[2013] UKUT 0278 (TCC)
Appeal number: FTC/54/2012

NATIONAL INSURANCE CONTRIBUTIONS – Income Tax (Earnings and Pensions) Act 2003, s 114 – whether car purchased outright by employee who then sold interest in it to employer was during the co-ownership period "made available" to the employee – held yes – Vasili applied – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

GR SOLUTIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE NICHOLAS ALEKSANDER

Sitting in public at 45 Bedford Square, London WC1 on 9 May 2013

Mark Ablitt and Marios Lourides, Sears Morgan, Chartered Certified Accountants, for the Appellant

James Rivett, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The Appellant, GR Solutions Limited, appeals against the decision of the First-tier Tribunal ("FTT") (Judge Staker and Mrs Bridge) released on 2 April 2012, dismissing an appeal by the Appellant against a notice of decision issued by the Respondents, HMRC, on 15 September 2010 (as varied by a decision dated 18 November 2010), under s 8 of the Social Security Contributions (Transfer of Functions etc.) Act 1999 that the Appellant company is liable to pay Class 1A national insurance contributions in respect of a car benefit made available to its director and employee Mr Ray Hall.

2. In essence, this appeal is solely concerned with whether, in circumstances applicable in this case, where an employee purchases a car and then sells an interest in it to his employer but continues to have private use of the car following that transfer, that car is "made available" to the employee within s 114 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). If it is, then Class 1A national insurance contributions are due on the car benefit and the car fuel benefit, the cash equivalent of which is determined under ITEPA.

The facts

3. For the purposes of this appeal, that general description of the circumstances is all that is required. We can however shortly state the material facts of the Appellant's case; these have never been in dispute.

4. Mr Hall is a director and employee, and shareholder, of the Appellant company. On 17 April 2004 he purchased a BMW X5 motor vehicle with an invoice cost of £53,645. At some time during the company's accounting year ended 31 December 2004, Mr Hall sold a 90% share of the car to the Appellant for £48,636. To use a neutral expression, the car continued to be used by Mr Hall for business and private use. Mr Hall did not keep records of his business and private mileage. He made a 10% contribution towards the running costs of the car and paid to the Appellant 10% of the total fuel costs of the car.

5. No car or fuel benefit charge was reported to HMRC by the Appellant for the period 5 April 2003 to 5 April 2009. By the 15 September 2010 decision (as varied by the 19 November 2010 decision) the Respondents determined that the Appellant was liable to pay Class 1A national insurance contributions in respect of the car benefit and car fuel benefit in the sum of £19,726.42.

6. As the matter was not in issue, the FTT made no finding whether or not there was any tax avoidance purpose in the arrangements. In the course of argument before us it was said on behalf of the Appellant, in the context of an argument distinguishing this case from earlier judicial decisions to which we shall come, that there was no tax avoidance purpose. No such purpose was alleged by HMRC in this case, and we accept that there was none.

The law

7. In its decision the FTT set out the relevant provisions of the legislation applicable to the national insurance contributions. As there is no dispute on those provisions, we need not repeat them here. It is common ground that if the conditions in s 114 ITEPA are satisfied in this case, then the national insurance contributions consequences will follow.

8. Section 114(1) and (2) provides relevantly:

> (1) This Chapter applies to a car or a van in relation to a particular tax year if in that year the car or van—
>
> (*a*) is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household,
>
> (*b*) is so made available by reason of the employment (see section 117), and
>
> (*c*) is available for the employee's or member's private use (see section 118).
>
> (2) Where this Chapter applies to a car or van—
>
> (*a*) sections 120 to 148 provide for the cash equivalent of the benefit of the car to be treated as earnings,
>
> (*b*) sections 149 to 153 provide for the cash equivalent of the benefit of any fuel provided for the car to be treated as earnings,
>
> (*c*) sections 154 to 159 provide for the cash equivalent of the benefit of the van to be treated as earnings; and
>
> (*d*) sections 160 to 164 provide for the cash equivalent of the benefit of any fuel provided for the van to be treated as earnings in certain circumstances.

