[2019] UKFTT 0072 (TC)

TC06956

5 **Appeal number: TC/2017/06318/06319/06320**

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – Benefits from availability of cars and use of fuel cards – whether* Apollo Fuels *applies because fair bargain – payments for private use – whether discovery assessments on
10 ***directors met conditions in s 29 TMA – effect of discovery assessment where enquiry still in train – application of s 32 TMA – whether NICs decision on Class 1A correct – whether penalties under Schedule 24 FA 2007 apply – careless or deliberate or neither? – whether penalties under regulation 81 SSCR 2001 apply – income tax appeals allowed – NICs appeals allowed in part.***

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FIRST-TIER TRIBUNAL
TAX CHAMBER

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(1) PAUL HARRISON **Appellants**
(2) LEE SOLWAY
(3) HARRISON SOLWAY LOGISTICS LTD

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
ANN CHRISTIAN

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Sitting in public at Alexandra House, Manchester on 15 November 2018

Stephen Outhwaite of Outhwaite Associates Ltd for the Appellants
Richard Jones, Litigator, HM Revenue & Customs, for the Respondents

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DECISION

1. This hearing was of appeals by Mr Paul Harrison ("Mr Harrison") and Mr Lee Solway ("Mr Solway") (together "the directors") against:

(1) Discovery assessments on each of them for the tax years 2010-11, 2011-12, 2012-13 and 2013-14.

(2) Amendments to their tax returns made in closure notices following an enquiry into each of their returns for 2012-13.

(3) Penalties under Schedule 24 Finance Act ("FA") 2007 for inaccuracies in their returns for all four tax years.

2. The hearing was also of appeals by Harrison Solway Logistics Ltd ("HSL") against decisions made by HMRC on HSL in relation to Class 1A National Insurance Contributions ("NICs") and penalties for its failure to deliver to HMRC returns of benefits provided by it to Mr Harrison and Mr Solway for the purposes of Class 1A NICs.

3. In addition a number of determinations (including penalty determinations) and decisions made by HMRC on HSL in respect of PAYE and of primary and secondary Class 1 NICs had been appealed by it and were included in the matters listed for hearing. We were informed at the start of the hearing that these matters, which covered tax years from 2007-08 to 2011-12 and involved amounts of over £1,700,000, had been agreed in principle in a very much smaller aggregate amount, but that no s 54 Taxes Management Act 1970 ("TMA") agreement had been made. We therefore have, in our decision, varied the determinations etc concerned in principle in accordance with the parties' agreement as to figures without specifying what the figures are for each tax etc for each tax year.

Evidence and Facts

4. We had witness statements from Mr Martin Bland and Mr Stephen Forsythe, officers of HMRC who had succeeded Ms Claire Lucas and Mr John Carruthers, the officers who opened the enquiries and checks. Those officers gave evidence and were cross-examined by Mr Outhwaite.

5. There were no witnesses listed for the appellants. We checked at the start of the hearing if Mr Outhwaite proposed to call either Mr Harrison or Mr Solway or both, given that one at least of them was present in the hearing room. Mr Outhwaite said he was not so proposing, even though we warned him that since much of the appellants' case relied on there being oral arrangements and agreements not reflected in the written evidence we would be left making what inferences we could from the documents we had.

6. From the documents supplied in our bundle which were exhibits to the witness statements of Mr Bland and Mr Forsythe we set out, as findings of fact, a chronology of events relevant to the dispute that remains outstanding.

7. For all tax years concerned Mr Harrison and Mr Solway were directors of HSL, the shares in which they owned 50% each.

8. On 23 May 2013 HMRC opened a check of HSL's employer records. The information that HMRC required included details of company cars.

5 9. At a meeting held on 16 July 2013 HMRC were told that there were no company cars, but that the directors had leased cars the costs of which are paid by direct debit and taken to their loan accounts[1]. The directors had a "BE card", a fuel card, which they used when they filled their private cars, and the cost of that was also taken to their loan accounts.

10 10. On 24 July 2013 HMRC asked for copies of the directors' loan accounts ("DLAs") for 2009-10 to 2012-13 inclusive.

11. In a letter from Dutton Moore, Chartered Accountants, of 12 December 2013 HMRC were given the DLAs as at 30 June 2009 to 2012 inclusive[2]. What we find from the DLAs is set out later.

15 12. At a meeting on 12 June 2014 between HMRC, the directors, Mrs Solway, HSL's bookkeeper, and Mr Bullock of Dutton Moore, Ms Claire Lucas of HMRC said she had identified various cars (we assume in the DLAs) and asked if these were personal cars of the directors and if they were leased and Kerry Solway confirmed that they were. Ms Lucas requested the lease agreements and referred to two tax cases, *Apollo Fuels*
20 *Ltd*[3] ("*Apollo*") and *Whitby v Ball*[4].

