[2016] UKFTT 0618 (TC)

# TC05354

**Appeal number: TC/2014/04743**

***INCOME TAX – discovery assessments – whether condition in s 29(4) or (5) TMA met – yes – whether claim for set off of tax credit made – no - whether cars were pool cars s 167 ITEPA – yes - whether effect of pool car treatment could give rise to discharge or repayment of tax – yes.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MICHAEL DUGAN** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**
**ANN CHRISTIAN**

**Sitting in public at City Exchange, Leeds on 3 August 2016**

**Mr M Dugan in person**

**Mr A Burke, Presenting Officer, for the Respondents**

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DECISION

1. This was, apparently at least, the hearing of appeals by Mr Michael Dugan ("the appellant") against:

(1) The amendment of his tax return ("ITR") for the tax year 2011-12 made by a closure notice under s 28A Taxes Management Act 1970 ("TMA"),

(2) An assessment on him under s 29 TMA for the tax year 2010-11,

(3) An assessment on him under s 29 TMA for the tax year 2009-10.

2. Would that it were so simple. It became clear to the Tribunal on reading the papers sent out beforehand that there was a lot more to the case than met the eye. It is necessary to set out some of the background to the notification of the appeals to the Tribunal. The following section of this decision is taken from the papers and is not in dispute, and to the extent appropriate and necessary we find what we say as fact.

## Background

3. The appellant was the Managing Director of, and 50% shareholder in, a company Duplas Ltd.

4. Duplas Ltd went into liquidation on 13 July 2013. [This is relevant to one of the arguments made by the respondents: see §23].

5. The appellant delivered his 2009-10 and 2010-11 ITRs to HMRC on 21 June 2011. No enquiry into them was made by any officer of the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

6. On 31 January 2013 the appellant delivered his 2011-12 ITR to HMRC. From the pages exhibited by HMRC the appellant showed the following amounts of income:

| | |
|---|---|
| £4,800 | Pay from Duplas Ltd |
| £5,288 | Benefits from company cars and vans |
| £4,324 | Fuel for company cars |
| £3,531 | Benefits from private medical and dental insurance |
| £1,648 | PAYE tax "taken off" pay. |
| £445.60 | Total tax etc due |

["Taken off" is we assume a synonym for "deducted", the term that millions of employees have been used to using for decades about items that reduce their pay packets. It is not a term that the Tax Law Rewrite caused to be used in the Income Tax (Earnings and Pensions) Act 2003 nor is it used in the Income Tax (Pay As You Earn) Regulations 2003. It seems to us to be very confusing for such a vague term to

be used in official documents, especially when, in the HMRC Tax Calculation associated with the return, the figure of £1,648 appears as "Tax deducted".]

7. On 23 January 2014 (eight days before the deadline) Mr Alex Dickson, an officer of HMRC, opened an enquiry under s 9A TMA into the 2011-12 TR.

8. The appellant spoke to Mr Dickson by phone on 30 January 2014.

9. On 3 February 2014 Mr Dickson wrote to the appellant saying that the appellant had, in the phone call, admitted that £30,000 of the £60,000 dividends shown in the accounts of Duplas Ltd for the year to 31 March 2012 had been omitted from his tax return. He enclosed a calculation of "Potential Lost Revenue" (PLR) of £1,980.22.

10. In the same letter Mr Dickson told the appellant that in view of the omission in the 2011-12 ITR he had reason to believe that the previous two years' ITRs were also incorrect. In view of the fact that the enquiry deadline for those years had passed, Mr Dickson proposed to deal with the matter by raising assessments under s 29 TMA. To that end he enclosed two more calculations of PLR showing £1,106.32 and £2,199.37.

11. The same letter also said that the submission of an incorrect ITR leading to an under-assessment of tax is "deemed by [HMRC] to be careless …". He added that because the ITRs were inaccurate the appellant "may be liable to a penalty under Schedule 24 FA 2007". Later in the letter Mr Dickson said that "[n]ot every inaccuracy will incur a penalty. No penalty will be due if a person takes reasonable care …" The appellant was given a Factsheet CCFS7a and was informed about his rights under Article ("Art") 6 of the European Convention on Human Rights about the effect of that Article, which he was asked to confirm in writing that he had read and understood. He was asked questions to establish why and how the inaccuracy happened and he was asked for a Certificate of Full Disclosure.

12. On 20 February 2014 the appellant replied. He said he omitted the dividends because "I was advised by our accountant at the time that as a standard rate taxpayer there would be no tax liability unlike share dividends received as a result of an investment."

13. In this letter the appellant also informed Mr Dickson that:

> "In 2008 the company began to run a new contract rental car, which was reallocated every two years until the demise of Duplas Ltd in June 2013.
>
> These cars were used exclusively as pool cars in accordance with HMRC guidelines and were mistakenly assigned to me as a benefit.
>
> To provide some background to the above I live 1.2 miles from the factory and either walk or cycle to work. Any private mileage was either in my wife's car (declared as a benefit) or my privately owned Renault Espace.
>
> In view of the above I enclose amended P11Ds to cover the relevant years."

14. These forms, covering 2008-09 to 2011-12, showed no benefits from cars or fuel, only for private medical insurance.

15. Correspondence ensued on the topic of the car benefit, in the course of which the appellant provided details of the vehicles, their use by each relevant employee and copies of the insurance policies for the cars, and details of breakdown calls to the AA made by him (with a view to demonstrating that on the many occasions when the AA were called out to attend to Mr Dugan he was driving his Renault Espace).

16. On 17 June 2014 HMRC issued Notices of Assessment under s 29 TMA showing tax charged on £1,106.32 for 2010-11 and £2,031.75 for 2009-10.

17. The correspondence culminated in a letter from Mr Dickson of 19 June 2014 which was his closure notice in relation to the enquiry into the 2011-12 ITR. The letter stated that because the appellant had omitted dividends Mr Dickson had amended the appellant's ITR accordingly, which now showed that an additional amount of £1,980.82 tax was payable.

18. On 15 July 2014 the appellant sent to HMRC what he called a formal appeal against the decision set out in the letter of 19 June 2014. While he freely admitted the omission of dividends, he argued that he was not liable to any charge on car and fuel benefits with the result, he thought, that HMRC owed him money.

19. Mr Dickson replied on 25 July 2014 noting the appeal and holding over, as requested, the disputed tax relating to the three years. We think that the appellant intended to appeal against the two s 29 assessments even though they were not mentioned in the letter of 19 June, as he asked for postponement of all three amounts, and Mr Dickson seems to have assumed that the appellant was appealing against all three amounts.

