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UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 22-24 March 2023
Judgment date: 10 July 2023

National insurance contributions – earnings – car allowances – whether disregarded as earnings pursuant to paragraph 7A Part VIII Schedule 3 Social Security (Contributions) Regulations 2001 – meaning of Qualifying Amount and Relevant Motoring Expenditure in regulation 22A

Before

The Honourable Mr Justice Michael Green
Judge Jonathan Cannan

Between

LAING O'ROURKE SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents/Appellants

and

WILLMOTT DIXON HOLDINGS LIMITED

Respondent

Representation:

For the Appellant: Jolyon Maugham KC and Georgia Hicks of counsel, instructed by Deloitte LLP

For the Respondents/Appellant: Akash Nawbatt KC and Joshua Carey of counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

For the Respondent: Rory Mullan KC, instructed by Innovation Professional Services Limited

DECISION

Introduction

1. These two appeals were heard together because they raise similar issues as to liability for Class 1 National Insurance Contributions ("NICs") on the payment of certain car allowances to employees.

2. In the first appeal, Laing O'Rourke Services Limited ("Laing") appeals a decision of the First-tier Tribunal ("the FTT") released on 8 June 2021 ([2021] UKFTT 0211 (TC)). The FTT dismissed Laing's appeal against HMRC's decision that Laing was not entitled to repayment of NICs paid in relation to car allowances in the tax years 2004-05 to 2017-18. The FTT records that Laing has claimed repayment of £2,228,892 of NICs.

3. In the second appeal, HMRC appeal a decision of the FTT released on 4 January 2022 ([2022] UKFTT 00006 (TC)). The FTT allowed the appeal of Willmott Dixon Holdings Limited ("Willmott") against HMRC's decision that Willmott was not entitled to repayment of NICs paid in relation to car allowances in the tax years 2004-05 to 2014-15. The FTT records that Willmott has claimed repayment of NICs on a sum of £1,470,056 paid to its employees.

4. The issues which arise are issues of statutory construction. We describe the relevant legislative provisions, before explaining the nature of the issues in each appeal.

Relevant legislative provisions

5. The relevant legislative provisions are set out in an Appendix to this decision. We have included provisions relating to the income tax treatment of mileage allowances and motoring expenses in the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") which are relevant to the parties' arguments. The scheme of the NIC provisions may be briefly summarised as follows:

> (1) Section 3 of the Social Security Contributions and Benefits Act 1992 ("SSCBA 1992") provides that "earnings" on which NICs are payable includes any remuneration or profit derived from an employment. The amount of an employee's earnings is to be calculated in accordance with regulations. We are principally concerned with the Social Security (Contributions) Regulations 2001 ("the 2001 Regulations")
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> (2) Regulation 22A of the 2001 Regulations ("regulation 22A") provides for certain amounts which would not otherwise be earnings to be treated as earnings in connection with the use of qualifying vehicles, which include cars. The amount is identified by reference to the formula *RME – QA*, where RME is the "relevant motoring expenditure" and QA is the "qualifying amount". RME is calculated in accordance with regulation 22A(3) and includes certain mileage allowances and other payments. QA is calculated in accordance with regulation 22A(4) by reference to the number of business miles travelled by the employee at a specified rate per mile.
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> (3) Regulation 25 of the 2001 Regulations provides that certain payments specified in Schedule 3 are to be disregarded in calculating earnings. We are concerned in particular with paragraph 7A in Part VIII of Schedule 3 ("paragraph 7A") which disregards "the qualifying amount calculated in accordance with regulation 22A(4)". We are also concerned with the disregards appearing in paragraphs 3 and 9.

6. The key provisions in relation to these appeals are regulation 22A and paragraph 7A. The principal issues concern the construction of those provisions and their history is relevant. Regulation 22A and paragraph 7A were introduced with effect from 6 April 2002. The background to those changes is helpfully summarised in the judgment of Etherton LJ, as he then was, in *Cheshire*

Employer and Skills Development Ltd v HM Revenue & Customs [2012] EWCA Civ 1429 ("*Cheshire Employer*") at [22] – [25]:

> [22] It is implicit in the concept of earnings, remuneration and profit that there is some overall net financial benefit to the recipient. In the context of income tax it has long been recognised as a general principle that the reimbursement by an employer to an employee, whether in whole or in part, of an expense that the employee has had to incur in order to perform his or her duties is not, without more, an 'emolument' of the employee's employment. For income tax purposes, however, ITEPA ss 70 and 72 deem sums paid to most employees in respect of expenses to be 'earnings' from the employment, but this is subject to the right of the employee to show that the expense incurred by them is deductible. There is nothing equivalent to ITEPA ss 70 and 72 for NIC purposes.
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> [23] Prior to the enactment of reg 22A there was no specific statutory regime dealing with the NIC treatment of payments by employers in respect of business travel expenses incurred by employees using their own cars. The treatment of reimbursement payments depended mainly on the general meaning of 'earnings', including acceptance that the genuine reimbursement of expenditure necessarily incurred by employees on business travel does not constitute 'earnings'. There was no legislative provision dealing with the mechanics for calculating the amount which could be paid by way of reimbursement without giving rise to a payment of 'earnings' for NIC purposes. The treatment of such payments was dependent largely upon HMRC's practice.
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> [24] Change in that respect came with the amendments to the 2001 Regulations made by the Social Security (Contributions) (Amendment No 2) Regulations, SI 2002/307. Those amendments included the insertion of reg 22A, and the insertion of para 7A and the amendment of para 9 in Pt VIII of Sch 3. Those amendments came into force on 6 April 2002. There came into force at the same time amendments to income tax legislation which included the provisions now in ITEPA ss 229–232.
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> [25] Essentially, although the drafting mechanisms and some details are slightly different, the broad effect of the amendments to the 2001 Regulations and to the income tax legislation was to introduce comparable treatment of mileage allowance payments. Exemption for mileage allowance payments was limited by reference to the number of miles of business travel by the relevant employee multiplied by a standard rate or rates per mile—40p in the case of a car (for the first 10,000 miles and 25p after that).

The Laing appeal

7. The findings of fact made by the FTT in the Laing appeal are recorded at [45] – [105] and [140] – 145] of its decision and what follows is a summary of the relevant findings.

8. Laing is a multinational construction and engineering company, employing more than 8,000 people with construction sites throughout the UK. It has a head office in Dartford, Kent and four permanent offices in St Neots, Leeds, Manchester, and Worksop.

9. During the relevant period from 2004 to 2018, employees were categorised as being fixed location, site-based or roving staff and were required to do varying amounts of business travel. Staff based at a fixed location could still be required to work at a different location.

10. Laing operated a car allowance scheme ("the Scheme"), which it inherited on the acquisition of Laing Construction in 2001. There was no evidence before the FTT as to when the Scheme was first set up or about the original design of the Scheme. The Scheme documentation described it as being "a car allowance in lieu of a company car".

11. Certain employees were entitled to a company car on the basis of business need, but were not entitled to participate in the Scheme. Business need was described as 8,000 business miles per annum. Some employees, in job grades 2 and 3 with certain specified roles, were entitled to a company car

or in the alternative to participate in the Scheme. All employees in job grades 4 and upwards were entitled to a company car or in the alternative to participate in the Scheme. Participation in the Scheme was therefore a mix of business need and seniority. Business mileage by employees in job grades 4 and upwards was unpredictable and variable. The Scheme gave such employees the option of receiving payments under the Scheme instead of a company car. In order to take advantage of the Scheme, employees were required to provide evidence that they had a valid driving licence and a car available for their use which was:

(1) commensurate with the car they would be eligible for under the company car scheme;

(2) reliable and roadworthy;

(3) insured for business travel;

(4) registered in the UK or Eire; and

(5) subject to an annual approved condition assessment where it was over 6 years old.

12. Annual spot checks were carried out to ensure that these requirements were met.

13. Sums payable by Laing to its employees pursuant to the Scheme were determined by reference to job grade rather than staff category or mileage driven. There was no minimum business mileage requirement. The car allowances payable throughout the relevant period were as follows:

Grades 4 and 5	-	£5,000 pa
Grade 6	-	£6,000 pa
Grade 7	-	£7,500 pa
Executive Level	-	£10,000 pa

14. In 2004, payments under the Scheme ceased on termination of employment, loss of the employee's driving licence, during periods of unpaid leave and for any period when an employee was banned from driving. By 2008, instead of automatic termination, Laing reserved the right to cease payment where, for example, an employee was on an extended period of unpaid leave, was banned from driving or had abused the Scheme. Payment ceased automatically only on termination of employment. At this stage therefore, an employee could potentially continue to receive payments even though they were banned from driving and could not drive a car. Payments were made regardless of the extent of any business-related costs incurred and specifically envisaged that some recipients would receive payments where no business mileage was driven.

