Part III of the 1981 Act shall apply in relation to services which do not involve the use of any place in London as a stopping place with the modifications set out in paragraphs 2 to 5 below...

Registration of local services outside London

- 20 **6** (1) In paragraphs 7 to 12 below—
- "local service" means a local service which is not a London local service...
- "the transitional period" has the same meaning as in paragraph 1 of this Schedule....
- (2) ...
- 25 (3) For the purposes of paragraph 8 below, a local service is improved if, but only if, there is any increase in—
- (a) the frequency of the service;
- (b) the length of its route;
- (c) the number of stopping places for the service; or
- 30 (d) the number of passengers which can be carried by the service taken as a whole.

7 ...

Variation and cancellation of registrations during transitional period

- 35 **8** (1) Where the prescribed particulars of a local service have been registered with a traffic commissioner under paragraph 7 above and an application is made to him for the variation or cancellation of the registration, he shall vary or (as the case may be) cancel the registration if he is satisfied that the application falls within one of the Cases mentioned in sub-paragraph (2) below.

40

Social Security (Contributions and Benefits) Act 1992

10A. Class 1A contributions: benefits in kind etc

(1) Where

- 5 (a) for any tax year an earner is chargeable to income tax under ITEPA 2003 on an amount of general earnings received by him from any employment ("the relevant employment"),
- (b) the relevant employment is both
- (i) employed earner's employment, and
- 10 (ii) an employment...within the meaning of the benefits code (see Chapter 2 of Part 3 of ITEPA 2003),
- (c) the whole or a part of the general earnings falls, for the purposes of Class 1 contributions, to be left out of account in the computation of the earnings paid to or for the benefit of the earner,
- 15 a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of the general earnings as falls to be so left out of account.

Social Security (Contributions) Regulations 2001

Schedule 3: Payments to be disregarded in the calculation of earnings for the purposes of earnings-related contributions

20

- 1.** (1) This Schedule contains provisions about payments which are to be disregarded in the calculation of earnings for the purposes of earnings-related contributions.
- (2) Part II contains provisions about the treatment of payments in kind.

Part II: Payments in kind

25

Certain payments in kind to be disregarded

- 1.** A payment in kind, or by way of the provision of services, board and lodging or other facilities is to be disregarded in the calculation of earnings.