20. Mr Dickson's letter included, he said, his "view of the matter", in which he reiterated the points he had already made about the car benefits. He mentioned that his letter of 1 April 2014 and 25 May 2014 had said that "the car and fuel benefits designated to you could not be rescinded".

21. The letter also told the appellant that he could request a review or notify his appeals to the Tribunal.

22. On 22 August 2014 the appellant sent a Notice of Appeal Form, and the relevant decisions by HMRC to the Tribunal. His grounds of appeal were as in his letter of 15 July 2014. The Tribunal informed the appellant on 3 September 2014 that the case was allotted as a Standard Case and that HMRC had 60 days to produce a Statement of Case.

23. On 23 October 2014 Mr Burke of HMRC Local Compliance Appeals and Reviews Section wrote to the Tribunal giving details of the enquiry and arguing that the appellant could not appeal against the assessments and amendment as they were specifically raised or amended to collect the tax on the undeclared dividends, and that the only recourse for the appellant was to make an "application" under Schedule 1AB

TMA which carried time limits of which the appellant had been made aware. HMRC also stated that the P11Ds submitted by Mr Dugan "could not be accepted" as they were submitted on behalf of Duplas Ltd, the employer, which was in liquidation, and so the appellant as a director did not have any power to send them in unless sanctioned by the liquidator (he cited s 103 Insolvency Act 1986).

24. The corresponding letter to the appellant of the same date referred to Schedule 1AB and informed him that he was already out of time for "2008" and "2009". He was also out of time at that date for "2010" but his letter of 20 February 2014 would be accepted as a claim "but not in the correct form". He was told of the correct form and that claims in that correct form should be sent to Mr Dickson as soon as possible (this statement was emboldened).

25. The Tribunal wrote to Mr Burke on 31 October 2014 asking him to clarify HMRC's position. Was he asking for a strike out of the appeals? Mr Burke responded to the Tribunal on 5 November 2014 apologising for sending an incomplete letter and confirming that he was asking for a strike out. The Tribunal informed the appellant of this and asked if he opposed it. He did, and sent further documents to Mr Burke, including an authorisation from the liquidator of Duplas Ltd, and three sworn and witnessed affidavits of employees of Duplas Ltd about the use of the cars.

26. The strike out application was listed to be heard on 25 September 2015 in Leeds.

27. On 14 January 2016 the Tribunal informed HMRC and the appellant that the appellant had withdrawn his appeal. It turned out that this was incorrect. The Judge's record of the hearing of 25 September had in fact stated that the application was withdrawn before the hearing. By this she meant that HMRC had withdrawn their strike out application. It appears the Judge's hearing record had not reached the Tribunal offices in Birmingham.

28. HMRC was then asked to produce a Statement of Case ("SOC") which it did on 16 March 2016. This SOC makes no mention of why HMRC withdrew the strike out application. Instead it concentrates on the car and fuel benefit issue, but adds that:

> "At the hearing of the FTT on 25 September 2015 HMRC's 'strike out' application was withdrawn and Mr Dugan was invited to make claims under Schedule 1AB TMA 1970.
>
> There has been no further correspondence or evidence provided. The case is continuing on the basis that the submission of correspondence and the 'revised' P11Ds' are late appeals which have been accepted by both HMRC and The Tribunal."

## Issues

29. It seems that there are three issues arising in this case.

30. The first is whether the s 29 assessments are justified and whether those assessments and the s 28A amendment are in the correct figures (ignoring the pool car issue).

31. The second is whether the "pool car" rules apply to the use of car leased by Duplas Ltd.

32. The third is whether the Tribunal has jurisdiction to hear and decide an appeal based on that issue.

## Discussion – the assessments and amendment

33. Taking the s 29 assessments first, these have been raised in a case where the appellant was required to make a tax return for the years concerned. It follows from s 29(3) that the s 29 assessments are only valid if they meet either (or both) of the conditions in s 29(4) and (5).

34. In *Michael Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC) ("*Brimheath*") it was held that what the Upper Tribunal there called the "competence" issue, that is whether the conditions required by s 29 TMA had been met, was one on which HMRC had to lead their evidence and seek to discharge the burden of proof irrespective of whether the issue had been raised by the appellant. The Upper Tribunal said at [43]:

> "In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of Mr Burgess or Brimheath to raise those issues. As Henderson J said in *Household Estate Agents*, in the absence of relevant evidence there is nothing to displace the general rule that discovery assessments (and we would add assessments outside the normal four-year time limit) may not be made."

35. The Upper Tribunal went on to say at [44]:

> "However, it was not open to [*HMRC*] to seek to discharge the burden that lay upon them of proving those cases by purporting to limit the issues before the FTT to the substantive issues. Nor can HMRC's assertion that there had been no appeal made by the appellants on the competence and time limit issues serve to shift the onus of making a positive case onto Mr Burgess or Brimheath. Any concession or waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent upon the appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove."

36. In this case there is also a time limit issue. A s 29 assessment for 2009-10 was out of time for assessing in July 2014. Thus HMRC must show that the assessment for that tax year was made for the purpose of recovering a loss of tax brought about by the appellant carelessly or deliberately (s 36(1) and (1A) TMA). But we are we think

bound to hold that the burden of proof remains on HMRC for both s 29 assessments even where the time limit is not an issue.

37. We note here that HMRC did raise the question of a possible penalty with the appellant, and did issue various factsheets etc (see §11). This was however the last mention by HMRC of penalties as well as the first, and no action was taken to make a penalty assessment or even to inform the appellant that penalties would not be raised.

38. HMRC argued that by omitting the dividends Mr Dugan had been careless in completing his returns, so that s 29(4) TMA applied to allow them to be raised, and that, in relation to 2009-10, raising them after the expiry of the time limit of four years from the end of the relevant tax year given by s 34 TMA was permitted by s 36(1).

39. When considering whether Mr Dugan had been careless, we considered his evidence which was that in about 2008 he was advised to switch from a salary to receiving dividends, primarily to save National Insurance Contributions liabilities; that he had been told by the company's accountant that there was no liability on dividends unless the basic rate limit was exceeded and that he did not think that his accountant knew of the level of benefits he was taking, as Mr Dugan's wife prepared the P11Ds and each did their own tax return.

40. But, crucially to our minds, he agreed that he had given no thought as to whether the dividends should have been returned or whether there was in fact a liability to tax on the dividends. On this basis we therefore decided that HMRC had met the burden on them to show that the discovery assessments were validly made because the appellant's admitted careless conduct had given rise to a tax loss.