15. Scheme participants were not required to own the vehicle or to undertake any business travel. In one year, 7.3% of employees receiving Scheme payments drove more than 20,000 business miles and 76% drove no business miles. In 10 out of the 14 years, 50% of employees receiving Scheme payments drove no business miles.

16. Throughout the relevant period, Laing treated payments to employees under the Scheme as being subject to income tax and NICs.

17. Employees participating in the Scheme were also entitled to make separate business mileage claims in respect of business mileage driven. The rate payable was lower than the HMRC "approved

mileage allowance payment" and employees were advised that they could claim income tax relief on the difference.

18. The FTT in the Laing appeal held, in broad terms, as follows:

> (1) Payments under the Scheme to employees were earnings for the purposes of section 3 of SSCBA 1992 (see [140] – [145]).
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> (2) The disregard from earnings for QA in paragraph 7A was not engaged unless the payments were RME (see [166] – [172]).
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> (3) The payments were not RME. In particular, the payments were not mileage allowance payments within regulation 22A(3)(a) because they were not related to use for business purposes which was a requirement of section 229(2) of ITEPA 2003. They were paid regardless of whether the employee had business mileage. Nor did the payments fall within regulation 22A(3)(c) because they were not made in respect of what the parties have called "actual use" of the vehicles. It was not sufficient if a payment was made in respect of expected use, potential use or availability for use (see [173] – [227]).

19. The FTT therefore dismissed Laing's appeal. Laing now appeals against the FTT's decision with permission from the FTT. It does not appeal against the FTT's finding that the payments were earnings. It does appeal the findings at (2) and (3) above and contends:

> (1) The FTT erred in its construction of paragraph 7A. A payment can be QA for the purposes of paragraph 7A and falls to be disregarded from earnings, whether or not it is RME.
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> (2) The FTT erred in its construction of regulation 22A. It ought to have concluded that the payments were RME within regulation 22A(3)(a) and/or regulation 22A(3)(c). The payments were related to use for business purposes and in respect of the use of the vehicles. Such use is not limited to actual use, but extends to expected use, anticipated use and availability for use.

20. HMRC support the decision of the FTT, broadly adopting the reasoning of the FTT.

The Willmott appeal

21. Willmott is a privately owned national construction and property company with projects and customers throughout England and Wales. The nature of Willmott's business means that many employees need a car to perform their duties.

22. The findings of fact made by the FTT in Willmott are recorded at [21] and [35] of its decision. The FTT also recorded some of the evidence at [22] – [34], which includes certain matters which are not in dispute. The relevant findings of fact and undisputed matters may be summarised as follows.

23. Willmott had a group car policy. Employees could choose to receive either a company car or a car allowance.

24. Willmott paid a car allowance to employees based on a grade which was allocated to each employee. The grade allocated to an employee did not depend on the number of business miles driven by that employee. Generally speaking, the more senior an employee, the higher the grade.

25. The amount of car allowance paid to an employee did not depend on the number of business miles driven by the employee. An employee with a higher grade who did fewer business miles than an

employee with a lower grade was paid a higher car allowance. Some individuals who drove no business miles were awarded a grade which entitled them to a company car or a car allowance.

26. In addition, employees were entitled to business mileage payments which were intended to reimburse an employee for the fuel costs of actual business miles driven. These were paid at the rate of 12p per mile without deduction for income tax or NICs. Mileage payments were also paid for travel between home and work, but these were subject to income tax and NICs.

27. At some stage in the relevant period (it is not clear when), car allowance payments ranged from £200 per month for Grade 1 employees to £550 per month for Grade 8 employees. An employee who was entitled to a company car or a car allowance at a certain grade could choose to select a company car from a lower grade and be reimbursed the difference between the car allowances payable for those grades.

28. Car allowances were paid in consideration of employees making a serviceable vehicle available for business use. There was no obligation on employees to use that vehicle for business purposes. There was no requirement for an employee to own or lease a car in order to qualify for a car allowance. The contracts of employment of employees who opted for a car allowance required them to have a properly insured, maintained and reliable vehicle available for use in performing their duties as an employee.

29. The purpose of the car allowance was to ensure that an employee had a properly insured, maintained and reliable motor vehicle available which that employee could use in performing his or her duties as an employee.

30. Car allowances continued to be paid when an employee was on parental leave, was ill (including long-term sick leave) and where their business miles reduced, for example during the covid pandemic, although that was not in the relevant period.

31. There was no obligation or direction as to how an employee should spend the car allowance. Willmott anticipated that an employee who had no satisfactory vehicle would spend the allowance, in part, on acquiring one, but there was no contractual obligation to do so. Similarly, once an employee was in possession of a satisfactory vehicle, Willmott anticipated that the allowance would be spent on financing, maintaining and insuring a vehicle. In other words, the ongoing cost of owning the vehicle. There was no contractual obligation to do so. An employee was free to decide how they spent the car allowance. It could be spent on something wholly unrelated to the vehicle or its use for business travel.

32. Willmott undertook a rigorous analysis of the underlying data and set the level of the allowances on the basis that an employee who did 10,000 business miles per year would be in the same financial position whether they opted for the car allowance, or chose a company car. There were winners and losers. Some employees in receipt of a car allowance would be paid more than the cost of running their car. Others would receive less. Willmott undertook no analysis to identify the winners and losers.

33. The car allowance passed the burden of acquiring and maintaining a vehicle onto the employee. The overall scheme was not intended to secure a tax benefit for Willmott. As a lump sum payment rather than a mileage allowance it was also consistent with Willmott's sustainable travel policy, which sought to encourage staff to reduce carbon emissions.

34. The FTT in the Willmott appeal held, in broad terms, as follows:

(1) Car allowance payments to employees were earnings for the purposes of section 3 of SSCBA 1992 (see [39] – [50]).

(2) The disregard from earnings for QA in paragraph 7A was not engaged unless the payments were RME (see [51] – [61]).

(3) The payments were RME. The payments were not mileage allowance payments within regulation 22A(3)(a) because they were not paid to an employee for expenses, which was a requirement of section 229(2) of ITEPA 2003. There was no obligation on an employee to use the car allowance for any particular purpose. However, they were payments within regulation 22A(3)(c) because they were made in respect of the use of the vehicles. In this context, "use" was not limited to actual use but included expected use, potential use and availability for use. It was sufficient if an employee was obliged to have a vehicle available for use (see [63] – [82]).

35. It was not necessary for the FTT's decision, but it also held:

(4) The disregard in paragraph 3 in Part VIII of Schedule 3 ("paragraph 3") was not engaged because there was no sufficient link between the car allowance and amounts necessarily and actually spent by employees. There was no obligation on the employee to put the car allowance to such use (see [84] – [88]).

(5) The disregard in paragraph 9 in Part VIII of Schedule 3 ("paragraph 9") was not engaged because the car allowance was not a specific payment of expenses which an employee actually incurred (see [89] – [93]).

36. The FTT therefore allowed Willmott's appeal on the basis of its finding at (3) above that the payments were RME, and QA fell to be disregarded from earnings by virtue of paragraph 7A.

37. HMRC appeal against the FTT's decision at (3) above with permission from the FTT. Its grounds of appeal are:

(1) The FTT erred in its construction of regulation 22A(3)(c) and gave RME too wide a meaning.

(2) The FTT's conclusion that the car allowances were RME was not a permissible conclusion on the facts as found. It ought to have concluded on the facts as found that the payments could not be RME within regulation 22A(3)(c). A payment for having a vehicle available for use was not a payment "in respect of use".

38. Willmott supports the decision of the FTT at (3) above, broadly adopting the same reasoning as the FTT. In addition, Willmott challenges the findings of the FTT at (1), (2), (4) and (5) above by way of respondent's notice. Adopting the same numbering, it contends as follows:

(1) The FTT erred in finding that car allowance payments to employees were earnings for the purposes of section 3 of SSCBA 1992.

