Neutral Citation: **[2023] UKUT 00048 (TCC)**

Case Number: UT/2021/000057

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

INCOME TAX and NICs – benefits in kind – ss 114 -148 ITEPA – car benefits – whether SORN meant car was not made available – discovery assessment – s 29 TMA – whether validly raised before officer ceased to be entitled to enquire into taxpayer's return – closure notice – ss 28A, 114 TMA – whether defect of form cured by s 114

Heard on: 12 and 13 December 2022
Judgment date: 24 February 2023

Before

JUDGE GREG SINFIELD

JUDGE NICHOLAS PAINES KC

Between

TIMOTHY NORTON
TIM NORTON MOTOR SERVICES LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Keith Gordon, counsel, instructed by Jackson & Grimes

For the Respondents: Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The first Appellant, Mr Norton, and the second Appellant, Tim Norton Motor Services Ltd ('the Company'), appeal against a decision issued by the First-tier Tribunal ('the FTT') on 14 December 2020 ('the Decision').

2. Mr Norton had appealed to the FTT against income tax assessments for the years 2012/13, 2013/14, 2014/15 and 2016/17 as well as a closure notice amending his self-assessment tax return for the year 2015/16. The Company had appealed to the FTT against decisions in respect of NICs for the years 2010/11 to 2016/2017 inclusive. The additional income tax and NICs were charged on the same basis namely that, in the view of the Respondents ('HMRC'), Mr Norton had received a benefit in kind from the Company because two cars had been "made available" to him by the Company in the relevant years.

3. The FTT dismissed the Appellants' appeals in relation to the years 2013/14 onwards and allowed them for earlier years in respect of one of the cars. Material to this appeal, the FTT decided that the cars were "made available" to Mr Norton even in periods when they were not used by Mr Norton and could not be lawfully used on public roads because no Vehicle Excise Duty ('VED') had been paid in respect of them.

FACTUAL BACKGROUND

4. There was no challenge to the findings of fact by the FTT which are set out in [16] to [31] of the Decision.

> "16. The company runs a Ford car dealership. It sells new cars, buys and sells second-hand cars and does some repair work. In 2001 it bought an expensive and rare Maserati, and in 2005 a Ford GT40 (a rare high performance car). Following a PAYE audit in 2016 HMRC concluded that these cars had been made available to Mr Norton for periods longer than those in relation to which a benefit in kind had been declared. They issued NIC determinations to the company for the years 2010 to 2017, and made income tax assessments for the years 2012/13 to 2014/15 and 2016/17, and issued a closure notice for 2015/16. Those determinations, assessments and notices are the subjects of the appellants' appeals.
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> 17. The company employs some 20 people. The company's directors at all relevant times were Mr Norton and his wife Gerry Norton. Mrs Norton, who is not as interested in cars as Mr Norton, deals with administration and accounting and Mr Norton deals mainly with buying and selling of cars.
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> 18. The company's premises are in Oakham, Rutland; at those premises there would generally be 25 to 30 new cars and about the same number of used cars ready for sale. The GT40 and the Maserati were kept at those premises.
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> 19. Mr and Mrs Norton live some 10 miles from the showroom and drive to work. The Maserati and the GT 41 (sic) are not used for such commuting.
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> 20. The keys for the Maserati and the GT40 are kept in a locked box which in turn is kept in a locked safe in the office. Only Mr Norton had access to the locked box. Mrs Norton would not have sought access to those keys. The keys to the other 40 or so cars on the premises were kept in two key cabinets to which certain members of staff had access - depending upon their roles.
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> 21. From a note of a telephone conversation on 24 August 2016 I find that the Maserati was kept in the back of a large garage which generally meant shuffling a number of vehicles to get it out, and that the GT40 was kept in the

showroom and occasionally taken to local shows (sometimes on a low loader) for advertising and promotion.

22. If it was desired to use the GT40 or the Maserati vehicle excise duty would be paid before it was used. After use a SORN (statutory off road notification) would be made.

23. The Maserati and the GT40 were insured initially on a policy which allowed only one to be used on the road at any one time, but more recently the GT40 has been separately insured and the Maserati covered by a general motor traders group policy. I understood that the insurance policy insured only one driver and that was Mr Norton.

24. Mr Norton had used the cars for the company's business on many occasions. On each of those occasions he would pay vehicle exercise (sic) excise duty in advance and check that the car he was taking had an MOT. These occasions included taking customers children to 'proms', participating in Ford fairs (including one in Le Mans) and meeting with advisers to discuss the possible sale of the company's premises.

25. The GT40 bore the words 'Tim Norton' on its bonnet. Mr Norton said, and I accept, that the GT40 acted as an attraction to the dealership, both when at the premises and when taken to various shows. It was a crowd puller and led to conversations and sales. Mr Norton did not make similar statements about the Maserati and the description in his witness statement of his business use of the Maserati focuses on meetings with advisers and attendance at Ford customer development events.

26. The extent and nature of the use of the two cars by Mr Norton in the period relevant to the appeals was not completely clear. There were the following pieces of evidence:

(1) In 2002, after the acquisition of the Maserati, the company's then accountants wrote to HMRC with a query about competing (sic) P11D forms (the forms on which employers notify employees and HMRC of the amounts of taxable benefits received by the employee in a year). They said they acted for a garage which rented out vehicles and that 'one of the directors occasionally uses one of the cars for private journeys'. Mr Norton said that he had so used it.