9. As indicated by s 114(2), s 120 ITEPA provides for the cash equivalent of the benefit of the car to be treated as earnings. Likewise, under s 149, if fuel is provided by reason of an employee's employment and that person is chargeable to tax in respect of the car by virtue of s 120, the cash equivalent of the benefit of the fuel is treated as earnings from the employment.

10. Although not referred to by the FTT, we should also mention that the cash equivalent of the car is calculated in accordance with the method of calculation set out in s 121 ITEPA. That method allows a deduction in respect of capital contributions made by the employee to the costs of the car or accessories in accordance with s 132, which provides:

> (1) This section applies if the employee contributes a capital sum to expenditure on the provision of—
>
> (*a*) the car, or
>
> (*b*) any qualifying accessory which is taken into account in calculating the cash equivalent of the benefit of the car.

(2) A deduction is to be made from the amount carried forward from step 2 of section 121(1)—

(*a*) for the tax year in which the contribution is made, and

(*b*) for all subsequent years in which the employee is chargeable to tax in respect of the car by virtue of section 120.

(3) The amount of the deduction allowed in any tax year is the lesser of—

(*a*) the total of the capital sums contributed by the employee in that year and any earlier years to expenditure on the provision of—

(i) the car, or

(ii) any qualifying accessory which is taken into account in calculating the cash equivalent of the benefit of the car for the tax year in question, and

(*b*) £5,000.

11. The dispute in this case centres upon the condition in s 114(1)(a). There is no dispute on condition (c), as a matter of fact. Condition (b) is also accepted as satisfied, as s 117 treats a car as made available "by reason of employment" if it is made available by an employer to an employee (or a member of the employee's family or household) unless certain conditions are satisfied. As one of those conditions is that the employer is an individual (and not, as here, a company), the exception does not apply, and the only question is whether the car was made available by the Appellant to the employee, Mr Hall.

The FTT decision

12. The FTT dismissed the Appellant's appeal. It rejected the Appellant's arguments that as joint owner Mr Hall enjoyed the most extensive possessory right in property law, that his use of the car was accordingly by virtue of his joint interest in the car and that an asset already available for use by a person by virtue of that person's ownership rights cannot be deemed to have been made available to that person by another person who only subsequently acquired a partial ownership right when there had been no discontinuance of ownership by the former person. Those essentially are the arguments pursued before us.

13. In making this submission before the FTT, the Appellant sought to distinguish this case from that of *Christenson v Vasili* [2004] STC 935, in the High Court. In *Vasili*, the facts were different, in that there it was the employer who had made the initial purchase of the car and the employee had subsequently acquired a 5% share. In that case the High Court, overturning the decision of the special commissioner, had decided that the car benefit provisions applied where an employee acquired a share in a car that was supplied to him for private use by his employer and that the fact that an interest in the car was conferred on the employee sufficient to give him an independent right to possess and use the car did not mean that the car could not be "made available" for his use.

14. The FTT held that *Vasili* could not be distinguished on this basis. It noted also that income tax is an annual charge and that it was necessary to consider for s 114 purposes whether a car had been made available in a particular tax year. On that basis the FTT found that the expression "made available" should be applied to the point in time at which the vehicle is used, rather than the point in time at which a partial property title is transferred from the employer to the employee or vice versa. It was irrelevant, in the FTT's view, how the circumstances of joint ownership came to be established at some point in the past.

Discussion

15. The Appellant's arguments that failed to find favour with the FTT have essentially been repeated before us. The Appellant submits that because Mr Hall was a co-owner his use of the car was by virtue of the rights he enjoyed as co-owner, and that consequently the car could not have been made available to him. It was argued that in order for something to be made available it must be something that is provided to which the recipient does not have an existing right.

