



FIELD COURT TAX CHAMBERS

Benefits in kind and motor cars¹

When is a car 'available'?

Everybody knows about car benefits. If you have a car provided for you by your employer then you have to pay tax on a benefit in kind.

To be more precise, ITEPA 2003 s 114 provides that the taxable benefit applies if, in the tax year, the car is made available to the employee by reason of his employment and it is available for the employee's private use.

In the recent case of *Tim Norton Motor Services Ltd v HMRC* [2020] UKFTT 503 (TC) (reported in *Tax Journal*, 29 January 2021), the First-tier Tribunal examined the meaning of 'available' in this context.

Mr Norton had two vehicles which had been made available to him by his employer, but they were not used by Mr Norton during the relevant years and the question arose whether they were nevertheless available for his private use. If so, he was liable to a car benefit charge.

The cars were off the road and subject to a SORN declaration (a statutory off road notification) and to drive them would have been a criminal offence. Mr Norton said that the cars were therefore not available for his use. The tribunal judge did not agree. He said that this potential illegality did not prevent the cars being available because the restriction on their use could easily be remedied.

Mr Norton suggested that such a conclusion would mean that the 40 or so cars on the company's forecourt would be equally available to him and he should be charged a benefit on all of them. That would seem to follow. Mr Norton was a director of the company and had the authority to use any of them. They may not have been immediately available to him but that could easily be remedied.

However, the judge said that the charge on the cars on the forecourt 'would not arise unless in fact Mr Norton did use the cars for private use.

I would respectfully suggest that this misses the point. Mr Norton did not use the cars on the forecourt – but neither did he use the two cars that were off the road in the relevant years. However, the judge held that a benefit still arose because Mr Norton had used the cars privately in other years. This is not easy to reconcile with the terms of s 114 which provides that the taxable benefit applies for a particular tax year if in that year the car was available for his private use.

The statutory test in s 114 is that the car 'is available' for his private use. The test is not that the car 'is not available but could easily become available'. The acknowledgement that the car

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is unavailable but could become available must mean that it does not satisfy the statutory test of being available – until such time as the unavailability is in fact remedied.

In any event, it is unclear how easy it needs to be to remedy the unavailability. A car which has a minor fault and is in a garage untaxed and uninsured could easily be fixed and would presumably be regarded as available. But what if the fault is not so minor, or nobody is available to fix it? Or it would be an easy job for a mechanic, but not for the employee. And so on. The permutations are endless.

This is a difficult point on which some judicial guidance was clearly required, but we seem to be left with more questions than answers.

It is interesting to note that the test used by the tribunal conflicts with the HMRC manuals. (That also raises the obvious question why the matter ended up at the tribunal in the first place).

In the *Employment Income Manual* at EIM21888 dealing with assets available for use, HMRC say that an asset is unavailable if:

- it is undergoing repair;
- it cannot lawfully be used; or
- is not in a fit condition to be used

When it comes to motor vehicles there is a 30 day test of unavailability in ITEPA 2003 s 143 before the lack of availability starts to scale down the taxable benefit, but that would clearly have been satisfied by Mr Norton in the relevant years.

HMRC says (at EIM25170) that a vehicle is unavailable if:

- it is physically incapable of being used (for example, it is broken down or in a garage undergoing repairs); or
- the employer is unable to gain access (for example he does not have the keys nor able to get hold of them).

Mr Norton may feel that he has been rather hard done by. The rest of us could certainly do with some clarification here. The tribunal did not expressly refer to the manuals, but it nevertheless clearly rejected the published HMRC practice on the meaning of availability. Many may struggle to conclude that the tribunal has found the right test.

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