(2) Mr Norton regarded the cars as longer term appreciating assets. He did not want them to have a large milage. He described them as being 'by far the most for business purposes' but he could not be certain that that had been their only use;

(3) the company declared the benefit of the cars on Mr Norton's P11D forms:

(a) in respect of the Maserati for the years 2011/12 until 2015/16, but not for 2010/11 or 2016/17;

(b) in respect of the GT40 for the years 2011/12, 2013/14, 2014/15, 2015/16 but not 2010/11, 2012/13 or 2016/17.

A note of a meeting on 22 March 2016 records Mrs Norton confirming to Mr Earl that Mr Norton had used the cars in the years declared, but no mention is recorded of whether that use was for private or for business purposes.

(4) In an e-mail of 18 February 2019, Mr Dewing of the appellants' accountants, Jackson & Grimes ('J&G'), said in relation to the GT40 that the declared use was not personal use but use in the promotion of the

company's business. It had been mistakenly declared on the forms P11D. There were no similar statements in respect of the Maserati.

(5) A letter of 15 September 2016 from Horsepower Racing thanks Mr Norton for bringing the GT40 'to Millbrook for the Ford/Castrol event'. Mr Norton said that at the event the car was displayed along with other Ford GT40s from the 1960s.

(6) In a letter of 6 May 2016 J&G accept that the Maserati and the GT40 were only used and available for use on the dates giving rise to the amounts declared on the forms P11D;

(7) A note of a meeting held on 18 January 2017 between HMRC and Mr Dewey records that Mr Norton 'still wishes to occasionally use the vehicle [the GT40] for private purposes'.

27. This last point indicated to me that, despite J&G's email of 18 February 2019 there had been private use of the GT40 in at least 2015/16 and probably in 2016/17; I also thought it likely that there had been some continuity so that private use extended back before that to all consecutive years where there had been some use. But the P11Ds recorded no use in 2012/13 which broke the chain. Before that I took into consideration J&G's email and concluded that whilst private use took place in 2013/14 and subsequent years it did not occur in 2010/11 to 2012/13.

28. Mr Gordon told me that it was accepted for the purposes of the appeal that in the periods for which vehicle excise duty had been paid (and which gave rise to the benefit declared on the forms P11D) the cars were available for Mr Norton's use.

29. I conclude that it is likely that:

(1) the Maserati was used by Mr Norton for personal as well as business purposes in the years 2011/11 to 2015/16 but it was not used in 2010/11 or 2016/17

(2) the GT40 was used in 2011/12, 2013/14, 2014/15, 2015/16 (because of the P11D forms) and 2016/17 (because of the letter from Horsepower Racing - see (5) above) and was not used by him in 2010/11 or 2012/13. His use in the period 2011/12 was for business purposes only but (because of the comment at [27] above) from 2013/14 to 2016/17 was also for private purposes.

30. The company's Handbook contained the following:

'Section 4 - Driving at work

4.1 Use of company vehicles.

It may be necessary to use a company vehicle in the course of your duties with the company. You may not use a company vehicle without the express permission of Management ... at all times all employees and officers of the company must ensure that any vehicle used is taxed unless covered for use by trade plates, has adequate insurance cover and a valid MOT if appropriate ...'

31. Mr Norton regarded these restrictions as imposing obligations on officers and employees in relation both to the work and the private use of a company car. Mr Norton told me, and I accept, that where vehicle duty had not been paid trade plates could be used where the use of the car displaying the plates was for the purposes of the company's business, but not otherwise."

GROUNDS OF APPEAL

5. The Appellants contend that the FTT erred when it considered that the GT40 and Maserati were available for private use at times when no VED was in place for them ('Car Benefit Issue'). In particular:

(1) the FTT wrongly treated the relative ease of removing SORN status as a reason for saying that the cars were still available to Mr Norton, even when no VED was in place;

(2) the FTT erroneously conflated Mrs Norton's consent or acquiescence on specific occasions with a consent or acquiescence to private use more generally;

(3) the FTT's decision is inconsistent with the judgment of Vinelott J in *Gilbert v Hemsley* and, properly construed (as indeed Mr Norton confirmed in his oral evidence how the company viewed the terms of the handbook), the handbook prevented any use except in circumstances where VED was in place.

6. In addition, Mr Norton submits that the FTT erred when it concluded:

(1) in relation to the discovery assessment for 2016/17, that a discovery assessment can be made during the 'enquiry period' ('Discovery Assessment Issue'); and

(2) that a letter written in March 2017 (when read in conjunction with section 114 of the Taxes Management Act 1970 ('TMA')) did not constitute a closure notice ('Closure Notice Issue').

7. Mr Norton had also been granted permission to appeal on the ground that the enquiry into the 2015/16 return was not retrospectively validated by the enactment of section 12D of the TMA. However, In the light of the Upper Tribunal's decision in *Allam v HMRC* [2021] UKUT 291 (TCC), Mr Norton did not rely on that ground or advance any argument in relation to it at the hearing but reserved the right to argue the point should the case proceed further.

CAR BENEFIT ISSUE

8. The statutory provisions treating the provision of cars, vans and related benefits as earnings for income tax purposes are found in Chapter 6 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). The material parts of Chapter 6 for the purposes of this appeal are as follows.