13. On 18 June 2014 Ms Lucas wrote to Dutton Moore asking for the lease agreements and said "[d]epending on the type of leases sometimes these arrangements fall within Section 114(1)(a) ITEPA 2003". She also asked for full details of the vehicles if they were not specified in the lease agreements.

25 14. On 23 September 2014 Dutton Moore provided lease agreements for Mr & Mrs Solway, but said that Mr Harrison could not find his agreements. We set out relevant terms of these and other agreements later.

15. On 2 October 2014 Ms Lucas wrote to Dutton Moore saying she would charge a car and fuel benefit on Mr Solway and Mr Harrison in relation to both cars but would
30 "as a concession" treat the lease payments debited to the DLAs as a private use contribution. She asked for details of all cars on lease agreements for the "last four

[1] There is also a reference to "Rovers" in the notes of the meeting but from the context we take this to refer to Hull Kingston Rovers Rugby League Club.
[2] Oddly when the Tribunal asked at the hearing to see the DLAs it was stated by Mr Outhwaite that he did not have them and that they had been supplied to HMRC, but Mr Jones did not refer us to the bundles but said that they were in HMRC's possession. We directed that they be supplied after the hearing, which they were.
[3] This would, we assume, have been a reference to the Upper Tribunal decision *HMRC v Apollo Fuels Ltd* [2014] UKUT 95 (TCC).
[4] This is a somewhat garbled reference to *Whitby & Ball v HMRC* [2009] UKFTT 311 (TC).

years". Her colleague Mr Carruthers would open section 9A TMA enquires into the director's returns[5].

16. On 8 January 2015 Ms Lucas, not Mr Carruthers, opened enquiries into the 2012-13 tax returns of both Mr Solway and Mr Harrison. The letters opening the enquiries addressed to the directors did not say what information was required, but the letters to Dutton Moore did, and they asked for details of company cars provided to the directors for the 3 years 2010-11, 2011-12 and 2012-13, and, if the benefit of the cars had not been shown on their 2013-14 tax returns, for that year as well. The specific details were the dates each car was made available, the make and model and the registrations.

17. On 28 January 2015 there was a meeting at Dutton Moore's offices between them and HMRC. Mr Bullock of Dutton Moore said that he had to concede that a charge on benefits was due and Mr Carruthers confirmed that HMRC would give them a reduction for the lease payments that had been paid. For periods when Kerry Solway was not a employee the tax would be charged on Mr Solway in respect of a family member.

18. Mr Carruthers wrote to Dutton Moore on 29 January 2015 confirming what had been said at the meeting and saying that HMRC accepted that the directors had not been careless in omitting the benefit charges from their returns. He added that HSL would be liable to pay Class 1A contributions, and that they had failed to file Forms P11D.

19. On 13 March 2015 Dutton Moore sent HMRC a schedule of cars and said that HSL did not believe P11Ds were due as they had charged amounts through the DLA.

20. On 26 March 2015 Mr Carruthers queried some of the detail of the cars.

21. On 29 April 2015 a meeting was held between HMRC and Mr Stephen Outhwaite who had begun to act for the appellants. HMRC explained that their figures for car benefits were necessarily estimated but they had taken Mr Carruthers' concession about private use contributions into account.

22. On 13 May 2015 HMRC gave Mr Outhwaite their analysis of the car and fuel benefit figures with the concessionary allowance.

23. On 9 November 2015 HMRC issued determinations of Class 1A NICs in relation to the directors' car and fuel benefits.

24. On 21 April 2016 Mr Outhwaite phoned HMRC to say that the directors could not stomach the car and fuel benefit liabilities and said that they felt no benefits had accrued to them. The HMRC officer taking the call, Mr Bland, who had succeeded Mr Carruthers, said that if the matter went to the Tribunal there would be no concession.

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[5] This must mean Mr Solway.

25. On 11 May 2016 Mr Outhwaite wrote to HMRC claiming that the arrangements made in this case followed that in *Apollo*[6] and said he intended to pursue this element of the case to the Tribunal. He argued that in HSL's view there was an "oral and de facto implied arrangement between the company and the directors in respect of the leased vehicles".

26. HMRC replied on 20 July 2016 giving their views on *Apollo* and what sort of payments would be acceptable to them as establishing that no benefit had been provided. These did not include cases where monthly lease payments were debited to an overdrawn DLA which remained overdrawn at year end, and they said that the appellants had not shown any documentary evidence that supported an acceptable method of payment.

27. On 23 September 2016 HMRC wrote to Mr Outhwaite with the views of their technical specialists. Mr Bland said that he had seen no evidence to support the claim that there was a "verbal agreement between the directors and the company" and that had such an agreement existed "effectively passing company property to the directors there would have been at least a minute in the notes of a director's (*sic*) meeting". Nor had it, he said, been shown that the directors met all the costs in respect of the vehicles.