(2) The FTT erred in its construction of paragraph 7A. A payment can be QA for the purposes of paragraph 7A whether or not it is RME.

(4) The FTT erred in its construction of the disregard in paragraph 3. Paragraph 3 was engaged because there was a sufficient link between the car allowance and amounts necessarily and actually spent by employees.

(5) The FTT erred in its construction of paragraph 9. Paragraph 9 was engaged because the car allowance was a specific payment of expenses which an employee actually incurred.

The issues

39. There is considerable overlap in the issues raised in the grounds of appeal of each appellant and in the respondent's notice relied on by Willmott. It is convenient to deal with the issues in the same order that they were dealt with at the hearing as follows:

(1) Does there have to be a payment of RME if there is to be QA for the purposes of paragraph 7A?

(2) Did the car allowances paid by Laing and/or Willmott fall within the meaning of RME pursuant to regulation 22A(3)(a) (in Laing's appeal) or pursuant to regulation 22A(3)(c) (in both appeals)?

(3) Did the car allowances paid by Willmott amount to "earnings" for the purposes of section 3 of SSCBA 1992?

(4) Did the car allowances paid by Willmott fall to be disregarded as earnings pursuant to paragraph 3?

(5) Did the car allowances paid by Willmott fall to be disregarded as earnings pursuant to paragraph 9?

40. Before considering the issues in detail, it is helpful to consider a number of preliminary matters which featured in the parties' submissions:

(1) The income tax treatment and NIC treatment of payments in relation to motoring expenses prior to 2002.

(2) The income tax treatment of payments to employees in relation to motoring expenses since 2002.

(3) The decision of the Court of Appeal in *Cheshire Employer*.

Treatment of motoring expenses prior to 2002

41. The income tax position prior to 2002 was described in Inland Revenue leaflet IR125, which was aimed at employees using their own cars for business travel. It described the position prior to April 2002 and the changes applicable from April 2002. Prior to April 2002 there was the "simple method" and the "exact method" of working out the available relief.

42. The simple method involved keeping a record of all business miles in a tax year. This was then multiplied by mileage rates published by the Inland Revenue, which varied by reference to engine size. If the allowance paid by the employer was greater than this, then the difference was taxable. If the allowance paid by the employer was less than this, then the employee could claim tax relief on the difference.

43. The exact method involved keeping a record of motoring costs including fuel, maintenance, insurance, loan interest and depreciation. The total costs, excluding depreciation, were then apportioned by reference to business miles as a proportion of total mileage. Depreciation was measured by reference to a capital allowance computation. Again, if the allowance paid by the employer was greater than the business costs, then the difference was taxable. If the allowance paid

by the employer was less than the business costs then the employee could claim relief on the difference.

44. IR125 reflects what are now sections 70-72 of ITEPA, which provide that sums paid to an employee by way of expenses are to be treated as earnings. Employees could and still can make a deduction for expenses pursuant to what are now sections 336 and 337-342 of ITEPA. Section 336 is the general rule for deducting expenses which an employee is obliged to incur and pay as the holder of the employment and which are incurred wholly, exclusively and necessarily in performance of their duties. Section 337 is a specific deduction for travelling expenses incurred in the same way. Sections 338-342 provide for relief for travelling expenses in certain specified circumstances.

45. The effect of the system prior to April 2002 was that drivers of larger, less fuel-efficient vehicles would get more tax relief than drivers of smaller, more fuel-efficient vehicles.

46. The NIC position prior to April 2002 was that certain sums paid to employees were disregarded in the calculation of earnings. Paragraph 3 disregarded payments of or contributions towards travelling expenses. Broadly, this was and is the equivalent of section 337 of ITEPA and applied to amounts necessarily expended on travelling in the performance of the duties of employment. Paragraph 9 was and is a general disregard of specific and distinct payments of or contributions towards expenses actually incurred in carrying out the employment. Broadly this was and is the equivalent of section 336 of ITEPA. In practice, relief for reimbursed motoring expenses was given in a similar way to the relief for income tax.

Income tax treatment of motoring expenses after April 2002

47. What are now sections 229 – 232 of ITEPA were introduced with effect from April 2002, at the same time as amendments to the NIC provisions.

48. Section 229(1) provides that there is no liability to income tax in respect of approved mileage allowance payments paid by an employer to an employee up to the approved amount. Mileage allowance payments are defined in section 229(2) as amounts paid to an employee for expenses related to the employee's use of a vehicle for business travel. They are approved to the extent that such payments do not exceed the approved amount for payments applicable to that type of vehicle.

49. Section 230 then provides that the approved amount is $M \times R$ where M is the number of business miles in the tax year and R is the rate applicable to that type of vehicle. For cars, the rate for the first 10,000 business miles is currently 45p per mile. Thereafter it is 25p per mile. Prior to 2011-12 the rates were 40p per mile and 25p per mile respectively.

50. Relief under section 229 is therefore limited by reference to the amount of the payment made to the employee, subject to a maximum of the approved amount. If no mileage allowance payment is paid, or if the amount paid is less than the approved amount, further relief is available by way of mileage allowance relief under section 231. Mileage allowance relief is available on the difference between the total mileage allowance payments made and the approved amount. Where an employee uses a vehicle for business travel and the total is less than the approved amount, the employee is entitled to relief for the difference.

51. Mileage allowance relief is given by section 232 against general earnings, and is available whether or not the employer has made any mileage allowance payment.

52. Section 359 of ITEPA provides that where mileage allowance payments are made or where mileage allowance relief is available then no deduction can be made pursuant to sections 337-342 of ITEPA.

53. The FTT in the Laing appeal compared the income tax provisions and the NIC provisions at [186] – [206]. It concluded at [201] and [205] that the income tax treatment and NIC treatment of motoring expenditure was "far from aligned". In particular, the NIC system does not employ the income tax technique of bringing amounts into charge, subject to the application of reliefs. It also noted that NICs were not only paid by the employee, but also by the employer.

Cheshire Employer

54. In *Cheshire Employer*, the taxpayer operated a scheme post-April 2002 for all employees involving mileage allowances and alternative lump sum payments. Most employees who received lump sums received up to £3,700 per annum. Two of the directors received lump sum payments up to £7,100 and only did modest amounts of business mileage. The issue before the FTT was whether the lump sum payments were earnings and it held that they were not earnings. The FTT mistakenly understood that if the payments were not earnings then HMRC accepted that they would be RME within regulation 22A. As the taxpayer's claim was limited to QA, the FTT did not need to address the question of whether the payments were RME.

55. The Upper Tribunal released its decision on 16 August 2011, but released a substantially amended decision on 25 November 2011. In both decisions, the Upper Tribunal recorded HMRC's case that the FTT had failed to deal with its argument that even if the payments were not earnings, they were not RME within regulation 22A(3). At [11] of the original decision, the Upper Tribunal recorded that it was common ground that regulations 22A(3)(b) and (c) were not in point. In the amended decision it recorded that it was common ground that regulations 22A(3)(a) and (b) were not in point, and the issue was whether the payments were within regulation 22A(3)(c). Amended reasoning was added at [21] as to the scope of regulation 22A(3)(c). In the original version of [21] the Upper Tribunal wrongly considered that if a payment was not RME then it was not relieved from NICs. In fact, if a payment was not earnings and not RME it would not be subject to NICs at all.

56. The Upper Tribunal held that the FTT did make an error of law and re-made the decision, finding that the payments were earnings. However, the Upper Tribunal said nothing about the application of paragraph 7A, which could apply in principle to a payment which was earnings. When the matter came before the Court of Appeal, it noted that the FTT and the Upper Tribunal had not been well-served by the parties' advocates and described the Upper Tribunal decision as being in some respects "perplexing".

57. In the circumstances, we do not consider that it is safe to rely on the reasoning of the Upper Tribunal in relation to matters which were not dealt with by the Court of Appeal.