9. Section 114(1) ITEPA states:

> "(1) This Chapter applies to a car or van in relation to a particular tax year if in that year the car or van -
>
> (a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family,
>
> (b) is so made available by reason of the employment (see section 117), and
>
> (c) is available for the employee's or member's private use (see section 118)."

The FTT referred to conditions in section 114(1)(a), (b) and (c) as Conditions A, B and C and we do the same in this decision.

10. Section 116 states:

> "(1) For the purposes of this Chapter a car or van is available to an employee at a particular time if it is then made available, by reason of the employment and without any transfer of the property in it, to the employee or a member of the employee's family or household.

(2) References in this Chapter to—

(a) the time when a car or van is first made available to an employee are to the earliest time when the car or van is made available as mentioned in subsection (1), and

(b) the last day in a year on which a car or van is available to an employee are to the last day in the year on which the car or van is made available as mentioned in subsection (1)."

11. Section 117(1) provides that a car made available by an employer to an employee or member of an employee's family or household is to be regarded as made available by reason of the employment subject to two exceptions, neither of which is applicable in this case.

12. Section 118 states:

"(1) For the purposes of this Chapter a car or van made available in a tax year to an employee or a member of the employee's family or household is to be treated as available for the employee's or member's private use unless in that year—

(a) the terms on which it is made available prohibit such use, and

(b) it is not so used.

(2) In this Chapter 'private use', in relation to a car or van made available to an employee or a member of the employee's family or household, means any use other than for the employee's business travel (see section 171(1))."

13. Finally, section 143 provides:

"(1) A deduction is to be made from the amount in the computation if the car has been unavailable on any day during the tax year in question.

(2) For the purposes of this section a car is unavailable on any day if the day-

(a) falls before the first day on which the car is available to the employee,

(b) falls after the last day on which the car is available to the employee, or

(c) falls within a period of 30 days or more throughout which the car is not available to the employee."

The remaining subsections provide for a reduction in the taxable benefit pro rata to the number of unavailable days.

14. The FTT decided that, in those years where a car had actually been used by Mr Norton with the acquiescence of the Company, the car was made available to Mr Norton for the purposes of section 114. The FTT held at [33] that:

"The use Mr Norton made of the cars could not have been other than with the company's consent. The cars were made available to him when he used them. And so in tax years when he used them Conditions A and B were satisfied."

15. The FTT then considered whether, in those periods in which Mr Norton did not use one or other of the cars, it was nevertheless made available to him. Mr Gordon submitted, as he did before us, that the cars were not available when subject to a Statutory Off Road Notification ('SORN') declaration because it would have been illegal to use the cars on the public roads without having paid VED (other than with trade plates or to drive to a MOT test). The FTT rejected the submission, at [50], on the ground that the need for a SORN before the cars could be driven on the road did not prevent them being available because it was relatively easy for the restriction to be removed by the payment of VED. At [51], the FTT also found that the passage in the Company Handbook (see section 4.1 of the Company Handbook in [30] of the

Decision at [4] above), was not an effective constraint because it was highly likely that Mrs Norton agreed or would have agreed to or acquiesced in Mr Norton's decisions to use the cars. Accordingly, the FTT concluded, at [52] and [53] that, even in periods when they were not used, the cars were made available for use by Mr Norton and thus Conditions A and B were satisfied in each relevant year.

16. Condition C is that the car is available for the employee's private use and section 118 provides that a car which is made available is to be treated as available for the employee's private use unless in the relevant year such use is prohibited by the terms on which it is made available and the car is not used for private purposes.

17. At [63], the FTT held, "with some hesitation", that the provision in the Company Handbook that an employee or officer of the company may not use a company vehicle without the express permission of Management was "a prohibition on the use of any company car for private purposes and that prohibition would apply to the use of such a car by Mr Norton unless such permission were given either generally or for a specific occasion." However, the FTT found that, in relation to the Maserati, Mrs Norton must have given her consent to private use of the car by Mr Norton in a general form at an early stage which meant that all later availability was not on terms which prohibited personal use. In relation to the GT40, the FTT found, on a balance of probability, that Mrs Norton consented to or acquiesced in the private use of the car by Mr Norton in the relevant years. As a result, the FTT concluded at [70] that Condition C was satisfied for all years in relation to the Maserati and in relation to the GT40 for 2013/14 to 2016/17.

18. The FTT's conclusion meant that relevant benefits in kind arose in relation to the Maserati for all relevant tax years and for the GT40 for 2013/14 to 2016/17.

19. Mr Gordon referred us to *Customs and Excise Commissioners v Elm Milk Ltd* [2006] EWCA Civ 164, [2006] STC 792 ('*Elm Milk*') which concerned a company's right to recover input tax on the purchase of a car that was provided to its sole director who also owned the company with other members of his family. Article 7 of the Value Added Tax (Input Tax) Order 1992 prevents the recovery of input tax on a car unless at the time of the purchase the purchaser intends to use it exclusively for the purposes of a business and does not intend to make it available for private use. The Court of Appeal considered the meaning of the phrase "made available" in article 7(2G) of the Order. Mr Gordon said that the Court of Appeal's comments were equally applicable to the term "available" in sections 114, 116 and 118 and we did not understand Ms Choudhury to disagree. At [38] and [39], Arden LJ said this about the meaning of "available":

