IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CCS/1655/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (31st March 2015, file reference *SC 900/14/00044*) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 and the decision is **RE-MADE** as follows:

(a) the Secretary of State's decision of 16th March 2011 is set aside;

(b) for the purposes of Mr M's Child Support Act 1991 maintenance calculation, his net income is to be calculated on the basis that his annual earnings are £11,113. The effective date for that calculation is 20th January 2011;

(c) the Secretary of State must carry out a maintenance calculation in accordance with (b) within 28 days of the day on which this decision is issued.

Background

1. I shall set out only some much of the background to this case as is relevant to the issues I have to decide.

2. Mr M appealed to the First-tier Tribunal (FtT) against the Secretary of State's determination of his liability to pay Ms C child maintenance. Mr M is the non-resident parent within the meaning of the Child Support Act 1991. The dispute concerned the amount of Mr M's earnings. None of the parties dispute that the calculation of Mr M's earnings was governed by the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 ("1992 Regulations") or that he was, for the purposes of the Regulations, an "employed earner".

3. The FtT appears of its own motion to have addressed whether a 'company car' used by Mr M generated earnings for the purposes of the 1992 Regulations. The FtT noted Mr M's tax return for the relevant year included an entry in respect of "company cars and vans – the 'total cash equivalent' amount" of £10,928, and another for "fuel for company cars and vans" of £4,418. I also note the FtT's record of proceedings shows it heard evidence that the car was bought in 2010 and Mr M had a "benefit by way of a car".

4. In the light of the Secretary of State's stance on this appeal, I observe that the evidence before the FtT did not indicate that Mr M was paid a car allowance. The evidence implies that Mr M's employer simply made a car available to him. Moreover, had Mr M simply been paid a car allowance he should not have faced a tax charge for a benefit in kind. Section 114 of the Income Tax (Earnings and Pensions) Act 2003, which identifies when a the provision of a car

is a taxable benefit in kind, refers to a car that is "made available (without any transfer of the property in it) to an employee…by reason of the employment…and is available for the employee's…private use".

5. The FtT's reasons for ascribing earnings to Mr M's use of the car were as follows:

> "5…[the tax return] shows that he received as an employed person a salary of £6,695. It also shows…that there were benefits and expenses received in relation to his car of £15,346…
>
> 6…that Tax Return…does reflect what the weekly earnings were of the appellant at that time, and reflected the benefit that he was receiving from the company car and fuel. Mr [M] confirmed in evidence that the car had been purchased in July 2010, which is then the time that the Tribunal was considering. The Tribunal concluded, therefore, it was entitled to rely on that evidence."

6. The FtT included that sum of £15,346 in Mr M's earnings. The FtT also accepted Mr M's argument that "repayments…from his Directors Loan Account are not taxable income and should not be included in the assessment from the effective date of 20/01/2011". That finding has not been challenged.

7. Mr M applied to the FtT for permission to appeal to the Upper Tribunal. His solicitor, Stephen Lawson of FDR Law LLP, argued the FtT erred in law by including the whole of the "benefits and expenses" in respect of the car in Mr M's earnings. He did not dispute the inclusion of £4,418 in "fuel charges" but argued there was no lawful basis for including the balance - £10,928 – which, as I understand it, was the notional income attributable to the company car for income tax purposes. Mr M's argument was that his earnings for the purposes of the 1992 Regulations were £11,113.

8. The FtT granted Mr M permission to appeal to the Upper Tribunal and, in doing so, made these observations:

> "…this is a 1992 "old Scheme case". This case can be distinguished from other existing case law as the car benefit is entirely taxable and could be treated as a benefit in kind. However it is arguable that the principles in *R (CS) 4/08* could apply. If so then there is a realistic prospect that the decision was wrong in law. Further the calculation of income under the new Regulations and new scheme could be illustrative…"

The legal context

Legislative framework

9. Schedule 1.1(1) to the 1992 Regulations enacts the general rule that, in the case of employment as an employed earner, an individual's earnings are "any remuneration or profit derived from that employment". That general rule is modified by the subsequent provisions of Schedule 1.1(2) & (3).

10. Schedule 1.1(1) also identifies certain matters that must be included within "earnings". These include "any payments made by the parent's employer in respect of any expenses not wholly, exclusively and necessarily incurred in the performance of the employment, including any payment made by the parent's employer in respect of (i) travelling expenses incurred by that parent between his home and place of employment …" (sub-paragraph (d)).

11. Schedule 1.1(2) declares that earnings shall not include certain matters, including:

(a) "any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment…" (sub-paragraph (a));

(b) "any advance of earnings or any loan made by an employer to an employee" (sub-paragraph (d));

(c) "any payment in kind".

