AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

76TACD2022

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against Notices of Estimation of Amounts Due raised by the Revenue Commissioners (hereinafter the "Respondent") on 22nd December 2017 in respect of PAYE, PRSI, USC and LPT for the tax years 2012, 2013 and 2014.

2. The total amount of tax at issue is €54,024.

Background

3. [redacted] Limited (hereinafter the "Appellant") is a limited company involved in [redacted]. In January 2008 the Appellant purchased a [redacted] motor vehicle registration number [redacted] (hereinafter the "car") for €110,000 with the intention of selling it on to the high end Dublin taxi market. The Appellant was subsequently unable to sell the car and retained ownership of same until November 2014.

4. On foot of an audit of the Appellant by the Respondent which began in November 2015, the Respondent raised Notices of Estimation of Amounts Due for the years 2012, 2013 and 2014 on 22nd December 2017. The Notices of Estimation of Amounts Due were raised on the basis that the car was available for the personal use of Mr [redacted] (hereinafter the "Director") who was a director and 99% owner of the Appellant for the years in question and that benefit-in-kind was due on the car.

5. The amounts raised in the Notices of Estimation of Amounts Due issued on 22nd December 2017 were as follows:

Year of Assessment	Amount raised
2012	€19,045
2013	€19,045
2014	€15,934

6. The Appellant has appealed the Notices of Estimation of Amounts Due raised on 22nd December 2017 and the total amount under appeal is €54,024.

7. The oral hearing took place remotely before the Commissioner on 28th April 2022. The Director appeared on behalf of the Appellant and was represented by the Appellant's accountant and tax agent. The Respondent was represented by Revenue officers. The Commissioner heard evidence and submissions on behalf of the Appellant and submissions on behalf of the Respondent.

Legislation and Guidelines

8. The legislation relevant to the within appeal is as follows:

Section 121 of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997"):

(1)(a)In this section—

"business mileage for a year of assessment", in relation to a person, means the total number of whole kilometres travelled in the year in the course of business use by that person of a car or cars in respect of which this section applies in relation to that person;

"business use", in relation to a car in respect of which this section applies in relation to a person, means travelling in the car which that person is necessarily obliged to do in the performance of the duties of his or her employment;

"car" means any mechanically propelled road vehicle designed, constructed or adapted for the carriage of the driver or the driver and one or more other persons other than—

(a)a motor-cycle,

(b)a van (within the meaning of section 121A), or

(c)a vehicle of a type not commonly used as a private vehicle and unsuitable to be so used;

"electric vehicle" means a vehicle that derives its motive power exclusively from an electric motor;

"employment" means an office or employment of profit such that any emoluments (within the meaning of section 113) of the office or employment would be charged to tax, and cognate expressions shall be construed accordingly;

"motor-cycle" means a mechanically propelled vehicle with less than four wheels and the weight of which unladen does not exceed 410 kilograms;

"private use", in relation to a car, means use of the car other than business use;

"relevant log book", in relation to a person and a year of assessment, means a record maintained on a daily basis of the person's business use for the year of assessment of a car or cars in respect of which this section applies in relation to that person for that year of assessment which—

(i)contains relevant details of distances travelled, nature and location of business transacted and amount of time spent away from the employer's place of business, and

(ii)is certified by the employer as being to the best of the employer's knowledge and belief true and accurate.

(b)For the purposes of this section—

(i) *(I)a car made available in any year to an employee by reason of his or her employment shall be deemed to be available in that year for his or her private use unless the terms on which the car is so made available prohibit such use and no such use is made of the car in that year;*

(II)a car made available to an employee by his or her employer or by a person connected with the employer shall be deemed to be made available to him or her by reason of his or her employment (unless the employer is an individual and it can be shown that the car was made so

available in the normal course of his or her domestic, family or personal relationships);

(III)a car shall be treated as available to a person and for his or her private use if it is available to—

(A)a member or members of his or her family or household,

(B)his or her civil partner,

(C)a member or members of the family or household of his or her civil partner,

(D)any spouse or civil partner of a child of the person, or

(E)any spouse or civil partner of a child of the civil partner of the person;