> "… The judge and the tribunal in this case clearly thought that unavailability for private use could be achieved by appropriate contractual provisions as well as by physical constraints. I agree. However, for the reasons given by Neuberger J in [*Customs and Excise Commissioners v Upton (trading as Fagomatic)* [2001] STC 912], it is difficult to see that physical restraints such as parking the car in a locked car park out of business hours could of themselves be effective in the case of a car acquired for use by a sole trader, or, I would add, a sole director.
>
> In my judgment, Parliament has not in art 7(2G) said that to show that there is no intention to make a car available for private use the taxpayer has to show that it is not physically so available. Parliament has neither said that any particular circumstance constitutes making a car 'available', nor has it excluded any evidence from the determination of whether a car is or is not made available. It is therefore, a question of fact for the tribunal as to whether in all the circumstances the taxpayer intended not to make the car available

> for private use by whatever means. There is no thus (sic) reason why a car cannot be made unavailable for private use by suitable contractual restraints, that is effective restraints."

20. In *Elm Milk*, the tribunal had found that the director intended to be bound by a board resolution that the car should be used for business purposes only, that the company did not intend to make the car available for private use and that any private use would be a breach of the employee's terms of employment. On that basis, Arden LJ held in [40] and [41] that it was not open to HMRC to submit that the restrictions were worthless because they could be revoked at any time by the director and that it followed from the tribunal's findings that it did not matter that, in theory, the director could have revoked the board resolution at any time.

21. We accept that *Elm Milk* is binding authority for the proposition that a contractual restriction on use for private purposes can be sufficient provided that the restriction is effective. We also accept that the contractual restraint need not have any permanence to it but, again, it must be effective at the relevant time. Whether a contractual provision is an effective prohibition on private use is a question of fact for the tribunal to determine having considered all the circumstances of the case.

22. Mr Gordon also referred to decisions of the FTT in *Golding v HMRC* [2011] UKFTT 232 (TC) and *Graham v HMRC* [2019] UKFTT 517 (TC) but we did not find they provided any greater assistance than we derived from the Court of Appeal's judgment in *Elm Milk*.

23. In this case, Mr Gordon submitted that there were two legal restraints on the use of the GT40 and Maserati where a SORN was in place and the car was untaxed, ie no VED had been paid. The first restriction was that the cars could not legally be used on the road if no VED had been paid. He argued that the term "available" in sections 114, 116 and 118 must mean available for lawful use. He contended that the FTT erred when it considered that the GT40 and Maserati were available for private use at times when no VED had been paid in respect of them because such use would be unlawful. The second restriction was the contractual prohibition in the Company Handbook. Mr Gordon relied on the FTT's conclusion at [63] that the Company Handbook imposed a prohibition on use of the cars unless the person who wished to use them first obtained permission from the Management of the Company, (which in Mr Norton's case meant the board as a whole or Mrs Norton), and also ensured that the cars were insured, VED had been paid (unless used with trade plates) and there was a valid MOT, if appropriate, in place. Accordingly, when the cars had no VED paid, they were not available to Mr Norton in accordance with section 118.

24. In relation to the first restriction, Mr Gordon submitted that the FTT was wrong in [50] to treat the relative ease of revoking the SORN and paying VED as a reason for saying that the cars were still available to Mr Norton, even when a SORN was in force. He submitted that, when it said that the ease of removing SORN meant that a car was available at all times, the FTT had substituted a test of potential availability for the correct test of whether the car was available at a particular time. We do not agree that the FTT used the wrong test. It seems to us that the FTT's conclusion at [50] amounted to a finding that the existence of a SORN was not an effective restriction in this case. That is clear from the last sentence of [50] which is as follows:

> "The restriction on the use of a car while the SORN remains in place is not enough, where the potential or actual user of the car can easily remove the restriction, for one to be able to say that the car had not been made available for use by him or her before the restriction was removed."

25. The statutory question is whether the cars were made "available". Mr Gordon's distinction between actual and potential availability is, in our view, at best a distraction from

the statutory question of "availability" and amounts to putting an impermissible gloss on the statutory words. There can often be something that needs to be done before a vehicle can, as a practical or even a legal matter, be driven. At [48] the FTT instanced the need to fuel a vehicle or put on a crash helmet. Similarly, a flat battery can prevent a car being immediately available for use and an under-inflated tyre can make immediate use a criminal offence (reg 27 of the Road Vehicles (Construction and Use) Regulations 1986 and section 41A of the Road Traffic Act 1988).

26. We therefore consider that the FTT was right at [50] to consider the ability of a user of a vehicle to remove a practical or legal restriction; this approach is fortified by the reference in *Elm Milk* to the need for an "effective restraint". The FTT had previously referred at [21] and [24] to the paying of VED prior to the use of a car and the subsequent making of a SORN and, on its findings, there was no obstacle to Mr Norton arranging for these things to be done.

27. In short, the FTT made a finding that the fact that a SORN was in place and using the cars without payment of VED would be illegal was not, in the circumstances of this case, an effective restraint upon their use and the cars were thus available for private use by Mr Norton at all times. That was a finding of fact and it seems to us that it was a conclusion that the FTT was entitled to reach on the evidence before it.