41. We next considered the amounts of the assessments (without, it may be said, the benefit of having HMRC's calculations before us, an omission which does not reflect well on HMRC's case preparation). The assessments charged to income tax dividends of £30,500 and £30,000 respectively, together with tax credits of £3,388 and £3,333. A proportion of the dividends plus associated tax credits for that proportion was charged at 32.5%, the upper dividend rate applying in those tax years. Set against the whole of the amount of the tax on dividends at both the 10% ordinary dividend rate and the 32.5% rate were the tax credits of 10% of £3,388 and £3,333.

42. We asked HMRC why they had given a set-off for the tax credits, and in particular where they found the appellant's claim for the set-off of the credits (as required by s 397(2)(a) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

43. HMRC said that the assessments had simply been made on a particular amount of dividends and that HMRC's computer had shown the credit as a set-off.

44. We then considered the amendment to the self-assessment for 2011-12. We asked HMRC if this amendment was also made for the purpose of recovering a loss of tax brought about by the appellant carelessly (the significance of which we deal with later). HMRC's response was that it was, and we accept that as correct.

45. The same question about tax credits arose in this tax year, with the same answer from HMRC.

46. In view of our doubts about the tax credit issue, we asked HMRC if they would accept a claim by the appellant for tax credits. They said they would and the appellant duly made such a claim (under Schedule 1A TMA) and it was accepted by Mr Burke for HMRC without enquiry (very properly in the circumstances waiving any requirement for the claim to be in writing). It follows that by paragraph 4 Schedule 1A TMA HMRC must give effect to the claim in the assessments and amendment, something which they have in fact already done.

## Discussion – pool car issue

47. We had oral evidence from Mr Dugan together with the documents he had supplied to HMRC which we admitted. These were the insurance terms of the vehicles, affidavits from three employees of Duplas who had used the cars and a schedule of breakdown call outs made by the RAC in response to calls from Mr Dugan.

48. Mr Dugan's evidence was that in 2008 the company had been offered very favourable terms for a rental agreement on an Audi A6, and they had accepted it. The agreement was renewed every two years, and the Audi had been replaced by a Peugeot and then a Vauxhall.

49. The P11Ds had been completed by his wife. She had said to him that HMRC would never wear a pool car claim for such a car, and so the benefits of its use and for the fuel were shown on Mr Dugan's P11D and his ITR. He had only seen the P11Ds in late January each year when he completed his returns. He said that each year he promised himself he would do something about making a pool car claim but never did so until the enquiry.

50. He explained that the company was in the business of designing and building machines for the packaging industry and had a 15,000 $ft^2$ factory in Wakefield. Customers were in Scotland, South Wales and South East England, and also in Germany where they had a close relationship with BASF.

51. He had several engineers and they had to make site visits and service calls to all customers including to Germany. Sometimes he would accompany an engineer.

52. He himself had a Renault Espace about which he was an enthusiast. He either walked or cycled to work, just over a mile. His wife had a company car which he drove at weekends – this was shown on her P11D and ITR.

53. Most of the engineers lived in Barnsley. When they needed to make an early morning journey they would take the "pool car" and keep it overnight at their house, but otherwise the car was kept locked in the factory site at evenings and weekends.

54. Mr Dugan said he had provided the schedule of breakdowns with the AA to show that on every occasion when they came out to him he was driving a Renault Espace.

55. Mr Dugan had also provided the insurance details for the cars. He agreed it was not against the terms of the insurance for any person to use the cars for private use, including travel to and from work. He was the person who, on behalf of the company, permitted other people such as the engineers to use the car.

56. Based on this evidence the appellant argued that the cars qualified as pool cars and that the information given in the P11Ds he had completed and sent to Mr Dickson was the amount to be taken as the full amount of his benefits from Duplas Ltd.

57. The appellant cited *Industrial Doors Ltd v HMRC* [2010] UKFTT 282 (TC) ("*IDL*") and he also referred to one of HMRC's cases, *Munden v HMRC* [2013] UKFTT 427 (TC) ("*Munden*").

58. HMRC's objections to pool car treatment were based entirely on the proposition that the company had not maintained records to show that the conditions in the law enabling the cars to be treated as pool cars were met and that there was therefore no evidence to support the claim.

59. In particular neither the insurance documents nor the breakdown schedule proved that the cars were pool cars. Mr Burke also asked Mr Dugan how the employees could "state categorically", as their affidavits put it, that Mr Dugan had not used the car privately, especially if they had been on holiday.

60. The appellant's response was that in such a small business everyone knew what each were doing. He admitted he had drafted the affidavits which they signed in front of a solicitors. But they had sworn to the truth of their statements.

61. The affidavits were not otherwise challenged by HMRC who did not seek to have any of the makers of them called for cross-examination, although they had had them since May 2016.

62. HMRC cited three cases, *Munden*, *Prince Erediauwa v HMRC* [2010] UKFTT 630 (TC) ("*Erediauwa*") and *Jubb v HMRC* [2015] UKFTT 0618 (TC) ("*Jubb*").

63. The law on pool cars is short. It is in s 167 ITEPA, and says:

> "(1) This section applies to a car in relation to a particular tax year if for that year the car has been included in a car pool for the use of the employees of one or more employers.
>
> (2) For that tax year the car--
>
> (a) is to be treated under section 114(1) (cars to which this Chapter applies) as not having been available for the private use of any of the employees concerned, and
>
> …

> (3) In relation to a particular tax year, a car is included in a car pool for the use of the employees of one or more employers if in that year--
>
> (a) the car was made available to, and actually used by, more than one of those employees,
>
> (b) the car was made available, in the case of each of those employees, by reason of the employee's employment,
>
> (c) the car was not ordinarily used by one of those employees to the exclusion of the others,
>
> (d) in the case of each of those employees, any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year, and
>
> (e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them."

64. The only question then is whether all of the five conditions in s 167(3) have been met. Condition (a) is we find as a fact met as both the appellant and those employees swearing the affidavits had had the cars made available to them.

65. Condition (b) is not in dispute, but had it been we would have found it met. There was no other reason than that of their employment suggested why the cars had been made available to the appellant and the other employees.

66. We accept the evidence of the appellant and the other employees about condition (c), and so we find as a fact that it was met.

67. As to condition (d) we accept the evidence of the appellant and the other employees that in their cases any private use was incidental, and we find as fact that this was so. In so doing we have not given any weight to what the employees' affidavits said about Mr Dugan's use of the car, as they were not necessarily in a position to know "categorically" (see §59). But given Mr Dugan's position in the company we do accept his evidence of what the other employees did with the cars.

68. Finally we accept the evidence of the appellant and the other employees that the cars were normally (and that is all that is required) kept on the company's premises overnight, and so we find as a fact that that condition (e) is met.

69. Thus we find that all five conditions were met. The only remaining question is whether there is something that should prevent us holding that s 167 had the effect that no charge to tax on benefits from the cars (or fuel) arises on the appellant, and we turn then to HMRC's submissions.