28. On 27 January 2017 there was a further meeting between HMRC and Mr Outhwaite. No agreement was reached on benefits or on penalties.

The hire agreements

29. There was in the bundle a hire purchase agreement between BMW Financial Services GB Ltd and HSL in respect of a Land Rover Discovery in which were stated:

Amount of credit	£39,000
Duration of agreement	60 months
Total Amount payable	£57,590.80
First and last repayment	£928.88
58 other repayments	£779.88
The cash price of the vehicle was	£49,500
Advance payment	£10,500
Total charge for credit	£8,090 of which
Interest	£7,792
Fees	£298

30. The terms of this agreement included that until the vehicle was returned or acquired by HSL they must not sell, rent or dispose of it or attempt to do so or allow someone other than HSL to become registered at the [DVLA] as the vehicle's registered keeper.

[6] By this time the Court of Appeal had given their decision in *HMRC v Apollo Fuels Ltd* [2016] EWCA Civ 157.

31. There was also a "Master Contract Hire Agreement" between Lex Autolease Ltd ("Lex") and HSL under which Lex agreed from time to time to let vehicles on hire to HSL. One of the conditions of hire was that the "Customer (HSL) shall not assign loan or hire the Vehicle or pledge the credit of the Supplier (Lex) or allow a lien to be created over the vehicle or suffer it to be taken or pass out of the Customer's possession" and that the "Customer shall not assign the benefit of this Agreement or its rights or obligations hereunder without the prior written consent of the Supplier." This agreement was signed by Mr Harrison "for and on behalf of the Customer".

32. The papers in the bundle also contain an agreement between HSL and Mercedes Benz Financial Services UK Ltd dated 15 April 2014, ie after the end of the relevant years, in respect of a Mercedes Benz E Class E63 AMG. It also contained a term prohibiting sale, disposal or abandonment, but the financial terms are not shown.

33. There is also an agreement between Alphabet (GB) Ltd and HSL in respect of a BMW X6 Coupe dated 13 August 2013. It also contained a term prohibiting sale or disposal or any attempt to do so, but the financial terms are not shown.

34. The Lex, MB and Alphabet agreements refer to rent being paid and we assume that they are operating leases and not either hire purchase contracts (like the BMW one) nor finance leases.

The Directors Loan Accounts

35. These showed a breakdown of each of the Directors' Current Accounts with HSL (as shown in the accounts under "Other Debtors") for the years ended 30 June 2009 to 30 June 2012 inclusive.

36. The opening balances at 1 July 2008 were £23,846 (owed by Mr Solway) and £38,201 (owed by Mr Harrison). At no time between that date and 30 June 2012 had the accounts gone into credit. We were not informed of any other accounts between the directors and HSL.

37. Taking the account ending 30 June 2011 as an example, to the opening balance of Mr Solway's account are added among others "BMW" £10,830, "Porsche" £14,388 and "Fuelcard" £4,634. Credits include "Mileage" £4,800 and a dividend of £90,000.

38. Mr Harrison's account shows "Lombard" £1,308, "Alphera" £7,315 and "Fuelcard" £9,571. Credits include "Mileage" £4,800 and a dividend of £90,000.

39. In other periods there are references to a Jaguar and a Mercedes.

The assessments, decisions, determinations and appeals

Class 1A NICs decision

40. On 9 November 2015 Mr Stephen Forsythe, Employment Compliance Officer, who had succeeded Ms Lucas, issued a notice of a decision he had taken that HSL was liable to pay "primary and secondary Class 1 contributions for the period 6 April 2010

to 5 April 2014 in respect of the earnings of P Harrison" and the amount HSL was liable to pay as a result was £20,445.12.

41. On 9 November 2015 Mr Stephen Forsythe, Employment Compliance Officer issued a notice of a decision he had taken that HSL was liable to pay "primary and secondary Class 1 contributions for the period 6 April 2010 to 5 April 2014 in respect of the earnings of L Solway" and the amount HSL was liable to pay as a result was £12,747.23.

42. The notices were said to be of "Section 8 decisions". This had been explained in a warning letter as being a reference to s 8 Social Security Contributions (Transfer of Functions, etc) Act 1999[7] ("SSCTFA").

43. On 25 November 2015 HSL appealed. Thus the appeals were within time, that time being 30 days from the date of issue of the notice of the decision[8], and was given to Mr Forsythe as required[9].

44. On 10 January 2017 Mr Forsythe gave his "view of the matter" to HSL in relation to the provision of car benefits. In it he referred to a letter of the same day to Mr Outhwaite and said "Following the issue of the amended Regulation 80 Tax Determinations and Section 8 NIC Decisions you have the right of appeal to [the] tribunal or can request a review." But there was no mention in the letter to HSL of amended s 8 decisions. In the letter to Mr Outhwaite, though, Mr Forsythe said that he was arranging "for the Section 8 Decisions originally issued 9 November 2015 to be amended to include the full car and fuel benefits in accordance with the enclosed computations". This was a reference to his withdrawing Mr Carruthers' concession over private use contributions debited to the DLA.