16. Arguments of this nature had succeeded before the special commissioner in *Vasili*, but were rejected by Pumfrey J on appeal to the High Court. As Mr Rivett reminded us, the Upper Tribunal is not bound by a decision of the High Court in the way that the First-tier Tribunal is. Nevertheless, it should, subject to one qualification, depart from such a decision only in circumstances where another High Court judge would properly be able to do so, namely if it considered that the judgment of the High Court was plainly wrong or if it considered itself bound by earlier authority (see *Revenue and Customs Commissioners v Abdul Noor* [2013] UKUT 71 (TCC) at [49]). The qualification, expressed in *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [41], is that where specialised issues arise before the Upper Tribunal, it may in a proper case feel less inhibited in revisiting issues decided, even at High Court level, if there is good reason to do so.

17. We turn therefore to the High Court decision in *Vasili*. But to put it in context we must first consider the special commissioner's decision in that case. Before the special commissioner the arguments of the parties were concentrated on the effect of the words which now appear, in parenthesis, in s 114(1)(a), "without any transfer of the property in it", it being argued for Mr Vasili that a partial transfer would exclude the operation of what was then s 157 of the Income and Corporation Taxes Act 1970 ("ICTA").

18. The special commissioner, however, approached the issue at a more fundamental level. He reasoned that s 157 (now s 114 ITEPA) did not apply because it could not be said, in a joint ownership case, that a car had been made available by the employer to the employee. He based this conclusion both on the co-extensive rights to use of the car enjoyed by the employer and employee as joint owners, and also on the absence, as he found it, of any provision (such as that in s 168D ICTA, now found in s 132 ITEPA) which would restrict the cash equivalent to the proportion of the price of the car owned by the employer. Instead, the special commissioner found that the benefit fell within the general benefit in kind provisions of s 154 ICTA.

If the employer has agreed that, notwithstanding its 95% ownership of the car, it will allow its employee 100% of the use of the car (without payment for that use by the employee), then, found the special commissioner, the employer is making available to him a benefit which is the use of its 95% interest in the car.

19. That analysis was not accepted by Pumfrey J in the High Court. He regarded it as inconsistent, one the one hand to say that the car had not been made available to Mr Vasili, and on the other to hold that Mr Vasili had been permitted a benefit in the form of the use of the employer's 95% interest in the car. The approach taken by the special commissioner was therefore rejected, and the question resolved itself around the construction of s 157 ICTA (now s 114 ITEPA).

20. Pumfrey J held (at [12]) that the words "made available (without any transfer of the property in it)" are not to be construed in a manner which has the result that the conferring of any interest upon the employee sufficient to give the employee an independent right to possess and use the asset is sufficient to prevent the car from being "made available". He dealt shortly with the argument on the meaning of the words "without any transfer of the property in it". He found that these were not apt to cover the conferring of a part interest only on the employer, so that s 157 would not be excluded by such a partial transfer. But his primary reason was that applying the ordinary meaning of "made available", the question "who made the car available to Mr Vasili?" had to be answered in the sense that his employer did so, and had not been paid for it (see *Vasili*, at [13]).

21. In reaching this conclusion it is clear that the judge was focussed on the position when the joint ownership structure was in place, and not, as the Appellant in this case submitted, the transfer of the 5% interest in the car to Mr Vasili. Mr Vasili had paid for his acquisition of that interest; the judge was looking at the use by Mr Vasili of the car after the joint ownership had been put in place, for which use Mr Vasili had not made any payment to the employer.

22. In this case the Appellant relies on the rights attaching to joint ownership as precluding the car being made available by the employer. Those rights were considered by Pumfrey J in *Vasili* (at [7]) where, citing *Bull v Bull* [1955] 1 QB 234 (a real property case), he stated that it is correct that no equitable or legal tenant in common can exclude any other from possession of the chattel of which they are tenants in common.