70. We see no force in their arguments. Firstly, the relevance of Mr Dugan's employer, Duplas Ltd, having filed P11Ds showing a benefit to the question of whether the cars were pool cars is none.

71. Second, we consider that HMRC were missing the point in saying that Duplas Ltd's failure to keep records determined the matter. Their approach in this case in the correspondence is instructive. They first asked for documentary evidence to prove compliance with the five conditions in s 167 ITEPA which they referred to as "guidelines" in their letter of 28 February 2014. Mr Dugan gave information in reply about how the cars met the conditions and provided the insurance documents, and in the course of that reply said that the cars were used exclusively as pool cars "in accordance with HMRC guidelines".

72. The response to this was that that would have entailed keeping accurate logs of use (something recommended in eg HMRC's Booklet 480) and Duplas Ltd had clearly not done that. The appellant then (with commendable restraint) pointed out that by guidelines he meant that which HMRC had called guidelines, the five s 167 ITEPA conditions, in their letter of 28 February.

73. Notwithstanding this correction and the evidence in writing of Mr Dugan about the use of the cars including the supply of the affidavits, HMRC's SoC argued that the absence of records such as are in the Booklet 480 guidelines means that the cars did not meet the s 167(3) "criteria".

74. This confuses the evidence that HMRC would like employers to keep with the evidence that the five conditions are met. It also confuses the question of whether the evidence provided to HMRC is sufficient to dissuade them from raising assessments or concluding an enquiry against the taxpayer with the evidence that would persuade the Tribunal that the conditions were met.

75. Even after Mr Dugan had given oral evidence at the hearing, amplifying the points he had made in letters, and put in his documents and affidavits, HMRC still persisted in saying there was "no evidence" that the cars were pool cars.

76. We consider that the issue of meeting the Booklet 480 guidelines about records is irrelevant to the Tribunal.

77. We also fail to understand why the SoC repeats the statement of Mr Dickson that the P11Ds sent in by the appellant showing no car benefits "could not be accepted" because the company was in liquidation. The SoC was dated March 2016, yet in September 2015 Mr Burke had received a letter from the liquidator of Duplas Ltd saying that he had authorised the submission by the appellant of the P11Ds.

78. But in any event whether these were valid P11Ds resubmitted by Duplas Ltd is irrelevant to this appeal. What these P11Ds clearly are is the appellant's quantification of the amounts which he considers he should have been taxed on by way of benefits. Their precise status may be an issue in the jurisdiction etc question, but they cannot affect the pool car issue.

79. There is nothing in HMRC's arguments that persuades us that s 167 cannot apply.

80. But we have also considered the cases cited by both parties. In *Munden* there was no evidence about the usage by employees of the car (a Porsche): in this case we do have evidence. In *Erediauwa* the employer said the car was not a pool car and the appellant did not attend the Tribunal hearing or produce any other evidence: it is hardly surprising that the Tribunal held that the car was not a pool car. (What is more surprising is that HMRC think this case is worth mentioning).

81. The facts in *Jubb* are closer to those in this case, as a P11D was submitted in relation to a BMW and a Jaguar. At the hearing Mr Jubb admitted that the cars were used privately by him and that they were garaged overnight at his house for most of the relevant period. This was clearly fatal to the claim that s 167 ITEPA applied. In any event it was a decision of this Tribunal (and so not binding) and was clearly a decision based on the facts established in that case.

82. We do not think any of these cases assist us, for the reasons we have given.

83. The appellant's case, *IDL*, was first mentioned to HMRC by the appellant in his letter of 20 April 2014. In that letter the appellant used the case to show that the keeping of records was not a requirement of the law, and the acceptance that, in the words of the Tribunal in *IDL* at [72] "in a small environment, in a small office with a few employees, control of the pooled cars could be achieved without formal written rules". The Tribunal there (Judge Gemmell) also found at [72] that "insurance was in place and parking space was available and appropriate for a pooled car arrangement. The nature of IDL's work was consistent with journeys from time to time starting at employees' homes rather than from IDL's premises."

84. This was a case in which the question was whether the evidence of a company director and shareholder and affidavits from two employees was sufficient evidence to meet the conditions. Their evidence was accepted, and the only contrary evidence by HMRC, surveillance evidence, was not relevant to the period of appeal. The Tribunal accepted the evidence of the appellant and it succeeded.

85. It is worth noting that the insurance in *IDL* allowed use for "social, domestic and pleasure purposes" and that the parking was "at or near" IDL's premises. In this case the insurance was similar but parking was actually on the premises of Duplas Ltd.

86. *IDL*, like the other cases, being a decision of this Tribunal, is not binding on us. But we respectfully fully agree with it, and particularly the approach taken to the lack of formality in the operation of pool cars. Mr Dugan pointed out to us that similar remarks were made by the Tribunal in *Munden*.

87. Our conclusion is, therefore, all the conditions in s 167 ITEPA having been met and no other reason advanced why we should not hold that the cars in question were pool cars in each of the three tax years with which we are concerned, that s 167 does apply and that the cars are treated as not having been available for the private use of the appellant in these tax years.

88. The appellant has also maintained that the cars were pool cars in 2008-09 and 2012-13. We would say that we can see no reason why the cars would not be pool cars in 2012-13, but that is not something we can decide on in these appeals. As for the earlier year (2008-09) we consider that below.

89. We should add that HMRC in its SoC also sought to show that there was no employer policy prohibiting private use, as required by s 118 ITEPA if cars are not to be treated as available for such use and therefore as giving rise to a benefit. One of HMRC's cases, *Munden*, shows at [29] that this issue is irrelevant to the question of whether 167 applies. Mr Burke did not pursue that point at the hearing.

## Discussion – jurisdiction issue

90. A number of questions occurred to us on reading the papers before the hearing. We raised the questions with HMRC at the hearing and our discussion is informed by those answers.

91. The questions are:

(1) Are we bound by HMRC's withdrawal of their application to strike out the appeals on the grounds that the Tribunal has no jurisdiction because the decisions are unappealable? If not, should we strike out on those grounds?

(2) If we are not bound to strike out, should we give effect to a decision on the substantive issue in favour of the appellant?

(3) What is the significance of HMRC's (Mr Burke's) acceptance in his letter of 25 September 2014 that the appellant's letter of 20 February 2014 would be accepted as a claim under Schedule 1AB "but not in the correct form" for 2009-10. Did it also apply for 2010-11 and 2011-12?

(4) Was a claim under Schedule 1AB validly made for all relevant tax years, despite not being in the "correct form"?

(5) If it was so made, has it been refused so as to give rise to a right of appeal?