45. On 26 January 2017 Mr Forsythe wrote to HSL with what he called "amended Section 8 NIC Decisions" adding that if HSL did not agree they could appeal and he explained their appeal rights.

46. The notices of decisions (which is what he actually enclosed) stated that Mr Forsythe had decided to vary the decision on 9 November 2015 to show that HSL was liable to pay Class 1A contributions in respect of benefits made available to Mr Solway and Mr Harrison in the amounts of £19,188.48 and £22,438.10.

47. We can find no appeal against these decisions in the bundles. On 29 March 2017 Mr Outhwaite appealed against certain penalty notices and requested that all open matters are reviewed.

48. On 19 April 2017 Mr Forsythe wrote to Mr Outhwaite to say that no appeal had been received against the variation and that therefore no review could be carried out of it, and that a later appeal would be given consideration.

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[7] Mr Forsythe omitted the "etc" in his letter.

[8] Section 12(1) Social Security Contributions (Transfer of Functions, etc) Act 1999

[9] Section 12(2) ibid.

49. But on 13 July 2017 the conclusions of a review were given, and in the conclusions letter the reviewing officer, Mrs Hogan, said that it included a review of "decisions under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 for CL1A NIC" and she upheld the Class 1A NICs decisions "as charged in the varied amounts raised on 26/01/2017".

50. Unlike the position in income tax (including PAYE) a decision under s 8 SSCTFA may be varied in accordance with regulation 5 Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) ("SSCDAR") otherwise than on determination of an appeal – indeed regulation 5(4) explicitly provides for this. A notice of variation is to be given to the same person and in the same manner as the notice of decision. But by regulation 5(1) a variation may only be made if the officer, in this case Mr Forsythe, had reason to believe that the decision was incorrect at the time it was made.

51. Mr Forsythe refers to two reasons for his variation. One was that he was removing Mr Carruthers' concession and the other that he was adding in medical and other benefits which had been agreed.

52. But the notice was also varied in another way. The original notice referred to primary and secondary Class 1 contributions and to earnings, itself a concept relevant to Class 1. Without any mention that that was wrong, Mr Forsyth varied the decision to refer, correctly, to Class 1A.

53. It appears to us that, contrary to what Mr Forsythe said, there is no right of appeal against a variation of a decision (see s 11(1) SSCTFA). Thus Mr Outhwaite was right not to appeal the variation, as HSL's appeal against the original decision still remained effective. Whether HMRC were entitled to review the varied decision or the original decision only is not something we need to decide as nothing turns on it.

Class 1A NICs penalty determination

54. Regulation 81(2) Social Security Contributions Regulations 2001 (SI 2001/1004) ("SSCR") provides for penalties for failure to make a return of Class 1A contributions by the due date (19 July after the end of the tax year).

55. On 3 February 2017 Mr Forsythe set out his calculations of the penalties due under regulation 81(2), and of the percentage amounts by which he had mitigated, on behalf of the Commissioners for Her Majesty's Revenue and Customs, the NICs-geared penalties due under regulation 81(2)(b).

56. On 6 February 2017 notice of a penalty determination of the amount of £691,566.80 was issued to HSL. That amount included amounts for PAYE failures where the penalty was charged under s 98A TMA 1970, but there was no further breakdown of the amounts in or with the notice apart from the letter of 3 February. It stated that "you should appeal in writing within 30 days of the date shown at the top of this notice". That date was 6 February 2017 so 30 days took them to 8 March 2017.

57. On 24 February 2017 Mr Forsythe wrote to the company informing them of the penalties included in the determination and explaining their appeal rights. The letter said that HSL had until 31 March 2017 to appeal.

58. On 29 March 2017 HSL appealed.

59. No point was taken by HMRC, for obvious reasons, about whether the appeal was late. We think it was for the following reasons.

60. The appeal rights against so much of the total penalty as related to PAYE are given by s 100B TMA 1970. That section applies to a penalty determination made under s 100 the provisions of TMA as to appeals against assessments to income tax, and so it is s 31A(4) TMA (as necessarily modified) which gives a right of appeal within 30 days after the date on which the notice of determination was issued.

61. The appeal rights against so much of the total penalty as related to Class 1A NICs are given by s 12 SSCTFA, because the decision that HSL is liable to a penalty and the amount are decisions falling within s 8(1)(k)(i) SSCTFA, that is decisions under paragraph 7B Schedule 1 Social Security (Contributions and Benefits) Act 1992 ("SSCBA"). Sub-paragraph (2)(h)(i) of that paragraph empowers the Treasury to make regulations to impose penalties for failure to make timely returns of inter alia Class 1A liability. Those regulations include regulation 81 SSCR. While regulation 82 SSCR applies certain provisions of TMA to regulation 81 penalties it does not include s 100B, only sections 100, 100D, 104 and 105 TMA.