(IV)references to a person's family or household are references to the person's spouse, sons and daughters and their spouses, parents and servants, dependants and guests;

(ii)in relation to a car in respect of which this section applies, expenditure in respect of any costs borne by a person connected with the employer shall be treated as borne by the employer;

(iii)the original market value of a car shall be the price (including any duty of customs, duty of excise or value-added tax chargeable on the car) which the car might reasonably have been expected to fetch if sold in the State singly in a retail sale in the open market immediately before the date of its first registration in the State under section 6 of the Roads Act, 1920, or under corresponding earlier legislation, or elsewhere under the corresponding legislation of any country or territory.

(2)(a)In relation to a person chargeable to tax in respect of an employment, this section shall apply for a year of assessment in relation to a car which, by reason of the employment, is made available (without a transfer of the property in it) to the person and is available for his or her private use in that year.

(b)In relation to a car in respect of which this section applies for a year of assessment—

(i)Chapter 3 of this Part shall not apply for that year in relation to the expense incurred in connection with the provision of the car,

(ii)there shall be treated for that year as emoluments of the employment by reason of which the car is made available, and accordingly chargeable to income tax, the amount, if any, by which the cash equivalent of the benefit of the car for the year exceeds the aggregate for the year of the amount which the employee is required to make good and actually makes good to the employer in respect of any part of the costs of providing or running the car,

…

(3)(a)The cash equivalent of the benefit of a car for a year of assessment shall be 30 per cent of the original market value of the car.

(b)Where a car in respect of which this section applies in relation to a person for a year of assessment is made available to the person for part only of that year, the cash equivalent of the benefit of that car as respects that person for that year shall be an amount which bears to the full amount of the cash equivalent of the car for that year (ascertained under paragraph (a)) the same proportion as that part of the year bears to that year.

(c)This subsection is subject to subsection (4A) for the year of assessment 2023 and subsequent years.

(d)This subsection is subject to subsection 5 (4B) for years of assessment 2009 and subsequent years.

…

7(a)This subsection shall apply to any car in the case of which the inspector is satisfied (whether on a claim under this subsection or otherwise) that it has for any year been included in a car pool for the use of the employees of one or more employers.

(b)A car shall be treated as having been so included for a year if—

(i)in that year the car was made available to and actually used by more than one of those employees and in the case of each of them was made

available to him or her by reason of his or her employment but was not in that year ordinarily used by any one of them to the exclusion of the others,

(ii)in the case of each of them, any private use of the car made by him or her in that year was merely incidental to his or her other use of the car in the year, and

(iii)the car was in that year not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.

(c)Where this subsection applies to a car, the car shall be treated under this section as not having been available for the private use of any of the employees for the year in question.

(d)A claim under this subsection in respect of a car for any year may be made by any one of the employees mentioned in paragraph (b)(i) (they being referred to in paragraph (e) as "the employees concerned") or by the employer on behalf of all of them.

(e)(i)An employer aggrieved by a decision of the inspector that a car has not been included in a car pool for the use of the employees of one or more employers may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 2 months after the date of the notice of that decision.

(iii)On an appeal against the decision of the inspector on a claim under this section all the employees concerned may take part in the proceedings, and the determination of the Appeal Commissioners shall be binding on all those employees, whether or not they have taken part in the proceedings.

(iv)Where an appeal against the decision of the inspector on a claim under this subsection has been determined, no appeal against the inspector's decision on any other such claim in respect of the same car while in the same car pool and the same year shall be entertained."

Submissions

Appellant's Submissions

9. The Commissioner heard sworn evidence from Mr [redacted] and from the Director at the oral hearing.

Witness 1 – Mr [redacted]

10. Mr [redacted] stated that he is the Brand Manager for [redacted] and that in the years 2001 – 2008 he was responsible for sales in [redacted] which was a dealership that was involved in selling multiple brands of vehicles.