58. Etherton LJ, as he then was, delivered the only judgment in the Court of Appeal and Mummery LJ and Sir Stephen Sedley agreed with his judgment. He described the issue before it as follows at [47]:

> **[47]** The proper structured approach to the issues in this case seems quite clear. The first question is whether the lump sum payments were earnings for NIC purposes on ordinary principles. If they were not, then that is the end of the matter and CESDL succeeds in its claim for reimbursement of NIC. It succeeds because either, as HMRC contend, the payments were not RME and so the deemed earnings provisions of reg 22A do not apply; or, if, as CESDL contends, they were RME, the claim still succeeds because CESDL has limited its claim to reimbursement to the QA. If, on the other hand, the lump sum

> payments were earnings for NIC purposes on ordinary principles, then other questions arise. The first is whether para 7A of Pt VIII of Sch 3 to the 2001 Regulations is, as HMRC contend, implicitly limited to RME. If it is not, then again that is the end of the matter and CESDL succeeds in its claim for reimbursement. If it is implicitly limited to RME, then, thirdly, it must be determined whether, as CESDL contends, the payments were RME or, as HMRC contend, they were not.

59. In the event, Etherton LJ held that the FTT had been entitled to find that the payments were not earnings. As a result, there was no need to consider the present issues, namely, the construction of paragraph 7A and the meaning of RME, and he declined to do so. In considering whether the payments were earnings, Etherton LJ described the appropriate test as follows:

> [55] Both sides accept the analysis of Walton J in [*Donnelly v Williamson* 54 TC 636]. What emerges from his judgment are the sensible propositions that, in a case where an employer establishes a general scheme for reimbursement of employees' travelling expenditure, then in determining whether the allowances are to be treated as the taxable earnings of the employees because they involve a profit element or they are to be ignored because they are reimbursement of expenditure: (1) a broad brush approach is necessary in view of the practical constraints of devising a scheme that can apply to a number of different employees and is administratively workable; (2) the test is not whether the allowance produces a mathematical equivalence with the expenditure; (3) rather, the question is whether the scheme was constructed in a genuine endeavour to produce an equivalence between the allowance and the expenditure and to apply with approximately equal justice to all within its scope.

60. Etherton LJ then said this in relation to the FTT's decision that they were not earnings:

> [57] I consider it is quite impossible, however, fairly reading the FTT's decision, to say that the FTT failed to address the relevant issues mentioned in *Donnelly* or to say that there was no material on which the FTT could properly have come to the decision which it did. …The FTT expressly recognised that it was carrying out an evaluation exercise, in which there was evidence and there were arguments capable of pointing to different conclusions. It was fully entitled, in the light of the evidence as a whole, to come down finally in favour of the conclusion that, on general principles, the lump sum payments were not earnings. It follows that it did not make an error of law on that issue, and that it was right to allow CESDL's appeal.

61. Willmott contends in the present appeal that the Court of Appeal's decision is binding to the effect that the car allowance scheme in that case, and similar schemes, do not give rise to earnings. We can say now that we do not accept that submission. The Court of Appeal simply held that the FTT had applied the right test and had reached an evaluative judgment which was open to it on the facts and with which it would not interfere.

62. We turn now to deal with the five issues before us as set out in [39] above.

(1) Construction of paragraph 7A

63. In construing paragraph 7A, we must have regard to the purpose of the provision and seek to construe it, so far as possible, in a way which best gives effect to that purpose (see most recently *Hurstwood Properties Limited v Rossendale BC* [2021] UKSC 16). In doing that, we must have regard to the context of the provisions, the structure of the 2001 Regulations and the relationship between the treatment of car allowances for NIC purposes and for income tax purposes.

64. In the present appeals, the taxpayers' case is that QA in paragraph 7A is not limited to RME and in any event the car allowances are RME. HMRC's case is that QA in paragraph 7A is implicitly limited to RME and that the car allowances are not RME.

65. The charge to Class 1 NICs is based on the earnings of an employee. Section 3 of SSCBA 1992 provides a wide definition of what is meant by earnings. The question of what amounts to earnings in the context of income tax and NICs is the subject of a well-established line of authorities going back to *Hochstrasser v Mayes* [1960] AC 376, which concerned payment of a housing allowance. In broad terms the question is whether the payment is a profit arising from the employment. The authorities address the principles to be applied in determining whether specific types of payments fall within the definition of earnings. The authorities include *Donnelly v Williamson*, which was referred to by Etherton LJ in *Cheshire Employer* and which considered whether car allowances paid to employees amounted to earnings (see [55] set out above).

66. Section 3(2) of SSCBA 1992 provides that regulations may prescribe the basis on which earnings shall be calculated. Section 3(3) provides that regulations may prescribe that payments of a particular description may be disregarded or deducted from a person's earnings. We are concerned with the 2001 Regulations. Regulations 22 and 22A provide that certain amounts shall be treated as earnings. Regulation 25 provides that certain types of payments specified in Schedule 3 shall be disregarded in calculating earnings. It makes clear that it is the "payments" specified in Schedule 3 which are to be disregarded in calculating earnings. Part VIII of Schedule 3 is concerned with travelling, relocation and other expenses and allowances. Paragraph 1 states that the travelling, relocation and other expenses and allowances mentioned in Part VIII are to be disregarded in calculating earnings.

67. Prior to April 2002, the only relevant provision dealing specifically with travelling expenses was paragraph 3. It applied to a payment or contribution towards travelling expenses which the employee was obliged to incur as the holder of the employment. Travelling expenses were defined as amounts necessarily expended in performing the duties of the employment.

68. The amendments in April 2002 introduced regulation 22A and paragraph 7A, dealing specifically with motoring expenditure.

69. The heading of regulation 22A refers to payments "in connection with the use" of motor vehicles. It provides that where a payment would not otherwise be earnings, an amount specified in regulation 22A(2) shall be treated as earnings. That amount is produced by the formula *RME – QA*. There is then a definition of RME in regulation 22A(3) and a formula to produce QA in regulation 22A(4). QA is the product of $M \times R$, where M is broadly the number of business miles travelled and R is the highest rate per mile identified in s 230(2) of ITEPA 2003.

70. QA is the amount that Parliament has chosen to give relief for in respect of business miles travelled by an employee. It is important to keep in mind that we and the FTTs are only concerned with employees who have undertaken business travel and who may be entitled to claim QA.

71. The FTT in the Laing appeal held that the QA referred to in paragraph 7A, had to be part of a payment of RME. The principal reasoning of the FTT, which was adopted by the FTT in the Willmott appeal, appears at [166(1)]:

> 166. I consider that … Paragraph 7A applies to the QA part of RME so that if the Payments are not RME they cannot benefit from the disregard for the following reasons.
>
> (1) I consider that the natural reading of the substantive wording of Paragraph 7A is that the "it" refers to the QA. However, QA is stated to be calculated in accordance with Regulation 22A(4). That provision makes repeated reference to "the payment"; for example, "M is the sum of (a) the number of miles of business travel undertaken, at or before the time when the payment is made – (i) in respect of which the payment is made"(underlining added)…. The natural reading of "the payment" takes the reader back to Regulation 22A(3) and the payments identified therein. QA is therefore intrinsically bound within the

provisions set out in Regulation 22A identifying RME. The reference in Paragraph 7A to Regulation 22A(4) ties the QA reference back to its origins in the identification of RME. If the drafter had wished to disassociate QA from RME it would have been a simple step to do so and that did not happen.

72. There was an issue before the FTT as to what "it" refers to in paragraph 7A. HMRC submitted that "it" referred to a payment of RME identified in the heading. Laing submitted that "it" referred to the QA identified in paragraph 7A. The FTT preferred the latter submission.

73. We do not agree with this aspect of the FTT's reasoning in [166(1)]. Paragraph 7A provides that to the extent that "it" would otherwise be earnings, "the qualifying amount calculated in accordance with regulation 22A(4)" is to be disregarded from earnings. Section 3(3) provides that regulations may prescribe that "payments of a particular class or description" may be disregarded. Regulation 25 provides that "Schedule 3 specifies payments which are to be disregarded". In our view, the "it" referred to in paragraph 7A is a payment, and not simply the number which is QA.

74. Mr Maugham KC and Mr Mullan KC, representing Laing and Willmott respectively, submitted that regulation 22A and paragraph 7A set out a coherent structure for the NIC treatment of payments made in connection with the use of vehicles. The two provisions are said to be complementary and remove the need for a complex fact-sensitive enquiry into whether any particular payment in connection with the use of a vehicle is earnings. A car allowance which is not earnings will be treated as earnings by regulation 22A to the extent that it exceeds QA. A car allowance which is earnings will be disregarded as such by paragraph 7A to the extent of QA. It is said that the whole universe of payments is captured and the statutory code is explicitly indifferent as to whether a payment is earnings or not. If that is right, it is submitted that there is no need to restrict the disregard in paragraph 7A to payments which are RME. The statutory purpose of disregarding QA is achieved without that restriction.