62. Section 12 SSCTFA gives a right of appeal within 30 days after the date on which the notice of determination was issued.

63. The single notice of determination is dated 6 February and specifically says the 30 days run from that date. In our view the appeal was late. It would also have been late had the letter of 24 February been the relevant one. 31 March is 35 days after the date of the letter, not 30 days so an appeal on 29 March was late.

64. But HMRC have allowed the appeal to be given to them, so no harm is done.

Income Tax: return amendments

65. As we noted at §16, on 8 January 2015 Ms Lucas had opened a s 9A TMA enquiry into the 2012-13 returns of Mr Solway and Mr Harrison with a view to examining all of the return.

66. On 22 February 2017 Mr Bland informed Mr Solway and Mr Harrison that following his investigation for the four years to 5 April 2014 into car and fuel benefits he intended to "raise formal assessments on you for the [tax on] the car and fuel benefits I believe were omitted from your returns". With the letter was enclosed a notice of assessment for the year ended 5 April 2013. With the notice was a two column tax calculation showing figures as returned and revised figures. The only difference was in the benefits charged to tax.

67. On 20 March 2017 Mr Outhwaite appealed against the assessments on behalf of his clients.

68. In her letter of 13 July 2017 Mrs Hogan, the reviewing officer, noted that because an enquiry had been opened into the 2012-13 return under s 9A a closure notice should have been issued under s 28A TMA as opposed to an assessment under s 29 TMA. She had therefore instructed Mr Bland to withdraw the s 29 assessment and to issue a closure notice in the same figures.

69. On 24 August 2017 Mr Bland issued a closure notice for 2012-13 to each of Mr Solway and Mr Harrison. The tax calculation showed the amendment he had made to the returns showed the same figures as the s 29 assessment.

70. On 23 September 2017 Mr Outhwaite appealed against them on behalf of his clients. There is nothing in the bundles to show that the s 29 assessment for this year was cancelled in any way. We consider the consequences of this later.

Income Tax: assessments

71. As we noted at §66, on 22 February 2017 Mr Bland informed Mr Solway and Mr Harrison that following his investigation for the four years to 5 April 2014 into car and fuel benefits he intended to "raise formal assessments on you for the [tax on] the car and fuel benefits I believe were omitted from your returns". With the letter were enclosed notices of assessment for the years ended 5 April 2011, 2012 and 2014. With the notices were a two column tax calculation showing figures as returned and revised figures. The only difference was in the benefits charged to tax.

72. On the date of issue, an assessment under s 29 was out of date under the ordinary time limits for assessing where it related to the tax year 2010-11 and 2011-12. It was therefore necessary for HMRC to show that the conditions in s 29(4) and s 36(1) TMA were met. As to the tax year 2013-14 given that a return had been made it was necessary for HMRC to show that one of the conditions in s 29(4) or (5) was met. Nothing was said in the letter about these requirements, contrary to HMRC's guidance for its staff in EM3347.

73. On 20 March 2017 Mr Outhwaite appealed against the assessments on behalf of his clients.

Income Tax: penalties

74. On 11 January 2017 Mr Bland issued letters to Mr Harrison and Mt Solway to which he attached an explanation of the penalty he would be seeking under Schedule 24 FA 2007. This explanation asked for the supply of any information that was relevant to the type of penalty, the "quality of disclosure, also referred to as 'telling, helping and giving'", the behaviours[10], and other circumstance that may lead HMRC to reduce the penalty further[11] and the amount of the penalty. A summary of the penalties proposed

[10] Whose behaviour is not specified: presumably it is open to the recipient of the letter to say what they think of HMRC's behaviour.

[11] No clues are given as to what those circumstances might be, or even what is meant by "further" as no information was given at that stage about any reductions whatsoever.

was at the end of the letter together with the amount that was suspended which was £0. No explanation was given about why £0 was suspended.

75. The Schedule itself said the inaccuracy leading to the penalty was the failure to declare on the returns benefits in kind and car and fuel benefits provided by the employer,

76. The behaviour was classified as deliberate because it was a deliberate attempt to evade the tax due as a result of the benefits provided. The disclosure was said to be prompted and the appropriate reduction was 70%. There were no special circumstances. Nothing was said about suspension.

77. On 21 February 2007 notices of assessment under Schedule 24 FA 2097 were issued on each of Mr Solway and Mr Harrison for the tax years 2010-11 to 2013-14. Appeal rights were given.