11. Mr [redacted] stated that he remembered the sale of the car to the Appellant, through the Director, which he stated was a high end luxury vehicle. He stated that an agreement for the Appellant to purchase the car was made at the end of 2007. The car was already in stock in [redacted] and was registered and delivered in early January 2008.

12. In relation to the car the subject matter of the within appeal, Mr [redacted] stated that vehicles of that type are made up of a lot of control units and consumables as a result of which they need to be driven a minimum of once a month. He stated that in his experience vehicles that have not been driven for periods as short as 5 or 6 weeks can experience brake corrosion and as a result, in his experience, vehicles need to be driven at least once per month for between 100 and 250 km to ensure this does not happen. He stated that if vehicles such as the car the subject matter of the within appeal are not driven at least once per month they can experience difficulties with their safety and control units as well as their batteries, all of which are costly to replace. In addition Mr [redacted] stated that low mileage affects the catalytic converter in vehicles which may not clear themselves if a vehicle is not driven regularly.

13. Mr [redacted] stated that over the years following the purchase of the car the Director was in contact with him every now and again. He stated that the economic crash from 2008 onwards adversely affected the value of vehicles and in particular the value of high end luxury vehicles such as the car which the Appellant purchased. He stated that high end vehicles were not attractive vehicles to be seen in at that time.

Witness 2 – the Director

14. The Director gave a history of the purchase of the car and stated that in 2007 the Appellant had supplied [redacted] to a construction company which was upgrading [redacted] buildings. He stated that there was difficulty in securing payment from the construction company and as a result he approached Mr [redacted] to see if there

was any possibility that he could assist with securing payment. The Director stated that Mr [redacted] came up with the idea that if he assisted the Appellant in securing payment of the outstanding monies, the Appellant would purchase the car the subject matter of the within appeal with a view to the Appellant selling it on to the high end taxi market in Dublin.

15. The Director stated that the Appellant has a fleet of approximately 30 vehicles most of which are made up of [redacted], vans, pick-ups and jeeps. He stated that the Appellant does not, and did not during the relevant periods, have any company cars other than the car the subject matter of the within appeal. He stated that the Appellant owns a [redacted] jeep which was purchased in 2006 which is needed to transfer personnel from site to site or from site back to base. In addition the jeep is needed to assist in the workings of the garage which the Appellant operates for servicing the company fleet, for refuelling [redacted] and for travel to the company [redacted].

16. The Director stated that the car was registered at the beginning of 2008 and was delivered to the Appellant's premises where it was kept until it was sold in 2014. He stated that the car was kept overnight at the Appellant's premises and was used as a pool car for the office staff in the Appellant's business and was used whenever staff would need to make bank lodgements or travel to meet customers and collect cheques. He stated that the only people that used the car were himself and two other office staff members.

17. The Director stated that the mileage on the car at the time it was sold in 2014 was in or around 38,000 km and that the National Car Test Certificates for 2012 and 2014 for the car showed an average mileage on the car of 112 km per week. He stated that the Appellant's offices are based in or around 8 km from [redacted] where the nearest bank is located. He stated that part of the reason for the use of the car as a pool car was to ensure that the car was used and that the battery was kept charged up. He stated that he and the office staff were aware that the car should not be driven too much as it was intended that the car would be sold. He stated that the car was not used privately.

18. In relation to his own personal vehicle, the Director stated that he purchased a [redacted] vehicle in 2006 which he still has, although he was unable to give the exact registration number of the car he stated that it begins with [redacted]. He stated that his wife had an [redacted] vehicle in 2012 which was subsequently sold and replace by a [redacted]. He stated that his wife would also drive the [redacted].

19. In written submissions the Appellant submitted that section 121 of the TCA1997 is a charging provision and that the Respondent must show that the Appellant comes clearly within its provisions. The Appellant referred to the following dicta of Barrington J in the case of *O'Coindealbhain –v- Gannon* 111 ITR 484

"The principle of legal interpretation to be applied to the construction of Revenue statutes are well established. It is a general principle that to be liable to tax the citizen must come clearly within its words…"

20. The Appellant submitted that section 121 of the TCA1997 provides for a charge to income tax on the benefit arising to an employee who, by reason of his or her employment, has a motor car owned by his or her employer which is made available for his or her private use.