(6) If it was refused did the appellant appeal against the refusal? Can the tribunal accept notification of any appeals?

(7) If it cannot be so treated can an appeal against a refusal be given orally at the hearing so as to enable it to be considered?

(8) To the extent that claims under Schedule 1AB are out of time, is it possible for a claim still to be made?

(9) What is the position for 2008-09?

(10) If Schedule 1AB cannot apply, can the consequential claims provisions be used to allow the appellant to amend his return under s 9ZA TMA to remove the car benefits after the time limits?

(11) If they can, are HMRC's s 29 assessments and s 28A amendment to be treated as disallowing the amendments, so that they are in play in these appeals?

## *Question (1): Are we bound by HMRC's withdrawal of their application to strike out the appeals on the grounds that the decisions are unappealable? If not, should we strike out on those grounds?*

92. The Tribunal must strike out the proceedings if it does not have jurisdiction (Rule 8(2)(a)) and it is under this Rule that HMRC asked for the strike out.

93. When the hearing to strike out the proceedings was arranged, HMRC withdrew its application. Mr Burke was not the presenting officer at that hearing. Mr Dugan was present and informed us that HMRC simply said they did not wish to proceed. The only conclusion we can draw is that HMRC were advised that the Tribunal does have jurisdiction to hear the appeals.

94. However a Tribunal must, of its own motion, strike out proceedings if it comes to the conclusion that it does not have jurisdiction. So we look at our jurisdiction to hear appeals in income tax cases. An appeal may be brought under s 31(1)(b) TMA against any conclusion stated or amendment made by a closure notice under s 28A TMA. An appeal may be also brought under s 31(1)(d) TMA against any assessment which is not a self-assessment, such as the discovery assessments in this case. Under s 31A(1), (3) and (4) TMA notice of the appeal must be given in writing, within 30 days of the date on which the notice of amendment or assessment was issued, to the officer of HMRC who gave the closure notice or notice of assessment. Section 31A(5) states that "the notice of appeal must specify the grounds of appeal".

95. In this case all these conditions were satisfied: the appeals were made in writing to Mr Dickson and the grounds of appeal were that no tax is outstanding contrary to the revised self-assessment and the s 29 assessments, because HMRC refused to accept the appellant's revised P11D figures.

96. HMRC accepted that notice of appeal could be given by the appellant, as in their letter of 25 July they set out their view of the matters "under appeal" and informed the appellant of his right to a review and to notify the appeal to the Tribunal. They raised no objection to the appeals on the grounds that they were somehow "invalid". In particular Mr Dickson did not follow the guidance given in HMRC's Appeals, Reviews and Tribunal Guidance at ARTG 2170 to 2172.

97. The appellant's notification to the Tribunal was in time and gave grounds as required by Rule 20(2)(f) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the FTT Rules"). These grounds amplified the previous grounds and related to the car benefits question, adding that including the car benefits in the tax calculation had caused the upper dividend tax rate to apply.

98. Mr Burke informed the Tribunal that in the circumstances of the case "Mr Dugan can't appeal against the Revenue Assessments for 2009/10 and 2010/11 or the Revenue Amendment for 2011/12 as they were specifically raised or amended to collect tax on the undeclared dividends and not the benefits". He asked for the appellant's case to be struck out, a request which led to the September 2015 hearing.

99. We consider that in this case the Tribunal *does* have jurisdiction: that is given to it by s 49D TMA, which includes as a condition that a notice of appeal has been given to HMRC. Such a notice of appeal was given.

100. We add that it seems to us that if HMRC consider that the grounds of appeal are not "valid" then their recourse is to seek a strike out under Rule 8(3)(c), not Rule 8(2)(a), of the FTT Rules. If the grounds do not truly relate to the subject matter of the amendment then the appeal will not succeed.

## *Question 2: If we are not bound to strike out, should we give effect to a decision on the substantive issue in favour of the appellant?*

101. We have as shown above determined the substantive (car pool) issue in favour of the appellant. Can we give effect to that decision on appeals against the amendments under s 28A TMA and the assessments under s 29 TMA? We consider each separately.

102. The powers given to the First-tier Tribunal in a case where the tax concerned is income tax are in s 50 Taxes Management Act 1970 ("TMA") and nowhere else.

103. That section provides relevantly:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, ... the appellant is overcharged by a self-assessment;
>
> (b) ... ; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment … shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment
>
> (b) ...; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment … shall be increased accordingly.
>
> …
>
> (8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which—
>
> (a) assesses an amount which is chargeable to tax, and
>
> (b) charges tax on the amount assessed,
>
> the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax

> charged by the assessment shall be taken to have been reduced or increased accordingly.
>
> ..."

104. First we look at the self-assessment and amendment to it.

105. Section 50(6) and (7) TMA had been amended by FA 1994 so as to apply to the self-assessment provisions introduced by that Act. In *D'Arcy v HMRC* [2006] SPC00549 ("*D'Arcy*") the Special Commissioner, Dr John Avery Jones, considered the issues arising on an appeal against an amendment to a self-assessment and remarked at [10]:

> "Accordingly, I consider that s 50(6) (and similarly with (7)) should be read in the context of s 31(1)(b) in this way:
>
> If, on an appeal [against a conclusion or amendment to a self-assessment stated in a closure notice], it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other ...evidence,—
>
> (a) that, ...the appellant is overcharged by a[n amended] self-assessment [so far as concerns matters appealed against];...
>
> the assessment... shall be reduced accordingly, but otherwise the assessment ...shall stand good."
>
> [Words in [ ] added by the Special Commissioner]

106. Because of changes made in 2009 by paragraph 31(2) of Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ( SI 2009/56) Dr Avery Jones's recasting of s 50(6) should now read:

> "If, on an appeal [against a conclusion or amendment to a self-assessment stated in a closure notice] notified to the tribunal, the tribunal decides——
>
> (a) that ... the appellant is overcharged by a[n amended] self-assessment [so far as concerns matters appealed against];...
>
> the assessment... shall be reduced accordingly, but otherwise the assessment ...shall stand good."
>
> [Words in [ ] added by the Tribunal]

107. In this case the consequence of our holding that s 167 ITEPA applies is that the appellant is overcharged by the amended self-assessment. The section does not ask whether an appellant is overcharged by the additional amounts, the amounts by which the original self-assessment is increased. To find whether he is overcharged we simply look at the whole of the amended return and self-assessment.