75. Mr Nawbatt KC on behalf of HMRC submitted that the FTT in the Laing appeal correctly found that the reference to QA in paragraph 7A was "intrinsically bound" with the provisions in regulation 22A, which itself identified RME. The FTT's reasoning in Laing was adopted by the FTT in the Willmott appeal. If QA did not have to be RME then there would be a disregard for payments which were otherwise earnings but which had no connection to motor vehicles or motor expenditure. The FTT's construction was also consistent with the heading to paragraph 7A, which refers to "qualifying amounts of relevant motoring expenditure".

76. We agree with the FTTs that the reference to QA in paragraph 7A is intrinsically bound with the provisions in regulation 22A which identify RME. QA must be part of the payment identified as "it" in paragraph 7A, which itself must be RME. Regulation 22A(4) defines QA by reference to business miles "in respect of which the payment is made". The fact that QA is defined by reference to a payment of RME supports HMRC's case. Indeed, the term itself – "qualifying amount" – suggests that it is a qualifying part of a larger sum, which in this case must be RME.

77. We do not accept that QA is simply a number which gives rise to a disregard from earnings in relation to any payment made by an employer to an employee, whether or not it is RME. The taxpayers' arguments would result in relief for NIC purposes against general earnings equivalent to the general relief in section 232 of ITEPA for income tax purposes. If that was the intention of Parliament, we consider the amendment would have made that clear.

78. We also take into account the heading of paragraph 7A which refers to "qualifying amounts of relevant motoring expenditure". It is not necessary that there should be any ambiguity in a provision

before reliance can be placed on a heading. The significance of headings was recently described by Whipple LJ in *HM Revenue & Customs v Naghshineh* [2022] EWCA Civ 19:

> **[41]** On the issue of statutory construction, we were taken to *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn) which suggests that a heading is part of an Act and may be considered in construing an Act, provided that due account is taken of the fact that its function is merely to serve as a brief guide to the material to which it relates and that it may not be entirely accurate (see para 16.7). The parties both accepted that general proposition, as do I.

79. In our view, it is significant that the heading treats QA as a part of RME. Mr Maugham accepted that on his case the heading contains a mistake. We do not accept that it does contain a mistake. Mr Mullan suggested that the heading was included because QA would be expected to be part of RME, but there was no condition to that effect. We do not accept that submission.

80. The Explanatory Notes to the Social Security (Contributions) (Amendment No 2) Regulations 2002 which introduced paragraph 7A also support HMRC's construction. They state as follows:

> Regulation 7 amends Part VIII of Schedule 3 to the principal Regulations. It inserts new paragraphs 7A to 7D into that Part. The purpose of these new paragraphs is to reflect, so far as is practicable, the treatment of such payments for tax purposes. Paragraph 7A provides for the disregard of the qualifying amount of relevant motoring expenditure to the extent that it would otherwise be earnings.

81. The taxpayers relied on the reference here to the new paragraphs reflecting so far as practicable the treatment of such payments for tax purposes. That is certainly what the amendments do, but not in our view to the extent of giving a right to disregard QA against general earnings. To the extent that regulation 22A and paragraph 7A both apply to RME, and give relief for the QA element of RME, they form a coherent scheme for dealing with NICs on RME.

82. Mr Maugham relied on the principle set out in *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15. That principle applies to give courts and tribunals power to add, omit or substitute words in order to make sense of a provision. However, it is only engaged in plain cases of drafting mistakes. We do not consider it is necessary to add, omit or substitute any words in order to make sense of paragraph 7A. The reference to "it" being to a payment and the cross-reference to regulation 22A(4) brings with it the requirement that QA must be part of a payment of RME.

83. It was also suggested that paragraph 7A concerns payments that are earnings, and it does not make sense to have a separate requirement that they should also be RME. We disagree. A payment of RME may or may not be earnings. If it is earnings, then the disregard for QA in paragraph 7A is engaged.

84. In conclusion, we agree with the FTTs in both the Laing and Willmott appeals that paragraph 7A is to be construed as requiring QA to be RME. The FTTs made no error of law in this regard.

(2) Were the car allowances RME?

85. Mr Maugham and Mr Mullan submitted that if paragraph 7A does require payments to be RME then the payments were RME within regulation 22A(3)(c). Mr Maugham also submitted that the payments in Laing were RME within regulation 22A(3)(a). Both submitted that regulation 22A is effectively a charging provision, which charges NICs on sums which would not otherwise be earnings. No statutory purpose would be served by giving it a narrow construction. A broad construction is supported by the language used to define RME.

86. Mr Nawbatt submitted that it is not a question of giving RME a narrow or a wide construction. It is a question of giving it a construction consistent with the purpose of the provisions. The provisions

were intended to reflect the requirement that relief is only available for expenditure actually incurred by an employee.

87. We must construe the term RME having regard to the purpose of regulation 22A and in a way which best gives effect to that purpose. We must have regard to the language used and the context of the provision.

88. We start with the purpose of the amendments in regulation 22A and paragraph 7A. An Environmental and Regulatory Impact Assessment was published by the Treasury when the amendments were introduced. It makes clear that the amendments were intended to provide for a fair reimbursement for car use, to make claims for relief easier to administer because they were to be based on a single rate, to allow closer alignment of tax and NICs and to send better environmental signals by discouraging unnecessary business use and encouraging more efficient vehicles. The new rate was greater than the old rate paid to users of smaller vehicles but less than the old rate paid for users of larger vehicles. The effect was that users of larger, less efficient vehicles would have their claims for relief capped at the new rate, and users of smaller, more efficient vehicles would be able to claim more than the cost of such use.

89. The effect of the provisions is illustrated by some examples referred to by HMRC, demonstrating the interaction of regulation 22A and paragraph 7A.

> Example 1 - An employee using a larger vehicle and incurring costs of 60p per mile. The employer reimburses at the rate of 60p per mile.
>
> Example 2 - An employee using a smaller vehicle and incurring costs of 30p per mile. The employer reimburses at the rate of 60p per mile.

90. In Example 1, HMRC do not consider any of the 60p to be earnings for NIC purposes because the payment reimburses actual expenditure incurred by the employee. Prior to 2002, there was no NIC charge. The purpose of the 2002 amendments was to limit relief to 40p per mile, with 20p per mile being treated as earnings. This was achieved using regulation 22A. The payment of 60p is RME, and RME – QA gives 20p which is treated as earnings.

91. In Example 2, HMRC consider 30p not to be earnings because it reimburses actual expenditure incurred. The other 30p is earnings because it gives the employee a profit. To meet the policy of encouraging use of smaller vehicles, 40p per mile is payable free of NICs. It is therefore necessary to disregard 10p from earnings and this is achieved using paragraph 7A. On another view, the whole 60p is earnings, but 40p is then disregarded by paragraph 7A with the same result.

92. Mr Maugham and Mr Mullan both submitted that the intention of Parliament in enacting regulation 22A and paragraph 7A was to remove the need to consider whether or not a payment is earnings. We can see that this may be the effect of the two provisions when read together, but we are not satisfied that this was Parliament's purpose as such. HMRC's examples suggest a more straightforward purpose which is consistent with the Explanatory Notes and the Environmental and Regulatory Impact Assessment referred to above.

93. There is nothing in the Explanatory Notes or elsewhere to suggest that the purpose of the amendments in 2002 was to remove the earnings question. The purpose was to limit the relief in Example 1 and extend the relief in Example 2 for environmental reasons in a way which was fair, easier to administer and which to some extent aligns income tax and NICs.

94. The taxpayers submitted that the intention was to align the treatment of car allowances for income tax and NICs. The Environmental and Regulatory Impact Assessment supports that submission, as do comments of the Financial Secretary to the Treasury in a debate on the Finance Bill 2001. The question is to what extent were the treatments for income tax and NICs aligned. The taxpayers said that the intention was to give relief irrespective of whether employees actually incurred expenditure on travelling business miles, equivalent to mileage allowance relief pursuant to sections 231 and 232 of ITEPA. We should therefore not restrict the definition of RME to payments which are reimbursement of actual expenditure by an employee. There is force in this submission.