23. Mr Rivett referred us in this connection to the fourth edition (re-issue) of *Halsbury*, at para 1217, where the unity of possession applicable to the joint ownership of chattels is described as the right of each owner to possession of the whole contemporaneously with the others. One of two owners cannot ordinarily maintain an action against the other for the common chattel while it is in the other's possession. On the other hand, the right to possession may by agreement be exclusively in one of several co-owners (see *Nyberg v Handelaar* [1892] 2 QB 202, CA).

24. *Vasili* has been followed in two subsequent decisions of the First-tier Tribunal. The first, *Samson Publishing Ltd and others v Revenue and Customs Commissioners* [2010] UKFTT 489 (TC), concerned a case where, although the evidence was not clear, it was accepted by the tribunal that the cars were not owned by the employer prior to the time when the employees obtained their interests. It can be regarded therefore as a case where the interests were acquired at the same time, which is different from the factual position in *Vasili*, and different from the facts of this case.

25. The First-tier Tribunal in *Samsom* followed *Vasili*. The judge took the view that the judgment of Pumfrey J was apposite to situations that went beyond the specific facts in *Vasili* itself, and could apply to those in *Samson*. The features of *Samson* that made it different from *Vasili* were not sufficient to distinguish it.

26. We should at this point deal with the submission on behalf of the Appellant that *Vasili* and *Samson* ought to be distinguished from this case on the footing that in both of those cases the motive for entering into the joint ownership arrangements was one of tax avoidance. So much was admitted in *Vasili*, and in *Samson* the tribunal did not accept that the purpose of co-ownership was not to avoid tax. We do not accept the Appellant's submission. The fact that the arrangements in *Vasili* were entered into to avoid tax did not form any part of the basis for the conclusions reached by Pumfrey J; a tax avoidance purpose is irrelevant to the proper construction of s 114 ITEPA.

27. The second case in which *Vasili* has been followed by the First-tier Tribunal is *Whitby and Ball v Revenue and Customs Commissioners* [2009] UKFTT 311 (TC). In that case the arrangements for the use of the cars involved a lease from the employer to the employees for which lease rentals were paid by the employees. The tribunal held that the conclusions reached in *Vasili* in the context of co-ownership were equally applicable to that of a lessor/lessee arrangement, and in consequence concluded that the cars had been made available to the employee within the meaning of s 114 ITEPA.

28. The decision in *Whitby and Ball* has, however, been criticised in the more recent First-tier Tribunal decision in *Apollo Fuels Ltd and others v Revenue and Customs Commissioners* (TC/2010/6146; released 12 December 2012), where similar leasing arrangements were entered into. The tribunal in *Apollo Fuels* decided that the leases created proprietary rights and that there was a transfer of the property in the cars, thus negating the application of s 114(1)(a). The decision was thus not based on whether the car was made available to the employee, but whether there had been a transfer of the property in it. *Vasili* was distinguished on that basis, and also on the basis that whereas in *Vasili* there had been no payment for the use of the car, in *Apollo Fuels* there had been such a payment.

29. We understand that HMRC have been given permission to appeal *Apollo Fuels* to this Tribunal. We need say nothing more about it. We do not consider that either of *Apollo Fuels* or *Whitby and Ball* is material to our decision in this case.

30. In our judgment, consistently with what was found by Pumfrey J in *Vasili*, the term "made available" in s 114 ITEPA must be given its ordinary meaning. It is

correct that, in legal terms, co-ownership gives rise to a concurrent right of possession for each co-owner, but an entitlement to possession is always subject, in practical terms, to availability for use. Availability is different from entitlement. For a co-owner to use the car, he must first be entitled to use it, and secondly it must as a practical matter have been made available for his use. Furthermore, physical use is different from the co-extensive right to possession. Although a co-owner may at all times enjoy such a right as a consequence of being a co-owner, he will not have the use of the chattel at a time when it is being exclusively used by another co-owner. The question of availability for use must be considered in the light of the circumstances that exist in practice.