21. The Appellant submitted that section 121(2)(a) of the TCA1997 states that:

"*In relation to a person chargeable to tax in respect of an employment, this section shall apply for a year of assessment in relation to a car which, by reason of the employment is made available (without a transfer of the property in it) to the person and is available for his or her private use*"

22. In addition the Appellant submitted that section 121(1)(b)(i) of the TCA1997 which states:

"*a car made available in any year to an employee by reason of his or her employment shall be deemed to be available in that year for his or her private use unless the terms on which the car is so made available prohibit such use and no such use is made of the car in that year* "

23. The Appellant submitted that for this charging provision to apply a vehicle must be available for an employees' private use. This, it was submitted, is different to the position with the car the subject matter of the within appeal where the use of the car was in the context of preventing mechanical degeneration to its engine and other body parts and not in the context of being made available to the employee for private use.
24. Reference was made by the Appellant to section 121(3)(b) of the TCA1997 which states:

"*Where a car in respect of which this section applies in relation to a person for a year of assessment is made available to the person in part only of that year, the cash equivalent of the benefit of that car as respects that person for that year shall be the amount which bears the full amount of the cash equivalent of the car for that year (ascertained under paragraph (a)) the same proportion as that part of the year bears to that year*."

25. It was submitted that even if this charging provision as set out in section 121 of the TCA1997 applies, the quantum of the benefit-in-kind charge imposed on the employee

must be by reference to the length of time in the particular income tax year it was made available for his or her private use.

26. The Appellant submitted that it does not accept as being a valid the contention advanced by the Respondent that, as result of the [redacted] jeep being a company vehicle, the car was made available to the Director.

27. Reference was made to Section 121(7) of the TCA1997 which relates to any car that has for any year been included in a car pool for the use of the employees of one or more employers. In particular reference was made to section 121(7)(b) and (c) of the TCA1997 which states:

> "*(b)A car shall be treated as having been so included for a year if—*
>
> > *(i)in that year the car was made available to and actually used by more than one of those employees and in the case of each of them was made available to him or her by reason of his or her employment but was not in that year ordinarily used by any one of them to the exclusion of the others,*
> >
> > *(ii)in the case of each of them, any private use of the car made by him or her in that year was merely incidental to his or her other use of the car in the year, and*
> >
> > *(iii)the car was in that year not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.*
>
> *(c)Where this subsection applies to a car, the car shall be treated under this section as not having been available for the private use of any of the employees for the year in question.*"

28. It was submitted that the car was normally kept overnight at the Appellant's business premises and that it was used by more than one employee and was not used ordinarily by any one of them. It was submitted that any private use of the car would have been incidental.

29. It was submitted that if the charging provision contained in section 121 of the TCA1997 applies, the pool car exemption set out in section 121(7) of the TCA1997 is relevant to the car in that it was a pool car.

Respondent's Submissions

30. The Respondent submitted that the benefit-in-kind provisions contained in section 121 of the TCA1997 apply in respect of the car the subject matter of the within appeal. The Respondent submitted that an audit was carried out on the Appellant beginning on 16th November 2015 during which a number of queries were raised by the Respondent.

31. The Respondent submitted that it is not satisfied that sufficient evidence has been provided by the Appellant that the car was only used for business purposes for the following reasons:

    i. No log of business use for the car was kept by the Appellant;

    ii. The National Car Test Certificates which were submitted by the Appellant contained mileage which was is not consistent with trips to the bank as claimed by the Appellant;

    iii. The evidence of Mr [redacted] was that 250 km per month was sufficient mileage to keep the car from degenerating;

    iv. The [redacted] jeep was available for company business;

    v. It is difficult to understand that a car dealer could not secure a purchaser for the car for in excess of 7 years;

    vi. No evidence has been adduced by the Appellant that private use was prohibited as set out in section 121(1)(b) of the TCA1997.

32. The Respondent submitted that the car was made available to the Director and the basis of this submission was that the Appellant's [redacted] jeep was used for business purposes by the Director and that therefore the car was made available for the Director's private use.