95. Mr Nawbatt submitted that the provisions must still be construed as providing relief only for the reimbursement of expenditure actually incurred. He said that this was recognised by Etherton LJ at [22] and [23] of his judgment in *Cheshire Employer*. He submitted that for a payment to be RME it must be paid in respect of the actual use of a vehicle by the employee. That was what the FTT held in the Laing appeal, and he submitted that the FTT in the Willmott appeal erred in law in finding that a payment to an employee to make a vehicle available for use falls within the definition of RME.

96. RME is defined by regulation 22A(2) as the aggregate of "relevant motoring expenditure" within the meaning of regulation 22A(3). In our view, little can be read into the use of the word "relevant". We agree with Mr Maugham that the FTT in the Laing appeal read too much into that word at [207] and [210] of its decision. We consider that "relevant" motoring expenditure simply refers to motoring expenditure which falls within regulation 22A(3). It is not, as Mr Nawbatt at one stage argued, confined to expenditure by employees. The word "relevant" does not operate to narrow the scope of regulation 22A(3).

97. Regulation 22A(3)(a) brings in the same mileage allowance payments as defined by section 229(2) of ITEPA. Such a mileage allowance payment is an amount paid to an employee "for expenses related to the employee's use of such a vehicle for business travel". A number of points arise out of that definition. Firstly, it is a payment "for expenses" which we accept indicates that it is a reimbursement of expenditure incurred by the employee. This is relevant to Mr Maugham's submission that the car allowances paid in Laing were RME within regulation 22A(3)(a). To be fair, Mr Maugham did not pursue that submission with much vigour. In our view, the car allowances in Laing are clearly not mileage allowance payments within section 229(2) of ITEPA. They are not payments "for expenses" incurred by employees. They are paid regardless of whether the employee incurs any expenditure.

98. The second point arising out of regulation 22A(3)(a) is that a payment "related to" the employee's use of a vehicle incorporates broad language. The taxpayers said that this includes not only actual use, but expected use, future use and availability for use.

99. The third point is that regulation 22A(3)(a) is limited to use "for business travel". HMRC said that it does not include payments reimbursing expenses for mixed business and non-business use. Typically it covers fuel costs when using a car for business travel but little if anything beyond fuel costs. HMRC said servicing costs for a vehicle used for business and non-business purposes is not covered by regulation 22A(3)(a). Reimbursement of such costs is covered by regulation 22A(3)(c). That is the basis on which HMRC said that regulation 22A(3)(c) is to be given a narrower interpretation than the taxpayers' suggested, and requires RME to be a reimbursement of expenses of actual use.

100. Returning to regulation 22A(3), sub-paragraph (b) deals with payments to another person for the benefit of the employee. It was not suggested that this sub-paragraph assists in construing regulation 22A(3)(c).

101.Regulation 22A(3)(c) is the key provision for present purposes. It refers to "any other form of payment … to, or for the benefit of, the employee in respect of the use by the employee of a qualifying vehicle". This utilises wide language in referring to "any other" form of payment "in respect of" the use. Again, the taxpayers said that this includes payments for expected use, future use and availability for use. HMRC said that this paragraph is aimed at reimbursement of expenditure which involves mixed business and non-business use, such as servicing costs, insurance or the cost of replacing a tyre.

102.The FTT in the Laing appeal at [222] considered that the word "use" in regulation 22A(3)(c) does not include expected use, future use or availability for use. Mr Nawbatt supported that construction, submitting that regulation 22A(3) does not bring into charge "hypotheticals". It brings into charge reimbursement of money actually expended by employees. In that sense, it is consistent with paragraphs 3 and 9 which disregard from earnings reimbursement of actual expenditure incurred rather than future expenditure which might or might not be incurred. The general income tax rule described in section 336 of ITEPA is also narrowly drawn and requires reimbursement of actual expenditure.

103.Mr Nawbatt accepted that the words "related to" and "in respect of "were capable of bearing a wide meaning but they must be read in their proper context. They are limited by their subject matter, namely "use", and in particular actual use.

104.We consider that this amounts to an unnecessary gloss on the words used in regulation 22A. Clearly, where business miles are being travelled, there will be expenditure on fuel, insurance and servicing of the vehicle. As Mr Maugham put it, business mileage is "not driven on thin air". Costs are inevitably incurred, although we accept not necessarily by the employee. However, if Parliament had intended a condition that the employee had to incur the relevant expenditure, it would have included such a condition. It did so in paragraphs 3 and 9. There is nothing to suggest that Parliament was concerned with the arrangements between the employee and whoever funds the vehicle. Similarly, mileage allowance relief pursuant to sections 231 and 232 of ITEPA is not concerned with such arrangements.

105.HMRC relied on the Upper Tribunal decision in *Cheshire Employer* at [18] – [21] where it held that there must be some link between the payment and the use of the vehicle. For reasons previously given, it is not safe to rely on that decision. In any event, those paragraphs say nothing about the nature of the use that is sufficient to establish the link. We accept that there must be a link to use, but it is not necessarily restricted to expenditure on actual use.

106.Contrary to the taxpayers' submission, we do not consider the fact that regulation 22A brings sums into charge to NICs that would not otherwise be within the charge is a reason to give it a wide construction. It has never been suggested that it is an anti-avoidance provision, and absent any other policy consideration there is no reason to think that Parliament intended it to be widely drawn or narrowly drawn. We do consider however, that the language used in regulations 22A(3)(a) and (c) indicates a wide construction.

107.The heading to regulation 22A refers to amounts "in connection with" the use of qualifying vehicles. Whilst this suggests a broad construction of RME, we do not think it really adds anything to the analysis.

108.We do not accept Mr Nawbatt's submission that regulation 22A(3)(a) is concerned with purely business expenses such as fuel, and regulation 22A(3)(c) is concerned with mixed business and non-business expenses such as servicing costs or the cost of a new tyre. If that was what Parliament

intended, we consider it would have made a clear distinction. All payments in respect of the business use of a vehicle will be mixed use, unless the vehicle is used solely for business purposes. Fuel purchased for a vehicle is unlikely to be used purely for business use. Whoever purchases the fuel will fill the tank and what is in the tank may be used for business or non-business purposes. There is no real distinction in this regard between fuel, oil, servicing costs, insurance and other costs associated with running the vehicle. That is reflected in the fact that all these costs are intended to be reflected in the 45p per mile used to calculate QA.

109.Mr Nawbatt submitted that HMRC's construction of regulations 22A(3)(a) and (c) gives meaning to both provisions. He said that if the taxpayers are right, then regulation 22A(3)(c) would be sufficient on its own to give relief, and regulations 22A(3)(a) and (b) would be unnecessary. This is a so-called argument from redundancy and we reject it. Whilst there is a presumption that every word and sub-paragraph in a statute is to be given meaning, it is not unusual for the draftsman, out of an abundance of caution, to include additional words or sub-paragraphs to emphasise what would otherwise be inferred from the provision (see Lord Hoffmann in *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 2 All ER 589 at p 595 and Nourse LJ in *Omar Parks Ltd v Elkington* [1992] 1 WLR 1270 at p1273). Regulation 22A(3)(a) also performs the function of linking the NIC treatment to the income tax scheme, by referencing section 229 of ITEPA which does not appear in regulation 22A(3)(c).

110.In our view, regulation 22A(3)(c) captures a payment by an employer which is broadly in respect of the use by an employee of a vehicle. It is not limited to reimbursement of expenses for actual use, which is the subject of regulation 22A(3)(a). It can extend to payments in respect of future use, whether or not the employee bears the cost of that use. To that extent, it aligns the NIC treatment with the income tax treatment. We return to the question of whether it extends to payments for making a car available for use in the context of the findings of fact in the FTT decisions.

111.We turn now to consider the approach of the FTT in the Laing and Willmott appeals, and the criticisms made by Mr Maugham and Mr Nawbatt respectively in each appeal.

112.Mr Maugham emphasised that each of the payments that is subject to the claim in the Laing appeal was made in respect of an employee who did actually use their vehicle for business travel and were therefore eligible for QA. He submitted that the FTT appeared to have lost sight of this important fact. It means that we, and the FTT, are only concerned with employees who made actual business use of their vehicles and received car allowance payments from their employer. Mr Maugham submitted that the entitlement to relief for such employees cannot be affected by the fact that there were some employees who did not use their vehicles for business.