31. Whether a car is made available to an employee does not in our view depend on the existence of any agreement for the use of the car. But where a chattel is co-owned, its physical use (as opposed to the legal right to possession of it) is subject to an agreement or understanding between the co-owners, which may be express or tacit. A mere omission by an employer who is a co-owner of a car with an employee to assert its own rights of possession, including a right to use the car, is in our view sufficient, in the context of s 114 ITEPA, to constitute such a tacit agreement or understanding as to amount to the making available of the car to the employee.

32. We do not accept that *Vasili* can be distinguished on the basis that in this case Mr Hall purchased the car outright and only subsequently transferred an interest to the Appellant. It is clear that Pumfrey J was focussing on the position after establishment of the co-ownership when finding that the employer in *Vasili* had made the car available to the employee, and that it was not the initial transfer of the interest in the car that was material for that purpose. Furthermore, we do not find anything of assistance in the Appellant's argument that in this case there was no occasion when the car was "within the car benefit regime", in the sense of having been wholly-owned at the outset by the employer, as was the case in *Vasili*. The conclusion in *Vasili* was not based on any such concept, and there is nothing in the legislation that suggests that such a concept even exists. The sole question is whether, in the given circumstances, the car has been made available for the use of the employee and is so available for the employee's private use.

33. It is in our view, agreeing with the FTT in this respect, immaterial how the co-ownership was brought about. Section 114 ITEPA applies to the state of co-ownership, howsoever it came to be established. It does not matter therefore whether the employer makes the initial outright purchase and transfers a fractional interest to the employee (*Vasili*), the employer and employee purchase jointly (*Samson*) or, as in this case, the employee makes the initial purchase and transfers a partial share to the employer. Construing s 114 in accordance with its ordinary meaning, in each case, on each occasion the employee uses the car during the currency of the joint ownership, the employer makes the car available to the employee.

34. We agree with the FTT when it accepted HMRC's argument that, as income tax is an annual tax, and s 114 operates expressly by reference to particular tax years, the question whether the car is made available to the employee must be considered in the circumstances applicable in the tax year in question. We further agree that the

expression "made available" should be applied to the point in time at which the vehicle is used, rather than at the point in time at which it is purchased, or the point in time at which a partial property title is transferred from the employer to the employee or from the employee to the employer.

35. It follows that we conclude that when Mr Hall had use of the car during the period of co-ownership, the car was made available to him by the Appellant. Consequently, the conditions of s 114 ITEPA are satisfied.

36. No argument was addressed to us, or as far as we can ascertain the FTT, on s 132 ITEPA. That is the provision that enables capital contributions made by an employee towards expenditure on the provision of a relevant car to be taken into account as a deduction in the calculation of the cash equivalent of the benefit under s 121. We mention the point because it was regarded by Pumfrey J as crucial to the construction of s 157 ICTA (and thus to s 114 ITEPA) that proper allowance could be made for the extent of the purchase price paid by Mr Vasili so as to reduce the cash equivalent under s 157. That, said the judge, depended crucially on the effect of s 168D ICTA (now s 132 ITEPA) (*Vasili*, at [13]).

37. Pumfrey J accepted in this respect that s 168D applied even where some part interest had been acquired by the employee. We respectfully agree. We consider further that such a provision is equally apt to apply in a case such as the present. There is in our view, having regard to the arrangements as a whole, nothing to prevent the net capital expenditure incurred by an employee, who buys a car outright and sells an interest in it to his employer, being regarded for the purposes of s 132 as a contribution of a capital sum to the expenditure on the provision of a car, so as to result in a deduction, capped in accordance with s 132(3), in the calculation under s 121 of the cash equivalent of the benefit of the car for the relevant tax year.

Decision

38. For the reasons we have given, we dismiss this appeal.

ROGER BERNER
NICHOLAS ALEKSANDER
UPPER TRIBUNAL JUDGES

RELEASE DATE: 01 JULY 2013