Company cars: relevant motoring expenditure

Employment Tax



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Peter Moroz, who instructed counsel in the recent *Willmott Dixon* case, considers the issue of tax relief for NICs on business mileage in a private car.

Key Points

What is the issue?

For tax purposes, it is well known that there is relief for business mileage driven in a private car. The issue has been debated in the courts as to whether a similar relief applies in respect of NICs.

What does it mean to me?

The issue actually relates to a simple matter and ultimately much of the debate hinges on what is meant by the word ‘use’.

What can I take away?

Protective claims should be made for the refund of NICs paid in error in respect of business mileage where car allowances have been paid. The claims can go back six full tax years under the error or mistake provisions provided in SSCR 2001 Reg 52.

For tax purposes, it is well known that there is relief for business mileage driven in a private car under Income Tax (Earnings and Pensions Act (ITEPA) 2003 ss 229-231 (mileage allowance relief). It is a straightforward matter of deducting 45p per business mile from taxable earnings; or if the employer has reimbursed the driver, then the total of the relief/amount paid tax free cannot exceed 45p per business mile. There is a reduction to 25p per mile where the business mileage exceeds 10,000 miles in a tax year.

The issue debated in the courts relates to the mechanism and law underpinning a similar relief in respect of NICs.

National Insurance vs tax

There are some obvious distinctions between tax and NICs.

An individual does not file a NICs return like they can a Self Assessment tax return, so any NICs relief is either at source via payroll or claimed by an error/mistake mechanism.

The tax law generally deems payment of expenses to be earnings and then provides relief for deductible items. National Insurance law has a different mechanism. One first has to decide if a payment is earnings for NICs purposes. The law then provides for a number of disregards from earnings in specific circumstances. One such disregard is in the case of providing relief for payments in respect of business mileage. However, to understand this issue we need to consider the detail of the law itself.

The central pieces of law involve the Social Security (Contributions) Regulations (SSCR) 2001 Reg 22A and para 7A of Schedule 3 Part VIII and were introduced in 2002.

Explanatory notes released at the time said that, as far as practicable, they were to give similar NICs relief to that allowed in tax law, which started at 40p per mile and was later increased to 45p per mile.

Reg 22A is actually a charging provision in that it seeks to deem as earnings any payments of what it defines as ‘relevant motoring expenditure’ (RME), but only to the extent that those payments are over 45p per business mile.

Para 7A mirrors this by saying:

‘7A To the extent that it would otherwise be earnings, [there is a disregard for] the qualifying amount calculated in accordance with regulation 22A(4).’

Reg 22A(4) defines the qualifying amount as the product of the formula:

M [business miles] x R [45ppm]

Background

The pattern in many companies is similar. A company pays a car allowance, which may be issued as an alternative to a company car. It is often treated differently from salary when it comes to pay rises. It is typically set by reference to the grade of the employee, such that more senior employees are entitled to a bigger car allowance.

In return for the car allowance, the employee is required to have an appropriate car available for business travel, and to service/maintain and insure it for business travel.

There may or may not be an additional payment by the employer for fuel costs. Many companies use the HMRC Advisory Fuel Rates for company cars to determine the rate of payment for business travel, but they can pay whatever they like. Some provide fuel cards.

Often, the employer does not treat the car allowance as pensionable; and HMRC says that the allowance does not usually count as earnings for National Minimum Wage purposes (although these rules use their own definition of earnings separate from tax or NICs.)

The cases at First-tier Tribunal

Two recent First-tier Tribunal cases related to these issues, and both concerned well-known construction companies: *Laing O'Rourke v HMRC* [2021] UKFTT 211 and *Willmott Dixon v HMRC* [2022] UKFTT 6.

Both cases looked at the following issues:

- Was the payment of car allowance earnings for NICs purposes?
- Is there a need for the car allowance payment to be relevant motoring expenditure to qualify for the disregard in Para 7A?
- Is the car allowance relevant motoring expenditure as defined in Reg 22A?

The taxpayers only needed to succeed with their arguments on any one of these points to win the case.

Case of *CESDL*

Looking back to previous judgments, in 2012 the case of *Cheshire Employer and Skills Development Ltd (CESDL) (formerly Total People Ltd) v HMRC* [2012] EWCA Civ 1429 was heard by the Court of Appeal. The outcome had been decided on the facts determined at the First-tier Tribunal; namely, and somewhat surprisingly, that the car allowance in that case was not even earnings at all.

As such, the Court of Appeal neatly dodged the issue of giving an opinion on the other two issues. However, just because CESDL's car allowance was not earnings, that does not imply the same for any other car allowance. One has to look at the rationale and construction of the car allowance payments on a case by case basis to understand whether or not they are earnings for NICs purposes.