33. The Respondent submitted that it was irrelevant whether private use was actually made of the car by the Director and that it is sufficient that private use of the car was made available to the Director in order for the provisions of section 121(1) of the TCA1997 to apply.

Material Facts

34. The material facts are at issue in the within appeal:

    i. The Appellant purchased a [redacted] car bearing the registration number [redacted] in January 2008;

    ii. The car was available for the private use of the Director;

    iii. The car was a pool car until its sale in 2014.

35. The Commissioner has considered the material facts at issue.

    <u>The Appellant purchased a [redacted] car bearing the registration number [redacted] in January 2008:</u>

36. In opening submissions the tax agent for the Appellant submitted that the car the subject matter of the within appeal was paid for by the Appellant because the Appellant owed money to the Director in the form of a director's loan and that the amount paid for the car was netted off against the director's loan at the time of purchase. The tax agent then stated that the car was transferred by the Director to the Appellant at the beginning of January 2008 as a result of it not being possible to sell the car due to the economic crash in 2008.

37. In direct evidence Mr [redacted] gave evidence that in late 2007 an agreement was made between the Appellant and [redacted] for the purchase of the car and that the car, whilst it was in stock at [redacted] at the time of the agreement, was registered and delivered in early January 2008.

38. When asked by the Commissioner why the car had first been registered in his name the Director stated that he was 100% sure that the car was first registered in the Appellant's name on 2nd January 2008 and that the submission made by his tax agent that it had first been registered in his name and then transferred to the Appellant in early 2008 was incorrect.

39. Whilst no copy of the original registration and ownership of the car has been submitted to the Commissioner no issue has been raised by the Respondent which suggests that there is a dispute as to who purchased the car. It is accepted by all Parties that the car was first registered in January 2008 and that it bears the registration number [redacted].

40. The Commissioner asked the Director to explain the circumstances surrounding the purchase of the car and in particular why the Appellant would take on the risk of purchasing such a high end car. In response the Director stated that Mr [redacted] assistance in

securing payment of the debt from the Appellant's customer was contingent upon the agreement for the Appellant to purchase the car. It was a type of *quid pro quo* or a "you scratch my back" situation and that Mr [redacted] would not have assisted with seeking the payment of the debt for the Appellant in the absence of the agreement for the purchase of the car. He stated that in hindsight it would have been better if the Appellant had not purchased the car given what happened with the economy in 2008 and the subsequent failure to sell the car into the high end taxi market.

41. Having considered the above the Commissioner finds that the Appellant's tax agent was in error when he made his opening submissions to the Commissioner and the Commissioner further finds that the Appellant purchased a [redacted] car bearing the registration number [redacted] in January 2008. Therefore this material fact is accepted.

The car was available for the private use of the Director:

42. Section 121(1)(a) of the TCA1997 defines "*business use in relation to a car in respect of which this section applies in relation to a person, means travelling in the car which the person is necessarily obliged to do in the performance of the duties of his or her employment*".

43. Section 121(1)(a) of the TCA1997 defines "*private use in relation to a car"* as meaning "*use of the car other than business use.*".

44. Section 121(b) provides as follows:

"(b)For the purposes of this section—

(i) (I)a car made available in any year to an employee by reason of his or her employment shall be deemed to be available in that year for his or her private use unless the terms on which the car is so made available prohibit such use and no such use is made of the car in that year;

(II)a car made available to an employee by his or her employer or by a person connected with the employer shall be deemed to be made available to him or her by reason of his or her employment (unless the employer is an individual and it can be shown that the car was made so available in the normal course of his or her domestic, family or personal relationships);

(III)a car shall be treated as available to a person and for his or her private use if it is available to—

(A)a member or members of his or her family or household,

(B)his or her civil partner,

(C)a member or members of the family or household of his or her civil partner,

(D)any spouse or civil partner of a child of the person, or

(E)any spouse or civil partner of a child of the civil partner of the person;"

45. The Commissioner has considered the submissions made on behalf of both Parties along with the relevant legislation in relation to this, and all, material facts.

46. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter "*Perrigo*"), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in* Dunnes Stores v. The Revenue Commissioners *[2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in* Bookfinders Ltd v. The Revenue Commissioner *[2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*
> >
> > *(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*
> >
> > *(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners*, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in* Revenue Commissioners v. Doorley *[1933] I.R. 750 where Kennedy C.J. said at p. 766:*

> *"*Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible*".*

47. Section 121(b)(i)(I) provides that "*a car made available in any year to an employee by reason of his or her employment shall be deemed to be available in that year for his or her private use unless the terms on which the car is so made available prohibit such use and no such use is made of the car in that year".*

48. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner finds that the words of the statutory provision contained in section 121(1)(b)(i)(I) of the TCA1997 are plain and their meaning is self-evident. The

Commissioner finds that applying the ordinary, basic and natural meaning of the words of that section means that where a car is made available in any year to an employee by reason or their employment that car shall be deemed to be available in that year for their private use unless:

i. the terms on which the car is made available prohibit private use; and

ii. no private use of the car is made by the employee in that year.

49. Therefore the test set out in section 121(b)(i)(I) is a two stage test, the first of which being whether the terms on which the car was made available prohibited private use of the car and the second of which being whether no private use of the car was made by the employee that year. Both of these parts of the two stage test must be satisfied in order to establish that a car does not fall within the charge to tax contained in section 121 of the TCA1997.

50. In relation to the first stage of the test, no evidence was submitted to the Commissioner during the course of the appeal which established that private use of the car was prohibited by the Appellant.

51. In relation to the second stage of the test, the evidence given by the Director was that the car was only used in conjunction with the Appellant's business, specifically it was used for travel to make lodgements in the bank and also to visit customers and collect cheques.

52. The Respondent submits that there was no log of business use kept for the car, the mileage on the car is no consistent with trips to the bank as claimed, the evidence was that 250 km per month was sufficient mileage to keep the car from degenerating, the [redacted] was available for business use and no evidence has been adduced by the Appellant that private use was prohibited are all reasons which point to the car being made available for the Appellant's private use. In addition the Respondent submits that it is difficult to believe that a car dealer could not secure a purchaser for the car for in excess of 7 years.

53. The Commissioner has considered all of the evidence submitted during the course of the within appeal. The evidence given by the director was clear and uncontested. The Director stated that the car was not used for personal use and that it was kept on the Appellant's premises except when it was being used for business purposes.

54. The Director has given evidence that no private use of the car was made and in support of this the Appellant has submitted the National Car Test Certificates for the car for 2012 and 2014 which set out the following mileage for the car on the following dates:

18th January 2012 25,838 km

3rd March 2014 38,212 km

55. The mileage contained in the National Car Test Certificates represents a usage of 12,374 km over a period of 110 weeks. This represents an average weekly usage of 112 km.

    i. It has not been established that the terms on which the car was made available to the Director prohibited private use; and

    ii. It has been established that no private use of the car was made during the relevant periods.

56. As the Appellant has not satisfied the first part of the two stage test, the Commissioner finds that the car was available for the private use of the Director. Therefore this material fact is accepted.

    <u>The car was a pool car until its sale in 2014:</u>

57. The Appellant submits that, if the car does fall within the charge to tax contained in section 121, the car was a pool car until its sale in 2014.

58. Section 121(7) of the TCA1997 provides that a car shall be treated as if it has been included in a car pool for the use of employees in any year if:

    i. the car was made available to and actually used by more than one of those employees and in the case of each of them was made available to him or her by reason of his or her employment but was not in that year ordinarily used by any one of them to the exclusion of the others;

    ii. in the case of each of them, any private use of the car made by him or her in that year was merely incidental to his or her other use of the car in the year, and

    iii. the car was in that year not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.

59. The Director gave unchallenged direct evidence that the car was only used for company business and that it was kept on the Appellant's premises at all times. He stated that he lives approximately 5 miles from the Appellant's premises and that he never used the car for personal use. The Director also gave evidence that the car was mainly used by two of the Appellant's office employees when they needed to make bank lodgements or to meet with customers and collect cheques.