28. By way of contractual restraint, Mr Gordon relied on two passages in paragraph 4.1 of the Company Handbook: the statements that "you may not use a company vehicle without the express permission of Management" and "at all times all employees and officers of the company must ensure that any vehicle used is taxed". As to the first of those, the Appellants challenged the FTT's findings in [66] and [67] that the cars were used with the knowledge and consent or acquiescence of Mrs Norton. Mr Gordon contended that the FTT wrongly conflated Mrs Norton's consent or acquiescence on specific occasions with consent or acquiescence to private use more generally. Mr Gordon submitted that the Appellants' concession, recorded at [28] of the Decision and repeated in his skeleton argument, that the cars were available for Mr Norton's private use in those periods when VED had been paid in relation to them was not an admission that Mrs Norton had consented to non-business use in those periods. Mr Gordon contended that the FTT should have found that Mrs Norton would not have consented to private use generally, or at least would not have consented to private use except where such use was wholly incidental to those limited occasions where business reasons justified VED being paid.

29. In response, Ms Choudhury submitted that the FTT was entitled to come to the conclusion in [66] and [67] that Mrs Norton had consented to the use of the cars for private purposes. She submitted that any challenge to that conclusion could only succeed if it satisfied the test in *Edwards v Bairstow* [1956] AC 14.

30. We agree with Ms Choudhury that there are no grounds for interfering with the FTT's finding of fact that Mrs Norton generally consented to Mr Norton using the cars for private purposes. It also seems to us that any requirement for Mr Norton to obtain the express permission of Management could have been satisfied by him simply deciding, as a director, that he would use the car. He was in a unique position to do so as he was in sole control of the keys to the cars which were kept in a locked box which in turn was locked in a safe in the office.

31. Secondly, Mr Gordon relied on the requirement in the Company Handbook that an officer of the company must ensure that any vehicle was taxed. He challenged the FTT's conclusion at [69] that this was not a prohibition on use but a requirement of use and that use of a car without VED was not a breach of a prohibition on use but a breach of the obligation to ensure the car was taxed when it was being used as being inconsistent with the judgment of Vinelott

J in *Gilbert (HM Inspector of Taxes) v Hemsley* (1981) 55 TC 419 ('*Hemsley*') which considered the predecessor to section 118 ITEPA.

32. In *Hemsley*, the taxpayer was provided with a car for business use and told that he was "not expected" to use it for private purposes. The General Commissioners found that the terms on which the car was made available to the taxpayer prohibited its private use and no such use was made of the car in the relevant year. On an appeal by the Revenue to the High Court, Vinelott J held:

> "… the legislature must have intended to limit the condition to the case where the terms on which a car is made available contain an express and legally enforceable ban on private use, so that private use would be a breach of those terms."

33. Vinelott J went on to hold that the words 'You are not expected to use' were capable of meaning and of being understood as meaning 'You are expected not to use' which was a polite way, appropriate in the circumstances, of saying 'You are not to use'. He concluded that the General Commissioners "must have taken the view that in the particular circumstances the words used were intended to mean and would be understood by a reasonable employee as meaning, and were (as they found) in fact understood by the taxpayer as meaning, that the car was being made available to him on terms that it would not be used for private purposes."

34. We respectfully agree with Vinelott J's analysis of the intent of the legislation and the need for an express and legally enforceable prohibition on private use, such an intention is evident in the provisions of sections 114 to 118 ITEPA. But we do not consider that Vinelott J's interpretation of the words used in that case provides any assistance to Mr Gordon. The issue before Vinelott J was whether the General Commissions had been entitled to find (as they had) that a statement that the taxpayer was "not expected" to make private use of a car amounted to a sufficiently categorical prohibition.

35. In the present case the issue is different. The words in the Handbook are categorical in saying that "at all times all employees and officers of the company must ensure that any vehicle used is taxed unless covered for use by trade plates". In respectful disagreement with the FTT, we tend to consider that for Mr Norton to drive one of the cars without first ensuring that VED was in place would be a breach of the instruction in the Handbook. But the prohibition is at most a conditional one: not to drive a car without first ensuring that it is taxed (or covered by trade plates). As with the legal obstacle to driving an untaxed car, it is not an effective restraint upon use in circumstances where Mr Norton could comply with the obligation in the Handbook by arranging for prior payment of VED. In the absence of any obstacle to Mr Norton making those arrangements, the clause in the Handbook does not advance Mr Gordon's argument.

36. For the reasons set out above, we find that the Company's appeal must be dismissed and we reject Mr Norton's first ground of appeal, but that does not conclude matters in relation to Mr Norton who appeals on two further grounds.

DISCOVERY ASSESSMENT ISSUE

37. In the FTT, Mr Norton had argued that the discovery assessment for 2016/17 was invalid because it had been made while the "enquiry period" for that year was still open. The "enquiry period" means the period between the delivery of a tax return and either:

(1) the closing of an enquiry window where no enquiry was opened, or

(2) if an enquiry has been opened, the closure of the enquiry.

38. There was no dispute that the assessment for 2016/17 was made on 20 November 2018 before the enquiry window closed on 31 January 2019 without an enquiry having been opened. The FTT concluded, at [139], that "the fact that the assessment was made during the enquiry

window at a time when an enquiry could have been opened does not invalidate that assessment."

39. It appears that, apart from in Mr Norton's appeal, this issue has only been considered at first instance in three other cases and has never been considered by the Upper Tribunal or higher courts.

40. Sections 8, 8A and 9 of the TMA empower HMRC to require a taxpayer to file a tax return, which must include a self-assessment of the person's tax liability. Section 9A empowers HMRC to enquire into a tax return on giving notice, which must generally be given within 12 months of the filing of the return (the "enquiry window"). Section 28A provides for the completion of such an enquiry by a closure notice. Under section 28A(4) a taxpayer may apply to the FTT for a direction requiring HMRC to issue a closure notice.