I say 'surprisingly' above as the definition of earnings for NICs purposes reads '"earnings" includes "any remuneration or profit derived from an employment"' (Social Securities Contributions and Benefits Act 1992 s 3).

As such, there was much debate in the *CESDL* case on the structure of the car allowance policy to decide whether or not there was indeed any profit from employment.

Case of *Laing O'Rourke*

Laing O'Rourke was the first of the recent cases to be heard. The First-tier Tribunal judge decided that the car allowance in question *was* earnings based on that company's policy. It is not, however, ideal that in order to get the NICs treatment right, a company needs to interpret reams of case law in order to establish whether a payment constitutes earnings. The judge also expressed her belief that the car allowance needed to be relevant motoring expenditure for the para 7A disregard to apply; and ruled that in the case of *Laing O'Rourke*, the car allowance did not qualify as such.

Case of *Willmott Dixon*

In *Willmott Dixon*, the First-tier Tribunal judge made similar rulings on the first two points. However, he crucially disagreed with the *Laing O'Rourke* judgment on the final point, deciding that the car allowance was relevant motoring expenditure and hence the para 7A disregard applied.

The distinction boiled down to interpreting the definition of relevant motoring expenditure in Reg 22A(3):

'(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…'

There was not much discussion in the tribunals of either case about (a) or (b), but a considerable amount of time was spent on analysing what was meant by 'any other form of payment in respect of the use by the employee of a car'.

HMRC’s position was that in order to be relevant motoring expenditure, a payment had to be intrinsically linked to the use of the car; i.e. linked to the miles driven. HMRC argued that a payment for the use of the car could not be a payment for potential use, or availability for use. Further, a payment for the acquisition of the car could not be a payment for the use of the car, and neither could a payment which was ‘in lieu’ of providing a company car.

The First-tier Tribunal judge in *Laing O’Rourke* agreed with HMRC.

In *Willmott Dixon*, the judge viewed the definition of relevant motoring expenditure as being far broader. It is, after all, a charging provision and includes ‘any other form of payment in respect of the use…’. As such, in his view, the car allowance payment fell within the definition of relevant motoring expenditure and the Para 7A disregard applied.

Appeals heard at Upper Tribunal (UT)

HMRC appealed the *Willmott Dixon* decision; and *Laing O’Rourke* appealed the decision made against it. The two cases at were heard jointly at the Upper Tribunal in March 2023 ([2023] UKUT 155).

All three of the bullet points above were analysed again. The Upper Tribunal does not have the power to change findings of fact, but only to determine whether there was an error in law or its interpretation.

HMRC’s argument was broadly that it agreed with the First-tier Tribunal decisions that the car allowance should be regarded as earnings; and that for Para 7A to apply, the car allowance had to be relevant motoring expenditure. Further, it argued that the definition of relevant motoring expenditure should be interpreted narrowly, so that only actual expenditure on the use of a car should fall within the definition. To HMRC, this excluded the payment of round sum car allowances.

When instructing counsel for Willmott Dixon, we argued conversely that the intention of the Regulations was to align the treatment of business mileage and car allowances for income tax and NICs, giving relief irrespective of the actual amount expended on travelling business miles, equivalent to mileage allowance relief pursuant to ITEPA 2003 ss 231 and 232.

Our contention was that we should therefore not restrict the definition of relevant motoring expenditure to payments which are reimbursement of actual expenditure by an employee. Following this logic, the car allowances in question did fall within the definition of relevant motoring expenditure.

The judges agreed and held that:

‘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.’

They therefore thought it unnecessary to consider the earnings question, as they ruled in favour of both of the taxpayers on the relevant motoring expenditure point with the outcome that a refund of NICs was indeed due.

Conclusion

Stop press: HMRC have decided not to appeal further. I would therefore advise generally:

1. It is clear that protective claims should be made for the refund of NICs paid in error in respect of business mileage where car allowances have been paid. The claims can go back six full tax years under the error or mistake provisions provided in SSCR 2001 Reg 52.
2. The question of how to agree the quantum of the claim with HMRC, and what evidence it requires of business mileage driven, is beyond the scope of this article and we are advising several companies on precisely that issue. There are further complications where drivers used a company fuel card.
3. The question of whether the car allowance paid by any given company falls within the definition of relevant motoring expenses is crucial and depends on the facts in each case. What matters is the nature of the payment as exemplified by the intention and requirements of employer and employee. These are typically set out in the employment contract and car allowance policy documentation.

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