78. On 20 March 2017 Mr Outhwaite appealed against the assessments on behalf of his clients.

79. The assessments were in time as were the appeals.

Law

80. Section 114(1) and (2) Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), as it stood before 2014-15 provided:

> "(1) This Chapter applies to a car or a van in relation to a particular tax year if in that year the car … —
>
> (a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family or household,
>
> (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).
>
> (2) Where this Chapter applies to a car … —
>
> (a) sections 120 to 148 provide for the cash equivalent of the benefit of the car to be treated as earnings,
>
> (b) sections 149 to 153 provide for the cash equivalent of the benefit of any fuel provided for the car to be treated as earnings,
>
> …"

81. Section 117 (relevant to this case in relation to Mrs Kerry Solway) provides that a car made available by an employer to an employee or a member of the employee's family or household "is to be regarded" as made available by reason of the employment. The corollary of this is that where it is not the employer making a car available then the question whether it is made available by reason of the employment has to be determined.

82. Section 120 provides:

> "(1) If this Chapter applies to a car in relation to a particular tax year, the cash equivalent of the benefit of the car is to be treated as earnings from the employment for that year.
>
> (2) In such a case the employee is referred to in this Chapter as being chargeable to tax in respect of the car in that year."

83. The method of calculating the cash equivalent of the benefit of a car is provided in section 121, in which the steps potentially relevant to this case are:

> "(1) The cash equivalent of the benefit of a car for a tax year is calculated as follows –
>
> *Step 1* Find the price of the car in accordance with sections 122 to 124A.
>
> ...
>
> *Step 3* Make any deduction under section 132 for capital contributions made by the employee to the cost of the car ... [Not to exceed £5,000]
>
> ...
>
> *Step 5* Find the appropriate percentage for the car for the year in accordance with sections 133 to 142.
>
> *Step 6* Multiply the interim sum by the appropriate percentage for the car for the year.
>
> *Step 7* ...
>
> The resulting amount is the provisional sum.
>
> *Step 8* Make any deduction from the provisional sum under section 144 in respect of payments by the employee for the private use of the car.
>
> The result is the cash equivalent of the benefit of the car for the year."

84. As to Class 1A NICs section 10 SSCBA provides:

> "*10 Class 1A contributions: benefits in kind etc*
>
> (1) Where—
>
> (a) for any tax year an earner is chargeable to income tax under ITEPA 2003 on an amount of general earnings received by him from any employment ("the relevant employment"),
>
> (b) the relevant employment is both—
>
> (i) employed earner's employment, and
>
> (ii) an employment, other than an excluded employment, within the meaning of the benefits code (see Chapter 2 of Part 3 of ITEPA 2003),
>
> (c) the whole or a part of the general earnings falls, for the purposes of Class 1 contributions, to be left out of account in the computation of the earnings paid to or for the benefit of the earner,

a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of the general earnings as falls to be so left out of account.

(2) … a Class 1A contribution for any tax year shall be payable by—

(a) the person who is liable to pay the secondary Class 1 contribution relating to the last (or only) relevant payment of earnings in that tax year in relation to which there is a liability to pay such a Class 1 contribution;

…

(3) In subsection (2) above "relevant payment of earnings" means a payment which for the purposes of Class 1 contributions is a payment of earnings made to or for the benefit of the earner in respect of the relevant employment.

(4) The amount of the Class 1A contribution in respect of any general earnings shall be the Class 1A percentage of so much of them as falls to be left out of account as mentioned in subsection (1)(c) above.

(5) In subsection (4) above "the Class 1A percentage" means a percentage rate equal to the secondary percentage for the tax year in question."

Submissions

Benefits in kind

85. For HMRC Mr Jones's arguments in relation to the charge to income tax on Mr Solway and Mr Harrison in respect of benefits from the provision of cars and fuel were:

(1) Cars were made available to Mr Harrison and Mr Solway by reason of their employment and without any transfer of the property in them and they were available for private use, and so s 114(1) ITEPA applies.

(2) Company fuel cards were given to the directors who did not reimburse HSL. Therefore benefits arise under s 150 to 153 ITEPA.

(3) A Class 1 (*sic*) NIC charge is due on HSL on the provision of car and fuel benefits.

86. Expanding on the "transfer of property" point, HMRC submitted that there was no transfer of a proprietary interest in the cars as it was HSL which entered into the leasing agreements and there can be no de facto lease between the company and the directors because the car always remained the property of the lessor. Allocation of the cars by HSL to the directors was not transferring the property.

87. The lease agreements seen by HMRC precluded the transfer of the agreements to anyone else without the consent of the lessor, and there was no evidence that any such transfer had been sanctioned. Liability to pay the lease amounts was with HSL: there was no guarantee from the directors, nor did they pay the lessors directly.

88. No verbal contract such as was alleged could be enforced by HSL or the lessors. In any event no evidence has been shown of it, and one would expect there to be at least

a board minute, the failure to produce which suggests to HMRC that no such minute exists.