41. Separately, section 29(1) empowers HMRC to issue a tax assessment where they "discover" that a taxpayer has not been assessed (or self-assessed) to income tax that is due. There are restrictions on the power to assess, of which the relevant one for present purposes is contained in section 29(3). This provides that where a taxpayer has delivered a return for the relevant tax year, he "shall not be assessed" unless one of the two conditions in subsections (4) and (5) is satisfied. Subsection (4) has no application to this case. Subsection (5) is as follows:

> "The second condition is that at the time when an officer of the Board—
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> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) in a case where a notice of enquiry into the return was given—
>
> (i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or
>
> (ii) if no such partial closure notice was issued, issued a final closure notice,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

The effect of section 29(6) is to confine "information" for the purposes of section 29(5) to information emanating from the taxpayer.

42. The first case that considers the relationship between enquiries and assessments is *Lee v HMRC* [2008] SPC 715 ('*Lee*') in which a number of applications had been made under section 28A(4) for directions requiring HMRC to close various investigations that were under way into the affairs of three taxpayers. The Special Commissioner found that only one of these was an enquiry under section 9A. At paragraph 8 he described the relationship between enquiries under section 9A and investigations with a view to an assessment under section 29 as follows:

> "Section 28A applies only to valid enquiries under section 9A. It does not apply to other forms of investigation. In particular, it does not apply to investigations related to the potential use of section 29 TMA (assessment where loss of tax discovered). It is worth noting that section 29 makes provision to avoid an overlap between investigations linked with that section and section 9A enquiries. This emphasises that the two are separate. Section 29(3) to (7) limits the powers of an Officer under that section where the taxpayer has delivered a return under section 8. One limit is that the section 29 powers can only be used after either the 'window' under section

> 9A has passed in respect of that tax return or the Officer has closed an enquiry into that tax return: section 29(5)."

43. The Special Commissioner's remarks about the timing of section 29 assessments were not necessary for his decision, but support Mr Norton's contention.

44. The next case is *Trustees of Bessie Taube and others v HMRC* [2010] UKFTT 473 (TC) ('*Taube*'). This involved a somewhat complicated series of interconnected appeals relating to an individual and two family trusts. The correct tax treatment of the individual depended in part on the correct tax treatment of one of the trusts.

45. An issue in relation to section 29 arose in the appeal of the individual. He had filed a tax return for 2000/01 in January 2002; the enquiry window had closed on 31 January 2003. Following an investigation into the tax return of one of the trusts, in September 2004 the HMRC officers dealing with the trust asked the individual's tax office to raise an assessment on him; this was done in December 2004.

46. The issue under section 29 did not relate to the permissibility of raising an assessment during the enquiry period but to the timing of the "discovery" pursuant to which the assessment was raised. At [69], the FTT summarised the taxpayer's argument as being that, in order for there to be a "discovery" within s 29(1), there has to be a discovery of something new outside the enquiry window and in that case there was no evidence that something had been newly discovered outside the enquiry window.

47. The FTT rejected this submission, reasoning as follows:

> "70. … We agree with [counsel for HMRC] that, although in a normal case it might be expected that, if HMRC come to the conclusion that there is a probable insufficiency, an enquiry would be opened, there is no requirement, or pre-condition, that this be done. We do not consider that the reference by Auld L J in *Langham v Veltema* (at [36]) to the inspector's option of making a s 9A enquiry before the discovery provisions of s 29(5) come into play establishes any principle that discovery can be made only after the enquiry window is closed. In that passage Lord Justice Auld was giving a general description of the scheme and not addressing any question of timing. His reference to s 29(5) in this context shows that what he had in mind was the time at which the taxpayer information was provided, and not the timing of the discovery itself.
>
> 71. In our view the statutory rules permit a discovery either before or after the time for opening an enquiry has expired …"

48. In its context, the FTT's decision in *Taube* was only that an assessment could be based on a discovery made during the enquiry window, not that an assessment could be raised during the enquiry period.

49. The matter does not seem to have come before the FTT again until the present case. In the Decision, the FTT respectfully disagreed with the conclusion of the Special Commissioner in *Lee* and concluded that a discovery assessment made during the enquiry period was valid. The FTT reached this conclusion despite noting that the validity of such an assessment could not be determined until the enquiry period had ended. This was because the condition in section 29(5) relates to the knowledge of the HMRC officer when the enquiry window closes, if a taxpayer made the relevant information available to the officer after the assessment was made but before the end of the enquiry period, the assessment would be retrospectively invalidated. The FTT recognised this "procedural problem" in [137] and [138] but disregarded it on the ground that the difficulty would be one of HMRC's own making and the FTT would be able to manage any appeal to take account of the timing issues.