113.We agree that the FTT appears to have overlooked the fact that the claim by Laing was made only in respect of payments to employees who undertook business mileage. We do not consider that the fact that a payment was made to other employees who did no business mileage should affect the nature of the payment made to those that did. It was a car allowance paid in lieu of a company car in circumstances where the recipient undertook business travel and used a car for business purposes.

114.The FTT's conclusion in the Laing appeal in relation to regulation 22A(3)(c) was expressed as follows at [221] – [223]:

> 221. [Regulation 22A(3)(c)] applies to any other form of payment in respect of the use by the employee of a qualifying vehicle. It is therefore not limited in any way to use for business purposes and does not need to be a payment of expenses.

> 222. However, I consider that "use" is still the determining factor. I recognise that "in respect of" is a wide nexus, but for a payment to be treated as RME under this sub-paragraph it must be made in respect of use by the employee; not expected use, or potential use or availability for use.
>
> 223. The Payments were not only not made in respect of business use; they were not made in respect of use at all given that they were entirely determined by reference to the grade of the employee regardless of the extent of use of their car.

115. We consider that the FTT was right to say that use is the determining factor in identifying a payment of RME. However, for the reasons given above we consider that the FTT was wrong to say that a payment for expected or anticipated use is not RME.

116. The FTT considered at [223] that the payments were not in respect of use at all because entitlement was determined by reference to the grade of an employee. However, the grade of employee was only relevant to the quantum of the payment not to what the payment was "in respect of". Where the employees who received the payments were required to have a reliable and roadworthy vehicle available for business use, and where those employees did actually undertake business mileage, we consider that the payments were "in respect of the use" of a vehicle. Parliament intended regulation 22A(3) to cover a wide variety of payments related to motoring expenses to bring them all within the charge to NICs, with relief only being granted to QA properly incurred.

117. If HMRC are right about the meaning of RME then there appears to be an unexpected gap in the legislation. The FTT referred to a submission of Mr Maugham to this effect at [225] but indicated that neither party had identified any sort of payment that would fall into the gap. Before us, Mr Maugham did identify a payment that would fall into this gap. He pointed to a situation such as in *Cheshire Employer*, where the directors received large payments which were not earnings but did only modest business miles. On HMRC's case those payments would not be RME and would therefore fall outside the charge to NICs. There seems no good reason why that should be the case. On the taxpayers' case, such payments would be RME and would be chargeable to the extent that they exceeded QA.

118. We therefore conclude in relation to the Laing appeal that the FTT erred in adopting a narrow definition of RME. We will therefore allow Laing's appeal in this respect and set aside the FTT's decision. Laing's appeal against HMRC's decision that it was not entitled to repayment of NICs paid in relation to car allowances must be allowed.

119. The FTT in Willmott gave RME a wide meaning, encompassing not just actual use but also "expected use, potential use and availability for use". Mr Mullan put Willmott's case to us on the basis that it was paying to secure the use of a suitable car for Willmott's business. We are not sure that is the right analysis. The FTT's finding of fact at [35(7)] was as follows:

> (7) The purpose of the car allowance was to ensure that an employee had a properly insured, maintained and reliable motor vehicle available which that employee could use for performing his or her duties as an employee; in other words for business use…

120. We agree with Mr Mullan and the FTT in the Willmott appeal that the fact that employees could use the car allowance as they saw fit is irrelevant. The definition of RME in regulation 22A(3)(c) and the relief for QA are not concerned with reimbursement of expenditure incurred by employees. The definition of RME is concerned with the nature of the payment by the employer to the employee, in particular, whether it is in respect of the use of a car. If it is a payment of RME, then one way or another there is relief for QA. The provisions do not focus on how the employee spends the payment of RME.

121. We agree with the FTT's finding at [77] that RME is to be given a wide meaning which includes expected use, potential use and availability for use:

> 77. Contrary to [*Laing*], my view is that use includes expected use potential use or availability for business use. Provided an employer can show that a payment was made and in consideration for that payment an employee was obliged to provide a vehicle for business use, then it falls within the ambit of subparagraph (c). It is a payment in respect of the use by that employee of a qualifying vehicle.

122. The FTT applied the test it had outlined at [80]:

> 80. When applying this principle to the facts in this case as I have found them, it is my view that the circumstances in which the car allowance payments were made brings them within the ambit of subparagraph (c). I have found that in consideration for the car allowance payments, employees were obliged ("must") to have ensured that a reliable motor vehicle which was fit for the purpose of performing business duties was available to the employee at all times; and that the individual "must" have use of a private car for use on company business. There is a clear and direct nexus between the payment on the one hand and the use by the employee of his/ her private vehicle, on the other.

123. HMRC said that the FTT's finding in the Willmott appeal that the car allowance was RME was not justified on the facts. In particular, it was calculated by reference to grade, not by reference to actual business use, and some employees who received the allowance did no business miles.

124. We disagree. The grade of employee affected the amount of the car allowance which was based on the type of company car that an employee of that seniority would have been entitled to if they had chosen that option. Again, the fact that some employees did no business miles cannot affect whether those who did are entitled to the relief.

125. In our judgment, the FTT was correct to conclude that the payments made by Willmott were "in respect of the use by the employee of a qualifying vehicle". The payments were made to ensure that the employee had a suitable vehicle available for business use. Where a vehicle was so used, the words in regulation 22A(3)(c) are wide enough to include payments for such use. The FTT in the Willmott appeal made no error of law in concluding that the payments are RME within regulation 22A(3)(c).

(3) Were the payments earnings?

126. The question of whether car allowances paid to employees who had driven business miles were earnings only arises in the Willmott appeal. For the reasons given above the car allowances paid by Willmott were RME. That resolves the appeal in Willmott's favour and it is unnecessary to consider its Respondent's Notice. In our view, this is the type of case where it is not necessary to determine the question of whether the payments were earnings. If the payments were earnings, the disregard in paragraph 7A is engaged. If the payments were not earnings, they were to be treated as such by regulation 22A with a deduction for QA. To that extent the taxpayers are correct that the question of earnings has been rendered redundant by the wider view of RME that we have adopted.

(4) Construction of paragraph 3

127. Mr Mullan submits that all expenses of employees attributable to business mileage undertaken by employees receiving car allowances were travelling expenses within paragraph 3. The car allowance operated as a contribution towards those expenses. It was designed to reimburse the costs incurred by employees in running their own vehicles.

128. The question of whether the disregard in paragraph 3 is engaged arises only in the Willmott appeal. It is not necessary to determine this issue because the payments made by Willmott to

employees who had driven business miles were disregarded as earnings by virtue of paragraph 7A. The car allowances were RME.

129.In any event, it is difficult to see how paragraph 3 could apply. The short point is that there was no obligation on employees to incur expenses in connection with the vehicles that were available for their use. The car allowance could not have been a payment of or contribution towards such expenses.

(5) Construction of paragraph 9

130.The question of whether the disregard in paragraph 9 is engaged arises only in the Willmott appeal. Again, it is not necessary to determine this issue because the payments made by Willmott to employees who had driven business miles were disregarded as earnings by virtue of paragraph 7A. The car allowances were RME.

131.Paragraph 9(1) contains a disregard from earnings for any specific and distinct payment of or contribution towards expenses actually incurred in carrying out the employment. It is subject to a specific exclusion in paragraph 9(2) for any amount of RME in excess of QA. Mr Mullan submits that if the car allowance is not RME, then the exclusion from this disregard will not apply. He says that the car allowance is a specific and distinct payment of expenses which employees actually incur in carrying out their employment. The amount of the car allowance was supported by detailed calculations based on reimbursing actual costs incurred. It could not be a requirement that the allowance was actually spent on expenses incurred. That would exclude reimbursement of expenses already incurred. Further, the amount to be disregarded under paragraph 9 would not be limited to QA, although Willmott had limited its claim to QA.

132. The FTT in Willmott at [89] – [93] held that the disregard in paragraph 9 did not apply. We agree. In our view, the short point is that the car allowances were not "specific and distinct" payments of expenses actually incurred by employees. They were round sum allowances paid to certain grades of employees irrespective of whether expenditure was actually incurred.

Conclusion

133. For the reasons given above, we allow the appeal of Laing and dismiss the appeal of HMRC in the Willmott appeal. We understand that there may still be issues in the Laing appeal as to the quantum of the claim to repayment of NICs. In so far as necessary, we remit that appeal to the FTT to consider quantum. If the parties are unable to agree issues of quantum, there is no reason those issues should not be determined by the same Judge subject to the practicalities of listing. In relation to the Willmott appeal, if there are any issues of quantum they will still be before the FTT and it is not necessary for us to remit the appeal to the FTT.