89. In support of these points HMRC say that the cases quoted by the appellants in support of their arguments, *Stanford Management Services Ltd & Ors v HMRC*[12], *Whitby and Ball* and *Apollo* assist HMRC. HMRC also cite *Baldorino v HMRC*[13] in relation to the production of relevant evidence.

90. As to reimbursement HMRC accept that s 144 ITEPA provides for a deduction for private use. It applies where the employee is required to pay an amount for that use by 6 July following the tax year. By contrast there was no provision that reduces the benefit because the employee reduces the running costs.

91. There was no evidence that HSL imposed any requirement on the directors to pay for private use.

92. The DLA figures were insufficiently detailed to show what was debited beyond the lease costs and the fuel cards: no evidence had been produced to show that the debits covered insurance or maintenance costs or if the directors paid them directly.

93. The DLAs were consistently overdrawn so there was no "payment" by the directors: they were simply adding to the amount they owed HSL. Debiting an overdrawn DLA may count as "making good" but only for the general benefit in kind rules, not for private use payments (so says HMRC's Employment Income Manual).

94. *Apollo* is not in point in this case as in that case there was a lease from the employer to the employees on normal commercial terms, whereas in this case HSL could not transfer the property in the vehicles to the directors because it was prohibited from doing so. Nor had the directors or HSL produced sufficient evidence to show that the directors paid full market value for the cars.

95. The legislation in "the Finance Bill of 2016" was enacted after the years in question and is not retrospective.

96. For the appellants Mr Outhwaite submitted that in relation to the benefit of the provision of cars:

(1) There was both an oral and de facto implied arrangement between the company and directors in response of the vehicles leased by HSL and accordingly property had passed to the directors so that s 114(1)(a) ITEPA was not[14] satisfied.

(2) All costs in respect of the vehicles had been borne by the directors through their loan accounts so there has been no provision of a benefit in kind either below

[12] [2010] UKFTT 98
[13] [2012] UKFTT 70
[14] Mr Outhwaite's written skeleton omits the "not", but this cannot be right or he is accepting HMRC's case.

market value or for nil consideration, something which Parliament did not intend to charge to tax when enacting the benefits in kind legislation.

(3) The amendments to s 114 made by Finance Act 2016 indicated that HMRC accepted that "fair bargain" arrangements were not within s 114 before then as determined in *Apollo*.

97. As to car fuel this falls away if no charge arises on provision of the cars, but in any event all fuel costs were effectively met privately by use of the DLAs or by reimbursement ("making good") to HSL.

98. Mr Outhwaite relied on *Apollo*, and pointed to the tribunals' reliance there on *Wicks v Firth*[15], *Mairs v Haughey*[16] and *Wilson v Clayton*[17]. He referred also to *Cheshire Employer and Skills Development Ltd v HMRC* [2012] EWCA Civ 1249 (a Class 1 NICs case) for the proposition that:

> "It is implicit in the concept of earnings, remuneration and profit that there is some overall net financial benefit to the recipient.

99. In this case the directors received no overall net financial benefit having met in full the cost of the vehicles on commercially available terms. Debits on an overdrawn loan account represent payment as the loan account represents an enforceable debt and is not different to any other loan.

100. As to the absence of a written lease agreement between the HSL and its directors, which HMRC point to distinguish the facts in this case from those in *Apollo*, it is a tenet of English contact law that the terms can be written, oral or implied. It was always the stated intention of the directors that title would be passed to them and this supplanted the lease between the company and the lessor. This passing on is evidence by the passing on of all costs to the directors and the lack of any VAT reclaim by HSL in respect of the lease costs.

Discovery assessments & amendments to the returns

101. In relation to the discovery assessments for 2010-11, 2011-12 and 2013-14 Mr Jones says that HMRC discovered that the directors had omitted benefits in kind from their returns and that their behaviour in omitting the benefits was deliberate (but if they are wrong about that, it was careless). Thus s 29(1) and (4) TMA is satisfied.

102. In addition in respect of 2010-11 and 2011-12 s 29(5) TMA applied because the officer concerned could not reasonably have been aware of the omissions and the loss of tax before the enquiry windows closed on 31 January 2013 and 2014 respectively.

103. The normal time limit for assessing 2010-11 and 2011-12 was four years from the end of the tax year, so the assessments made on 22 February 2017 were outside this limit. They were inside the 6 year limit in s 36(1) for which HMRC have to show careless conduct. The conduct was at least careless, but HMRC also say it was

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[15] *Wicks v Firth (HM Inspector of Taxes)* [1982] 56 TC 318

[16] *Mairs (Inspector of Taxes) v Haughey* (1992) 66 TC 273 (Court of Appeal of Northern Ireland)

[17] *Wilson (Inspector of Taxes) v Clayton* [2003] EWCA Civ 1657

deliberate for which the time limit is 20 years which the assessments are comfortably within.

104. Mr Outhwaite argued that because for 2012-13 HMRC wrongly raised a discovery assessment when there was an open enquiry, the subsequent action in issuing a closure notice was technically incompetent.