108. But the question we have to decide is not confined to whether in absolute terms there is an overcharge, or at least not on Dr Avery Jones' formulation. We have to ask ourselves whether the appellant is overcharged *in relation to the matters appealed against.*

109. *D'Arcy* is again instructive on this point, also in [10]:

> "Sections 31(1)(b) (that an appeal may be brought against the conclusion or amendment in a closure notice) and s 50(6) and (7) (that the appeal Commissioners' jurisdiction is to determine whether the appellant is over- or undercharged by the self-assessment) do not appear to fit together well. What, for example, is the procedure for an appeal against a conclusion that does not lead to an amendment? And if there is an appeal against both the conclusion and the amendment the appeal Commissioners are apparently not required to adjudicate on the reasons for the amendment; they must either reduce or increase the assessment or allow it to stand good. This apparent mismatch is the basis for Mr Furness's contention that once there is an appeal against something, the appeal Commissioners' jurisdiction is to determine the figure in the whole of the self-assessment, whether or not it has any relationship to the conclusion or amendment that is the subject matter of the appeal. Such a reading could be even wider than the previous system of appeals against an assessment, under which the assessment (on an individual) was limited to the source of income assessed; under self-assessment the figure in the whole of the return could be amended. The logical end result of his contention has to be that if the Revenue come to a conclusion about a trading profit, which the taxpayer appeals, there is nothing to prevent the Revenue from contending in the course of the appeal that the taxpayer is liable to more tax on something quite different, say rent. I do not consider that this is a correct reading. *If Parliament had intended a continuation of the system of appeals against assessments there would have been no need to provide that an appeal may be brought against the conclusion or amendment*; the equivalent of the former system would have been that the appeal was against the amended self-assessment. *Instead Parliament enacted a system under which the Revenue had to state a conclusion and make an amendment, against which an appeal could be brought, necessarily limited to that conclusion or amendment.*"
>
> [The Tribunal's emphasis]

110. The matters covered in the closure notice for the s 9A TMA enquiry (Mr Dickson's letter of 19 June 2014) are the omitted dividends. The matter covered by the amendment to the ITR for the enquiry year, 2011-12, is the additional tax charged on the dividends. Dividends are the topmost slice of a person's income (s 16(4) Income Tax Act 2007) and so the tax charged by the amendment can only refer to the dividends.

111. It is true that if the car benefits were omitted from a tax calculation of the appellant's income, the amount of tax charged on the dividends would be less or nil, because more (or all) dividends would be below the basic rate limit which determines when the dividend upper rate is payable. And dividends are not (generally – but see §42 above) liable to tax when they fall within the basic rate band: the rate is 10% less the 10% tax credit. But we do not think that this secondary effect matters or can affect the basic proposition that an appeal against an amendment to a return can only be successfully made against the matters which were the subject of the amendment.

112. We next turn to the s 29 assessments, the assessments which are not self-assessments.

113. Does this also apply to an appeal against a further assessment in the shape of s 29 determination? In our view the answer is also yes. As Dr Avery Jones points out in *d'Arcy*, before self-assessment, an assessment, whether initial or further, was of income from a particular source (or perhaps more precisely of tax on income charged under a particular Schedule or none), and self-assessment has not changed that so far as s 29 assessments are concerned. In this case the assessment is of income charged under that part of Part 4 of ITTOIA dealing with dividends. An appeal may be made against the assessment, but only an appeal which concerns that source of income is capable of succeeding.

114. Thus in this case we do not consider that the appeals made by Mr Dugan on the basis that the charge to benefits is wrong can succeed.

115. We are comforted in this conclusion by the knowledge that there are alternative remedies potentially available to someone in the appellant's position. HMRC have pointed out that a claim under Schedule 1AB (overpayment relief – the successor to "error or mistake" relief) may apply. We would also add that a person may amend their self-assessment under s 9ZA TMA if they find that after submission there is an error causing an overstatement of tax due, and an Extra-statutory Concession ("ESC") may apply. We address these matters below.

## *Question 3: (a) What is the significance of HMRC's (Mr Burke's) acceptance in his letter of 23 September 2014 that the appellant's letter of 20 February 2014 would be accepted as a claim under Schedule 1AB "but not in the correct form" for 2009-10. (b) Did it also apply for 2010-11 and 2011-12?*

116. As we have noted, in his letter of 23 October 2014 to the appellant (and to the Tribunal) Mr Burke raised the possibility of the appellant making a claim under Schedule 1AB TMA, and in fact agreed that the appellant had made a claim in his letter of 20 February 2014 "but not in the correct form".

117. The "correct form" is we assume a reference to paragraph 2 Schedule 1A TMA which says that every claim not made in a return (and a Schedule 1AB claim cannot be so made – paragraph 3(4) Schedule 1AB) shall be in a form prescribed by the Board. We have not seen any order by the Board prescribing the form of a claim under Schedule 1AB but we assume that the list given by Mr Burke in his letter is a list of the matters prescribed. Certainly there is no suggestion of a specific form with a number in the 'R' series having been prescribed (eg like the form R40 used for claims for repayment of tax on investment income where a return is not required). Mr Burke's list is clearly taken from HMRC's Self Assessment Claims Manual (SACM) at paragraph 12150 which says overpayment relief claims must be made in writing and (relevantly) must:

(1) clearly state that the person is making a claim for overpayment relief

(2) identify the tax year … for which the overpayment or excessive assessment has been made

(3) state the grounds on which the person considers that the overpayment or excessive assessment has occurred

(4) state whether the person has previously made an appeal in connection with the payment or the assessment

(5) include a declaration signed by the claimant stating that the particulars given in the claim are correct and complete to the best of their knowledge and belief

(6) state the amount that the person believes they have overpaid.

SACM 12150 also says that if the claim is for repayment of tax, the claimant ("you") must have documentary proof of the tax deducted or suffered.

### *Question 4: Was a claim under Schedule 1AB validly made for all relevant tax years, despite not being, in HMRC's view, in the "correct form"?*

118. In our view most of the information set out in §117 was provided by the appellant in his correspondence with HMRC. In relation to the matters listed, the letters forming part of the correspondence sent by the appellant are in writing and since:

(1) Mr Burke accepted that a claim for overpayment relief had been made, this point need not trouble us further,

(2) the tax years have been identified,

(3) the grounds have been stated – that the car benefits are not chargeable on the appellant,

(4) if the appellant appeals against the amendment and the s 29 assessments are "previous appeals" then that fact has been stated in the letter making the appeals and giving the grounds,

(5) no form embodying this declaration (compare the R40) has been prescribed we do not think this is relevant in this case.

(6) we cannot say that this has been done in terms, but the figures can be easily calculated, as the amount of the erroneously included income and its type is known, and we would hold that this requirement has been fulfilled

As to proof of payment, as the tax on the amended self-assessment and the s 29 assessments has been stood over we think the claim is, primarily at least, for an excessive assessment. To the extent there is a claim for repayment then we assume the appellant has proof of the tax paid under self-assessments from his SA statements, and he has proof of PAYE deductions form other sources including SA tax calculations and P60s.