Case law authorities

12. Mr M's solicitor relied on *R (CS) 6/05*, a case about whether "taking a company car" was capable of amounting to a diversion of income so that a departure direction might be made. There is no issue as to departure directions in the present appeal. However Child Support Commissioner (now Upper Tribunal Judge) Jacobs held in paragraph 34 that "the benefit of a company car is a benefit in kind, which is not taken into account as income in the formula assessment". On the facts of that case, Commissioner Jacobs went on to find:

> "34…What the absent parent has done is to take a benefit in a form that is outside the formula assessment instead of in a form that is within the formula assessment. I consider that that amounts to diverting income to another purpose for the purposes of regulation 24(b) [of the Child Support Departure Direction and Consequential Amendments Regulations 1996]."

13. The Secretary of State refers me to the following case law.

14. *CCS/318/98* was an unreported decision of Commissioner Williams. It was decided under the 1992 Regulations and concerned a parent supplied with a company car by her employer. The Commissioner noted that the term "payments in kind" (excluded from income by Schedule 1.1(2) to the 1992 Regulations) is not defined in the 1992 Regulations but he took it to mean "a payment that is made to the recipient otherwise than in money".

15. The Commissioner held that, if the company car represented a payment in kind, it was excluded from the parent's earnings by Schedule 1.1(2) to the 1992 Regulations. But the Commissioner added that "moreover, in so far as the car and fuel were made available for [parent] to perform her employment, then the provision of the car and fuel were not payments at all, but merely the provision of equipment and materials with which to perform the work: *Owen v Pook* [1969] 2 All ER 1". I observe that those comments were unnecessary since the Commissioner had already found that the company car did not result in any earnings for the purposes of the 1992 Regulations.

16. *CCS/3866/07* is another unreported decision decided, in fact, under the Child Support (Maintenance Calculations and Special Cases) Regulations 2000. Paragraph 4.2(d) of the Schedule to those Regulations excludes from a parent's earnings "any payment in kind". The Upper Tribunal Judge found "the provision of a car and fuel by the non-resident parent's employer fell to be excluded…by virtue of paragraph 4.2(d)".

17. *R(CS) 4/08* was decided under the 1992 Regulations. It concerned payment to a parent of a car allowance used partly to offset his costs of leasing a car. The case did not involve an employer making a car available for use by an employee. It was not a 'company car' case. The issue was the application of the earnings disregard for payments "in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment" (Schedule 1.2(a) to the 1992 Regulations). Upper Tribunal Judge Bano held that the First-tier Tribunal had erred in law by "failing to apportion the non-resident parent's car expenses between business and personal use in order to decide whether the car allowance paid by the employers fell within paragraph 1(2)(a) of Schedule 1."

The arguments

18. Mr M's solicitor argues the case law authorities are clear. Making a company car available to an employee does not involve any earnings for the purposes of the 1992 Regulations.

19. The Secretary of State argues that *R(CS) 4/08* applies. Findings therefore need to be made about the use of Mr M's car for business and personal purposes so that the taxable benefit ascribed to the car (£10,928) can be split into earnings and non-earnings. It is clear that the Secretary of State assumes Mr M was paid a car allowance. His written submission to the Upper Tribunal assert the FtT erred in law because it "failed to make any findings as to whether the car allowance was an expense that was wholly, exclusively and necessarily incurred in the performance of the absent parent's employment".

20. Ms C has declined to put forward any argument on this appeal. In response to the Upper Tribunal's direction to supply a written submission, Ms C simply responded "CSA have taken Mr [M] to court, not me".

21. None of the parties request a hearing of this appeal.

Conclusion

22. I reject the Secretary of State's argument. It involves a misreading of *R(CS) 4/08*. It is clear that, on the facts of the present case, Mr M's employer simply made a company car available to him. No party has directed me to any evidence that Mr M received payments akin to a car allowance and I cannot identify any (see paragraphs 3 to 5 above). Accordingly, there is no justification for remitting this case to the FtT for it to carry out an analysis of Mr M's car usage as set out in *R(CS) 4/08*.

23. I agree with Mr M that the FtT erred in law by taking into account as earnings the taxable benefit ascribed to his company car. As the case law authorities show, the provision by an employer of a company car for the use of an employee is not a payment in kind. It generates no earnings for the purposes of the 1992 Regulations. Accordingly, any notional valuation of the benefit derived from a company car for income tax purposes must be left out of account in fixing Mr M's earnings for the purposes of the 1992 Regulations. That explains the decision given at the start of these reasons.

24. The FtT, in granting permission to appeal, suggested the new maintenance calculation scheme might influence the outcome in the present case. The new scheme is contained in the Child Support Maintenance Calculation Regulations 2012. Those Regulations cannot alter the meaning of the 1992 Regulations. While both Regulations have the same parent Act, they are nevertheless self-contained statutory schemes to be interpreted on their own terms.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
6th January 2016