50. The final case to consider this point is *Curtis v HMRC* [2022] UKFTT 172 (TC) ('*Curtis*') which involved a discovery assessment raised during the relevant enquiry period. In that case, the FTT followed *Lee* and declined to follow the FTT in this case. The FTT in *Curtis* observed at [84]:

> "81. In our judgment, the scheme of section 29 is clear. It was not intended that HMRC should make a discovery assessment prior to the end of the enquiry window. It is implicit that the discovery required by section 29(1) is a discovery made after the closure of the enquiry window or after an enquiry has been opened and closed in circumstances where HMRC were not aware of the deficiency.
>
> …
>
> 84. … The condition in section 29(5) is looking back at the position when the enquiry window closed. Hence it refers to the time when the officer "ceased to be entitled" to open an enquiry. If [HMRC's advocate] was right, Parliament would have left open the possibility that such a date might be in the future. The wording would have been 'ceases or ceased'.
>
> 85. The purpose of the two conditions in section 29 is to protect both the taxpayer and HMRC. The taxpayer is protected from an assessment if he has not been careless and if in the course of making a return, or in the course of an enquiry into a return, he has made available information from which a hypothetical officer should reasonably be expected to be aware of the deficiency. HMRC are protected because they are entitled to make a discovery assessment if the taxpayer is careless in completing a return or if the taxpayer fails to provide information from which the deficiency should be apparent by the time the enquiry window closes. HMRC do not require that protection in a case where they are still entitled to open an enquiry."

51. The FTT in *Curtis* noted that HMRC's submissions in that case, if accepted, would lead to the situation that the validity of an assessment would remain uncertain until the end of the enquiry period. Unlike the FTT in this case, the FTT in *Curtis* did not regard that as a manageable problem but as a reason for concluding that section 29(5) could not have been intended to give rise to such a result, especially where it would be preferable and straightforward for HMRC simply to open an enquiry.

52. Ms Choudhury submitted that the question was only whether the legislation gives HMRC the ability to choose whether to issue a discovery assessment during the enquiry window. She said that HMRC accepted that the opening of an enquiry and subsequent issue of a closure notice is the primary method of enforcement but that did not mean that a discovery assessment is a method of last resort. Ms Choudhury also agreed that an assessment made during the enquiry period has a precarious existence until the period has ended but maintained that it is nevertheless possible to issue an assessment in those circumstances.

53. We can deal with this ground of appeal quite briefly. We do not accept HMRC's submissions or the views of the FTT in this case. In our view, the legislation and its intended effect are clear. Section 29(3) TMA states that the taxpayer "shall not be assessed" unless one of two conditions is satisfied. In a case like the present where the condition in section 29(4) is not applicable, the words of section 29(3) amount to an unambiguous prohibition on any assessment being made while the conditions in section 29(5) have not been met. We also agree with the FTT in *Curtis* at [87] that the validity of a discovery assessment must be tested at the time it is made. The conditions in section 29(5) are temporal as is made clear by the words "at the time when". It follows that a discovery assessment made during the 'enquiry period' is invalid because the conditions in section 29(5) cannot be satisfied at that time. As the FTT in

Curtis pointed out, HMRC's view would mean that the validity of an assessment would remain uncertain until the end of the enquiry period. We do not accept that a discovery assessment issued during the enquiry period can exist in an indeterminate state like Schrödinger's cat until the enquiry period ends.

54. Accordingly, we allow Mr Norton's appeal in relation to the discovery assessment for 2016/17.

CLOSURE NOTICE ISSUE

55. The FTT found at [166] that HMRC had not validly issued a section 8 TMA notice to Mr Norton requiring him to file a return for 2015/16 and, as a result, no valid enquiry under section 9A TMA could have been opened at the time. That analysis was subject to section 12D TMA which had been inserted into the TMA, with retrospective effect, by section 87 of the Finance Act 2019. In brief, the effect of section 12D is that where a person makes a self assessment tax return otherwise than in response to a notice ('a voluntary return'), HMRC may treat a notice as having been given and the voluntary return as having been made in pursuance of it. In this case that meant that, if section 12D applied, the 2015/16 return, enquiry and closure notice were made valid retrospectively.

56. Section 12D was subject to transitional provisions which limited its retrospective effect. It was common ground that the transitional provisions in section 87(4) meant that section 12D would not apply if a letter dated 20 March 2017 from HMRC to Mr Norton was an effective closure notice in relation to the 2015/16 enquiry. In the letter of 20 March 2017, HMRC wrote:

> "Information obtained by my colleague Mr Earl as part of his employers review suggests that the car benefit figure declared on your Self Assessment returns for the tax years ended 5 April 2013 to 2016 is incorrect.
>
> I have now recalculated your tax liability using a revised figure in relation to car benefits and this has resulted in additional tax being due.
>
> In order to protect the position of HM Revenue and Customs, I have raised assessments for the tax years ended 5 April 2013 to 2015 and amended the tax return for the year ended 5 April 2016. Copies of my notices of assessment are attached.
>
> I understand that your agent, Jackson & Grimes Ltd, are currently in discussions with Mr Earl regarding the car benefit and I have therefore informally suspended collection of the additional amounts due.
>
> Once these discussions have been finalised, I will be in touch with you again regarding your tax liability."

The attachments to the letter included an amendment to the return for 2015/16.

57. In March 2017, the relevant provisions of section 28A TMA read as follows:

> "(1) An enquiry under section 9A(1) or 12ZM of this Act is completed when an officer of the Board by notice (a 'closure notice') informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section 'the taxpayer' means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued."

58. At [206], the FTT held that the 20 March 2017 letter did not constitute a closure notice within the terms of section 28A:

> "I accept that otherwise than by a closure notice … an officer cannot amend a self-assessment and that the letter clearly indicates that an amendment is being made. But I do not think that there can be read into her words the necessary formality of saying that her enquiry was at an end and that she had reached her conclusions. In particular her use of the word 'suggested' did not indicate a final conclusion."