119. In our view the claims have been made in the correct form. If necessary we would hold that this claim is an "other proceeding" in s 114(1) TMA so as to validate the claim for any want of form or omission.

### *Question 5: If it was so made, has it been refused so as to give rise to a right of appeal?*

120. A claim made by a taxpayer outside a return, as these were, cannot be adjudicated upon by this Tribunal without more being done. Once such a claim is made, HMRC have two options. They can open an enquiry into it or do nothing. If they do nothing the claim is to be given effect to – paragraph 4 Schedule 1A. If they open an enquiry under paragraph 5 Schedule 1A within the time limit (31 March 2015 in this case – paragraph 5(2)(a)) – they must give a closure notice with the officer's conclusions. That closure notice must, if the officer thinks a claim for discharge or repayment of tax is excessive, amend the claim. An appeal may be made against the conclusions or amendment within 30 days of the closure notice, and by s 48 TMA the appeal provisions relating to assessments apply with any necessary modification.

121. The powers of the Tribunal in this case are given at first glance by paragraph 9 Schedule 1A. Sub-paragraph (3) provides that the Tribunal may vary an amendment in a closure notice appealed against in either direction. But that is clearly not the limit of the Tribunal's power: if we were to uphold HMRC's decision we think that s 50 TMA would apply with the appropriate modifications (by virtue of s 48(2)(a) TMA) to say that the amendment to the claim stands good.

122. The question remains – what has happened to the claim? It seems to us that by his letter of 28 February Mr Dickson opened an enquiry into the claim and by his letters of 1 April 2014 or 25 May 2014 he gave his conclusion that the claim failed.

123. But in any event we are of the view that HMRC cannot now argue that the claim is not "valid" as not being in the correct form, when they have enquired into the claim and issued a closure notice where neither the enquiry or the closure notice raised the issue of lack of compliance with the prescribed requirements.

### *Question 6: If it was refused did the appellant appeal against the refusal? Can the tribunal accept notification of any appeals?*

124. Mr Dugan's letters of 20 April, 2 May and 21 May 2014 may be regarded as appeals, but in any case his appeal letter of 15 July should, we consider, properly be taken as an appeal against the conclusions of Mr Dickson's Schedule 1AB enquiry. HMRC received those appeals, and to the extent there were late notices, they did not take any point under s 49 TMA so must have accepted them as given.

125. We add that despite Mr Burke referring only to 2009-10 as being the tax year with an in date claim, we can see no reason not to apply our reasoning to 2010-11 and 2011-12.

126. That being so, we are clearly able to determine the appeals against the conclusions of Mr Dickson's Schedule 1A TMA enquiry. For the reasons given in

§§64 to 87 we vary the conclusions so as to allow the claims in full for the tax years 2009-10, 2010-11 and 2011-12, and cancel the amendments to the claim.

## *Question 7: If it cannot be so treated can an appeal against a refusal be given orally at the hearing so as to enable it to be considered?*

127. In the light of our view of the answer to question 6, this question falls away.

## *Question 8: To the extent that claims under Schedule 1AB are out of time, is it possible for a claim still to be made?*

128. We may be wrong in our view that a valid and in time claim under Schedule 1AB was made for the tax years 2009-10 to 2011-12. We have therefore considered whether in the circumstances of this case a valid claim could still even now be made. We should also consider whether a claim could be made for 2008-09 as the appellant produced his claims in the form of P11Ds for that year.

129. The time limit for making claims under Schedule 1AB is given in s 43(1) TMA, and is four years from the end of the tax year to which they relate. This means that as at the date of the hearing no claim for any of the years is within that time limit – four years from the end of 2011-12 having been up on 6 April 2016.

130. That is not the end of the story. ESC B41 allows a late claim for repayment of tax if there is HMRC error, but only where there is no doubt or dispute about the facts. HMRC would probably say there was dispute about whether the conditions in s 167 ITEPA were met and we agree (for what it's worth, as we have no jurisdiction over disputes about the applicability of ESCs).

131. Section 118(2) TMA says:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the [Commissioners] or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased …"

132. Until recently it was generally though that this subsection only applied where the time limit was one that related to an obligation on a person, eg to send in a tax return. But in *Raftopolou v HMRC* [2015] UKUT 0579 (TCC) ("*Raftopolou*") the Upper Tribunal (Judges Berner and Raghavan) decided that s 118(2) TMA applied to a case where the time limit related to a *claim* by the taxpayer, not an obligation on her, and in that case it was in fact a claim under Schedule 1AB.

133. So the questions are firstly, would an officer of HMRC allow further time and secondly, if not, did the appellant have, and does he still have, a reasonable excuse for not making the claims in time (assuming that timely claims were not in fact made).

134. In relation to the first question we do not know.

135. As to the second question, in our view the appellant would not have a reasonable excuse that satisfied s 118(2). This is because he had been told on more than one occasion by Mr Burke that he should make claims in the appropriate form as soon as possible. The appellant could not know that the Tribunal might take the view he had done so without realising it, and could not and so did not rely on that. In our view any excuse that he might have had ceased when Mr Burke told him about the need to make a valid claim without his having made those claims within a reasonable time.

136. The third way of making a late claim for overpayment relief under Schedule 1AB is to invoke the consequential claims provisions in Part 4 TMA.

137. Under s 36(3) TMA where an assessment is made under s 29 TMA (discovery assessments) in a case involving a loss of tax brought about carelessly or deliberately, the person assessed may require that effect is given in making the assessment to any relief or allowance to which the person would have been entitled to claim or apply for if they had made the claim in the time limit given for that claim or application.

138. Under s 43(2) TMA a claim under s 42 TMA which could not have been allowed but for the making of an assessment after the tax year to which the claim relates may be made up to the end of the tax year following that in which the assessment was made.

139. Under s 43A(1) TMA, where a s 29 assessment is made but not for the purpose of making good any loss of tax brought about carelessly or deliberately, any relevant "claim, election, application or notice" may be made which the person would have been entitled to claim or apply for if they had made the claim in the time limit given for that claim or application. The claim etc must have the effect of reducing an increased liability to tax resulting from the assessment or any other liability to tax for the tax year or later tax year.

140. Where s 43A TMA applies the relief that may be given can only extinguish the tax on the s 29 assessment and no more (s 43B).

141. Under s 43C(1) TMA, ss 36(3) and 43(2) apply to the amendment of a self-assessment under s 28A as they apply to a s 29 assessment.