MR JUSTICE MICHAEL GREEN
JUDGE JONATHAN CANNAN

RELEASE DATE: 10 July 2023

APPENDIX

Relevant Legislative Provisions

Social Security Contributions and Benefits Act 1992

3. Earnings and earner

(1) In this Part of this Act and Parts II to V below –

(a) earnings includes any remuneration or profit derived from an employment; and

(b) earner shall be construed accordingly.

(2) For the purposes of this Part of this Act and of Parts II to V below other than those of Schedule 8 –

(a) the amount of a person's earnings for any period; or

(b) the amount of his earnings to be treated as comprised in any payment made to him or for his benefit,

shall be calculated or estimated in such manner and on such basis as may be prescribed by regulations…

(3) Regulations made for the purposes of subsection (2) above may prescribe that payments of a particular class or description made or falling to be made to or by a person shall, to such extent as may be prescribed, be disregarded or, as the case may be, be deducted from the amount of that person's earnings.

Social Security (Contributions) Regulations 2001

22 Amounts to be treated as earnings

(1) For the purposes of section 3 of the Act (earnings), the amounts specified in paragraphs (2) to (11) shall be treated as remuneration derived from an employed earner's employment.
…

22A Amounts to be treated as earnings in connection with the use of qualifying vehicles other than cycles

(1) To the extent that it would not otherwise be earnings, the amount specified in paragraph (2) shall be so treated.

(2) The amount is that produced by the formula –

RME – QA

Here –

RME is the aggregate of relevant motoring expenditure within the meaning of paragraph (3) in the earnings period; and

QA is the qualifying amount calculated in accordance with paragraph (4).

(3) A payment is relevant motoring expenditure if –

(a) it is a mileage allowance payment within the meaning of section 229(2) of ITEPA 2003; or

(b) it would be such a payment but for the fact that it is paid to another for the benefit of the employee; or

(c) it is any other form of payment, except a payment in kind, made by or on behalf of the employer, and made to, or for the benefit of, the employee in respect of the use by the employee of a qualifying vehicle.

Here 'qualifying vehicle' means a vehicle to which section 235 of ITEPA 2003 applies, but does not include a cycle…

(4) The qualifying amount is the product of the formula—

M x R

Here –

M is the sum of –

(a) the number of miles of business travel undertaken, at or before the time when the payment is made –

(i) in respect of which the payment is made, and

(ii) in respect of which no other payment has been made; and

(b) the number of miles of business travel undertaken –

(i) since the last payment of relevant motoring expenditure was made, or, if there has been no such payment, since the employment began, and

(ii) for which no payment has been, or is to be, made; and

R is the rate applicable to the vehicle in question, at the time when the payment is made, in accordance with section 230(2) of ITEPA 2003 and, if more than one rate is applicable to the class of vehicle in question, is the higher or highest of those rates.

25 Payments to be disregarded in the calculation of earnings for the purposes of earnings-related contributions

Schedule 3 specifies payments which are to be disregarded in the calculation of earnings from employed earner's employment for the purpose of earnings-related contributions.

SCHEDULE 3

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

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

…

(5) In computing earnings there are also to be disregarded –

(a) …

(c) the travelling, relocation and overseas expenses specified in Part VIII …

PART VIII Travelling, relocation and other expenses and allowances of the employment

Travelling, relocation and incidental expenses disregarded

1 The travelling, relocation and other expenses and allowances mentioned in this Part are disregarded in the calculation of an employed earner's earnings.

Travelling expenses - general

3 A payment of, or a contribution towards, travelling expenses which the holder of an office or employment is obliged to incur and pay as the holder of that office or employment.

For the purposes of this paragraph –

'travelling expenses' means –

(i) amounts necessarily expended on travelling in the performance of the duties of the office or employment; or

(ii) other expenses of travelling which are attributable to the necessary attendance at any place of the holder of the office or employment in the performance of the duties of the office or employment and are not expenses of ordinary commuting or private travel (within the meaning of section 338 of ITEPA 2003 (travel for necessary attendance);

Qualifying amounts of relevant motoring expenditure

7A To the extent that it would otherwise be earnings, the qualifying amount calculated in accordance with regulation 22A(4).

Specific and distinct payments of, or towards, expenses actually incurred

9 (1) For the avoidance of doubt, there shall be disregarded any specific and distinct payment of, or contribution towards, expenses which an employed earner actually incurs in carrying out his employment. This is subject to the following qualification.

(2) Sub-paragraph (1) does not authorise the disregard of any amount by way of relevant motoring expenditure, within the meaning of paragraph (3) of regulation 22A, in excess of that permitted by the formula in paragraph (4) of that regulation.

Income Tax (Earnings and Pensions) Act 2003

62 Earnings

(1) This section explains what is meant by earnings in the employment income Parts.

(2) In those Parts earnings, in relation to an employment, means

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) money's worth means something that is

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

70 Sums in respect of expenses

(1) This Chapter applies to a sum paid to an employee in a tax year if the sum -

(*a*) is paid to the employee in respect of expenses, and

(*b*) is so paid by reason of the employment.

72 Sums in respect of expenses treated as earnings

(1) If this Chapter applies to a sum, the sum is to be treated as earnings from the employment for the tax year in which it is paid or paid away.

(2) Subsection (1) does not prevent the making of a deduction allowed under any of the provisions listed in subsection (3).

(3) The provisions are -

section 336 (deductions for expenses: the general rule);
section 337 (travel in performance of duties);
…

229 Mileage allowance payments

(1) No liability to income tax arises in respect of approved mileage allowance payments for a vehicle to which this Chapter applies (see section 235).

(2) Mileage allowance payments are amounts, other than passenger payments (see section 233), paid to an employee for expenses related to the employee's use of such a vehicle for business travel (see section 236(1)).

(3) Mileage allowance payments are approved if, or to the extent that, for a tax year, the total amount of all such payments made to the employee for the kind of vehicle in question does not exceed the approved amount for such payments applicable to that kind of vehicle (see section 230).

230 Approved amount for mileage allowance payments

(1) The approved amount for mileage allowance payments that is applicable to a kind of vehicle is —

M x R

Where —

M is the number of miles of business travel by the employee (other than as a passenger) using that kind of vehicle in the tax year in question;

R is the rate applicable to that kind of vehicle.

(2) The rates applicable are as follows:

[Car or van: 45p for the first 10,000 miles and 25p after that]

231 Mileage allowance relief

(1) An employee is entitled to mileage allowance relief for a tax year —

(a) if the employee uses a vehicle to which this Chapter applies for business travel, and

(b) the total amount of all mileage allowance payments, if any, made to the employee for the kind of vehicle in question for the tax year is less than the approved amount for such payments applicable to that kind of vehicle.

(2) The amount of mileage allowance relief to which an employee is entitled for a tax year is the difference between —

(a) the total amount of all mileage allowance payments, if any, made to the employee for the kind of vehicle in question, and

(b) the approved amount for such payments applicable to that kind of vehicle.

232 Giving effect to mileage allowance relief

(1) A deduction is allowed for mileage allowance relief to which an employee is entitled for a tax year.

(2) If any of the employee's earnings—

(a) are taxable earnings in the tax year in which the employee receives them…

the relief is allowed as a deduction from those earnings in calculating net taxable earnings in the year.

336 Deductions for expenses: the general rule

(1) The general rule is that a deduction from earnings is allowed for an amount if —

(a) the employee is obliged to incur and pay it as holder of the employment, and
(b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

(2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.

(3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses).

337 Travel in performance of duties

(1) A deduction from earnings is allowed for travel expenses if -

(*a*) the employee is obliged to incur and pay them as holder of the employment, and
(*b*) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.

(2) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

359 Disallowance of travel expenses: mileage allowances and reliefs

(1) No deduction may be made under the travel deductions provisions in respect of travel expenses incurred in connection with the use by the employee of a vehicle that is not a company vehicle if condition A or B is met.

(2) Condition A is that mileage allowance payments are made to the employee in respect of the use of the vehicle.

(3) Condition B is that mileage allowance relief is available in respect of the use of the vehicle by the employee (see section 231).