60. The Director stated in direct evidence that his personal car was a 2006 [redacted] which he purchased in 2006 and that in his home there was also an [redacted] which was

later changed for a [redacted]. It was put to the Director that he had never provided the Respondent with the registration number of the [redacted]. In response the Director stated that it is [redacted] although he was unable to provide the full registration number.

61. On cross examination it was put to the Director that he had confirmed in 2017 that the [redacted] was for his daughter's use and that his wife had a [redacted] vehicle. It was put to the Director that he did not have exclusive use of the [redacted] or the [redacted]. In response the Director stated that his wife often used all of the cars but that there would always have been a car available to him.

62. The Commissioner has considered the evidence and submissions made on behalf of both the Appellant and the submissions made on behalf of the Respondent. The Commissioner accepts the evidence given by the Director that the car was used only for business purposes. The mileage for the car as set out in the National Car Test Certificates was on average 112 km per week. The Director gave evidence that lodgements would regularly be made to the Appellant's bank account and that the car would be used for meeting customers and collecting cheques and that this would be done by the office staff. He gave evidence that the nearest bank to the Appellant's premises is 8 km away. The Commissioner accepts that this would have necessitated a 16 km round trip to the bank a number of times per week by one of the Appellant's office staff. The Commissioner also accepts the reality that the Appellant's business would have involved the need to travel to meet customers and to collect cheques. In particular the Commissioner accepts that the economic realities of the years 2012, 2013 and 2014 for which the Notices of Estimation of Amounts Due were raised meant that travelling to meet customers and collect cheques would not have been an unusual activity for a business involved in [redacted]

63. The Commissioner accepts the Appellant's evidence that he had his own private vehicle and had access to a private vehicle other than the car the subject matter of the within appeal during the periods for which the Notices of Estimation of Amounts Due were raised.

64. Having considered all of the above the Commissioner finds on the balance of probabilities that the car the subject matter of the within proceedings was a pool car as set out in section 121(7) of the TCA1997 and until its sale in 2014. Therefore this material fact is accepted.

Analysis

65. As with all appeals before the Commission the burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of

proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> "*This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable*."

66. The Commissioner has considered the submissions made on behalf of both Parties along with the relevant legislation and the material facts.

67. The Commissioner has accepted as material facts that the Appellant purchased the car in January 2008, that the car was available for the personal use of the Director and that the car was a pool car until its sale in 2014.

68. The Commissioner must now consider the provisions of section 121(7)(c) of the TCA1997 which provides that where it has been determined that a car is a pool car:

> "*… the car shall be treated under this section as not having been available for the private use of any of the employees for the year in question.*"

69. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner finds that the words of the statutory provision contained in section 121(7) of the TCA1997 are plain and their meaning is self-evident. The Commissioner finds that the use of the word "*shall*" in section 121(7)(c) of the TCA1997 indicates a mandatory provision and that where it has been determined that a car is a pool car it shall be treated as not having been available for the private use of any of the employees for the year in question.

70. The Commissioner has already found as a material fact that the car the subject matter of the within appeal was a pool car. Therefore, pursuant to section 121(7) of the TCA1997 the Commission must find that the car the subject matter of the within appeal shall be treated as not having been made available for the private use of any of the Appellant's employees for the years 2012, 2013 and 2014 for which the Notices of Estimation of Amounts Due were raised and that the benefit-in-kind which was applied in the Notices of Estimation of Amounts Due raised by the Respondent was incorrectly applied.

71. The Commissioner notes that the circumstances of the within appeal are unusual and in particular notes the highly unusual circumstances in which the Appellant purchased the car the subject matter of the within appeal.

Determination

72. For the reasons set out above, the Commissioner determines that the Appellant has succeeded in its appeal and that the Notices of Estimation of Amounts Due which were raised by the Respondent for the years 2012, 2013 and 2014 on 22nd December 2017 shall not stand.

73. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
11th May 2022