142. Under s 43C(2) TMA, ss 43(2), 43A and 43B apply to the amendment of a self-assessment under s 28A as they apply to a s 29 assessment, references to "assessment" in those sections being read as to an "amendment".

143. Some terms used differ from provision to provision:

(1) Section 36(3) refers to "relief or allowance" made by any claim or application.

(2) Section 43(2) refers to any claim, by which it clearly means a claim within s 42 which includes elections (s 42(10)).

(3) Section 43A(2) refers to a "claim, election, application or notice"

(4) Section 43C(5) refers to any "claim, supplementary claim, election, application or notice" that may be made under ss 36, 43 or 43A.

144. The question that needs to be answered is whether the discovery assessments in this case were made to bring into charge a loss of tax brought about carelessly or deliberately.

145. The s 29 assessment made in June 2014 was out of time to charge tax for 2009-10, so can only be justified on the basis that it was so made (ss 34 and 36 TMA).

146. We have held (agreeing with HMRC) that Mr Dugan's conduct in failing to return his dividends was careless, so the s 29 assessment for the year is in time. Thus s 36(3) applies to allow a claim that could have been made but for the time limit to be made and given effect to "in making the assessment". We find it difficult to see how a claim for overpayment relief under Schedule 1AB can be given effect to in making the s 29 assessment (although we do not read s 36(3) as requiring that the claim be made before the making of the assessment – that would be perverse). It may be given perhaps by setting the tax overpaid (the tax on that amount of dividends which equals the car benefit in that year) against the tax charged by the assessment.

147. The s 29 assessment for 2010-11 was made within the time limit in s 34 TMA. A discovery assessment must, in a case where a return has been required, be justified either by s 29(4) or s 29(5). In this case we have agreed with HMRC that s 29(4) applies, as it does for 2009-10. The position is therefore the same as for 2009-10.

148. For 2011-12 the position is different. There we have an amendment to a self-assessment. But by s 43C(1) and (2) consequential claims may be made in an amendment case. Again the relevant provision depends on whether the amendment was made in a case involving a loss of tax brought about carelessly or not. The concept of a "loss of tax" in a s 9A TMA enquiry into a tax return is a little odd, but it clearly relates to the question whether the tax return omitting the dividends was made carelessly or not. We asked HMRC whether in their view it was. They said it was and we agree, and so it is s 43C(1) that applies to invoke s 36(3). Thus the result is the same as in the s 29 case, save that the relief is to be given effect in making the amendment.

## *Question 9: What is the position for 2008-09?*

149. Mr Burke informed the appellant that a claim for this year was out of date, and was not capable of being accepted. But he did not deny that a claim was made by the appellant by being submitted in the P11D format.

150. It seems to us that the claim for this year was in the same form as the later years' claims but was outside the s 43(1) TMA time limit. Mr Dickson nonetheless gave his conclusion on the claim to the same extent as he did the claims for the later years, and the appellant appealed against it to the same extent. We consider that in his notification to the Tribunal the appellant was appealing Mr Dickson's decision to refuse the claim following his enquiry into it.

151. We do not think that HMRC can now say that the claim should not have been admitted as it was late. In our view HMRC has a duty to admit a late claim if it is of the view that the appellant had a reasonable excuse for not bringing it within the time limit. The time limit for 2008-09 was 5 April 2013. HMRC's conduct in admitting the late claim can therefore only lead to the conclusion that they were of the view that the appellant had a reasonable excuse, and there is no warrant for our going behind that decision. We therefore vary HMRC's amendment of the claim by allowing it.

152. If we are wrong and the claim was not a valid claim, then can a claim for 2008-09 still be made under any of the three ways we have referred to?

153. For the reasons given in relation to the later years we do not consider that ESC B41 or s 118(2) TMA can assist the appellant.

154. But nor do we think the consequential claims provisions help him, as there is neither a s 29 assessment nor a s 28A amendment for this year.

## *Question 10: If Schedule 1AB cannot apply, can the consequential claims provisions be used to allow the appellant to amend his return under s 9ZA TMA to remove the car benefits after the time limits?*

155. Section 9ZA TMA provides:

> "(1) A person may amend his return under section 8 … of this Act by notice to an officer of the Board.
>
> (2) An amendment may not be made more than twelve months after the filing date.
>
> (3) In this section "the filing date", in respect of a return for a year of assessment (Year 1), means—
>
> (a) 31st January of Year 2, or
>
> (b) if the notice under section 8 … is given after 31st October of Year 2, the last day of the period of three months beginning with the date of the notice."

156. This means that the latest date for amending the return for 2011-12 in this case was 31 January 2014, and was one year earlier for each of the previous tax years. It seems to us that the Upper Tribunal decision in *Raftopolou* has the effect that an amendment may be made late if the person shows they have a reasonable excuse for not notifying the amendment within the time limit.

157. The first letter notifying the error in the returns was the appellant's of 20 February 2014. But we were told that the appellant spoke to Mr Dickson on 30 January 2014 and if he had informed him then of his intention to amend his return it could be regarded as in time for 2011-12. Mr Dugan admitted that he hadn't.

158. Notice for all years was therefore out of time and it is necessary then to consider s 118(2) TMA.

159. Mr Dugan had admitted in evidence that he had simply said to himself every 31 January that he should address the pool car issue, but that he hadn't until the tax on the dividends had hit home to him. He does not in our view have a reasonable excuse for not seeking to amend his returns before the time limits expired.

160. If s 118(2) does not apply, then the question arises whether the consequential claims provisions can apply. In our view the only one that could apply is s 43A(1) TMA because that extends to an "application" or "notice" as well as to a claim or election. It is a condition of s 43A (read with s 43C) that a s 29 assessment or s 28A amendment has been made otherwise than for the purpose of making good any loss of tax brought about carelessly. We have held that the s 29 assessments and s 28A amendment in this case were so made, so that s 43A does not apply, and a late notice of amendment is not possible. As to 2008-09 there is no relevant assessment or amendment

# Decision

161. Under s 50(6) TMA the s 29 assessments for 2009-10 and 2010-11 stand good. By virtue of s 50(8) TMA we confirm the amount of income charged at £33,888 and £33,333 respectively.

162. Under s 50(6) TMA the self-assessment as amended for 2011-12 stands good.

163. Under paragraph 9 Schedule 1A TMA (and so far as relevant, s 50(6) TMA as modified by s 48(2)(a) TMA) we vary HMRC's conclusion that the appellant's claims under Schedule 1AB TMA for the tax years 2008-09, 2009-10, 2010-11 and 2011-12 are refused and instead we allow the claims. We leave HMRC to make the necessary consequential adjustments.

164. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**RICHARD THOMAS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 26/08/2016**