59. The FTT then considered whether the defects could be remedied by applying section 114 TMA. Section 114(1) permits certain procedural defects in certain documents, including closure notices, to be disregarded. It provides:

> "An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

60. The FTT decided that section 114 did not overcome the defects that it had identified in the 20 March 2017 letter and gave its reasons in [210]:

> "… section 114 saves the notice only if it was "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". The provisions indicate, and the intent and meaning, of the Taxes Acts in relation to a closure notice are, that it is an important procedural event – one which thereafter limits HMRC's ability to make further adjustment or enquiries and starts time running for the taxpayer to make an appeal – and that therefore it should be a clear statement that that time had arrived. The letter of 20 March 2017 does not provide such a clear statement, and in that respect does not comply in substance with the intent of the Taxes Acts. Accordingly it is not saved by section 114."

61. Before us, Mr Gordon accepted that there was no express statement in the 20 March 2017 letter that the enquiry had come to a formal conclusion but he submitted that it was clear from the context that the enquiry had ended. He pointed out that there are no time limits governing the closure of enquiries and therefore the words "in order to protect HMRC's position" could only relate to the discovery assessments and not to the amendment to Mr Norton's 2015/16 tax return; moreover, the amendments could only be made if the officer were issuing a closure notice. He submitted that the key words in the letter of 20 March 2017 were "amended the tax return for the year ended 5 April 2016" and the only basis for such an amendment was section 28(2)(b) TMA. Mr Gordon pointed out that both parties treated the letter as a closure notice. Ten days later, Mr Norton's accountant notified appeals to HMRC and subsequently notified them to the FTT. HMRC produced a statement of case which stated that they had opened and closed an enquiry. Only subsequently, in a letter of 29 March 2019, did HMRC say that no closure notice had been issued in 2017.

62. Mr Gordon submitted that an objective reader, with the knowledge of Mr Norton about what had led to the enquiry, would assume that the HMRC officer had reached a conclusion about his tax liability for 2015/16, which was reinforced by the statement that the officer said she would be amending the return. Mr Gordon stated that the HMRC officer recognised that

she was creating an enforceable debt which she had to suspend to stop collection proceedings taking place. He pointed out that both parties considered there to have been a closure notice and the only omission was the lack of any statement that the enquiry had been concluded which was mere form and not substance. Mr Gordon contended that, in those circumstances, section 114 applies to allow any omission of form to be disregarded.

63. Ms Choudhury submitted that the absence of any stated conclusion in the letter of 20 March 2017 was fatal. She contended that this was a matter of substance because one of the substantive requirements of section 28A was simply not met and section 114 did not permit such a fundamental flaw to be disregarded.

64. There is no prescribed form for a closure notice under section 28A TMA but it must state certain matters (see *HMRC v Bristol & West plc* [2016] EWCA Civ 397 at [24] and *R (oao Archer) v HMRC* [2017] EWCA Civ 1962 at [17]). Those matters are:

(1) that HMRC have completed their enquiry;

(2) their conclusions; and

(3) either that no amendment of the return is required or the amendments that are required to give effect to the conclusions.

65. We agree with the FTT that the letter of 20 March 2017 is not a closure notice within the terms of section 28A TMA. In the letter, the HMRC officer did not tell Mr Norton that she had completed her enquiries and did not state a concluded view. The officer based her views about Mr Norton's tax position on information obtained from a colleague who was still engaged in discussions with Mr Norton's accountant. The officer only stated that the information suggested that Mr Norton owed additional tax which indicates a provisional or tentative view rather than a firm conclusion. The officer made it clear that the assessments and amendment were not final in the last two paragraphs of the letter when she stated that she had informally suspended collection of the additional amounts due until discussions between Mr Norton's accountant and her colleague had been finalised. Only then would the officer contact Mr Norton again about his tax liability and, we infer, finalise the position.

66. There was no dispute that there is nothing to preclude a taxpayer from relying upon section 114 TMA although it is usually HMRC who rely on the section. Section 114 applies to cure documents, such as purported closure notices, which would otherwise be invalid for "want of form [or because] of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". In our view, the absence of key features in the letter of 20 March 2017 such as a statement that the HMRC officer had completed her enquiries and a definitive statement of her conclusions were errors of substance rather than mere want of form. In the letter, the HMRC officer said that there were ongoing discussions between a colleague and the Company about the car benefit charge and that the officer would contact Mr Norton again about his tax liability when those discussions were finalised. This indicated that HMRC had not completed their enquiries or reached a concluded view about Mr Norton's tax liabilities. The reference to the collection of the additional amounts of tax being suspended pending completion of the discussions also indicates that the amendments notified by the letter were not final. We are forced to conclude that these show that the letter was not in substance and effect a notice of closure in conformity with or according to the intent and meaning of section 9A of the TMA. Accordingly, we dismiss Mr Norton's appeal on this ground.

DISPOSITION

67. For the reasons given above, the Company's appeal is dismissed and Mr Norton's appeal is also dismissed save in so far as it relates to the discovery assessment for 2016/17 in respect of which we allow the appeal.

COSTS

68. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is the order be made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Upper Tribunal Judge

Judge Nicholas Paines KC
Upper Tribunal Judge

Release date: 28 February 2023