105. HMRC do not address this issue, despite their acknowledgement of the appellant's submissions in their own skeleton.

106. Assuming that HMRC did have the competence to issue a closure notice there can be no question of time limits making it invalid. No objection was taken that the enquiries themselves were out of time.

Penalties on the directors

107. HMRC say that the tax returns of the directors for each tax year involved were inaccurate because they failed to declare car and fuel benefits, so they had committed an "offence" under Schedule 24 FA 2007.

108. HMRC also say that the inaccuracies were deliberate but unconcealed, the maximum penalty for which is 70% of the tax potentially lost but HMRC have allowed reductions for the quality of the disclosures by the appellants:

(1) They have allowed 10% (out of a maximum of 30%) for "telling" because there was no disclosure of omissions and a delay of more then 3 years from the date of the inaccuracies.

(2) They have allowed 30% (out of a maximum of 40%) for "helping" because no positive assistance was given to bring matters to a conclusion although most of the information required had been provided.

(3) They have allowed the maximum of 30% for "giving".

109. HMRC say the inaccuracies were deliberate because:

(1) The directors signed the lease agreements on behalf of the company and used the vehicles.

(2) As directors they were responsible for ensuring that returns by the company were correct so would have known what as required in terms of when a benefit arose.

(3) When they signed the returns they would have been fully aware of all the benefits they had received from HSL and that they were not on their returns.

(4) Other benefits were also omitted from the returns.

110. HMRC disagree that the appellants took reasonable care because they were acting on the professional advice of the agents. They say:

(1) The directors have supplied no evidence that the inaccuracies were the fault of the agent (Dutton Moore) or that they were acting on the agent's advice.

(2) They had a duty to take reasonable care by giving an agent all relevant information and checking the agent's work to the extent they are able to do so. And as directors of a company they would be familiar with the provision of benefits.

5 (3) They could have checked the position on HMRC's website.

(4) When they signed the returns they would have been fully aware of all the benefits they had received from HSL and that they were not on their returns.

111. HMRC have considered whether a special reduction is due and have decided that it is not. They have taken into account that the appellants claim they were badly advised
10 by Dutton Moore but these circumstances are not special, in that they are not uncommon or exceptional.

112. Mr Outhwaite said that as there was no liability there was no tax chargeable and there can be no penalties. If there is tax due then the appellants took reasonable care to make accurate returns. They did not act deliberately, but on the advice of their previous
15 advisers.

Penalties on HSL

113. HMRC say that the regulation 81(2)(a) SSCR penalties are fixed where there is a failure to make the return.

114. As to regulation 81(2)(b) penalties they are a maximum of the Class 1A unpaid
20 NICs at 12 July following the year end, but can be reduced. HMRC have given a 50% reduction, with 10% for disclosure, 20% for co-operation and 20% for seriousness.

115. HMRC recognise that Mr Carruthers said the second tranche of end of year penalties would not be charged, but submit that:

(1) The directors were given factsheets concerning penalties before Mr
25 Carruthers' statement so they knew penalties would be part of the enquiry settlement.

(2) The notes are not verbatim and so neither can the context be judged nor the full discussion ascertained.

(3) The penalties are correct in accordance with the legislation.

30 (4) There is insufficient evidence to support the claim that an authorised assurance was given to HSL.

116. Mr Outhwaite says that HMRC had previously agreed that tax geared penalties would not be sought and are reneging on a previous agreement and that HSL acted with reasonable care in not making returns of Class 1A NICs on a P11D(b) as there was no
35 liability to report.

Post-hearing submissions

117. During the hearing the Tribunal asked HMRC to show that the measure of the amounts on which Class 1A NICs were charged was identical to the measure of benefits under ITEPA, or if they were not, what was the measure. Following discussion the

Tribunal issued directions requiring HMRC to make submissions on the point and allowing the appellants to comment.

118. We consider this issue further when we come to discuss the Class 1A decisions.

Discussion

Benefits in kind

119. We deal with this issue in the order (a) s 114(1) ITEPA and the concept of benefit and fair bargain (b) s 114(1) ITEPA and "making available" and "by reason of employment (c) s 114(1) and transfer of property (d) deductions from the amount chargeable (e) fuel (f) maintenance and insurance (g) the Class 1A NICs issues.

(a) the concept of benefit

120. In *HMRC v Apollo Fuels Ltd* [2016] EWCA Civ 157 ("*Apollo CA*") the Court agreed with the Upper Tribunal and the First-tier Tribunal that for there to be a charge under s 114 there had to be a benefit in the sense as explained by David Richards LJ at [45]:

> "These are all considerations which, in my judgment, show that the choice of the word 'benefit', without any definition qualifying or altering its ordinary meaning, was intended to show that, before a charge to income tax in these circumstances arises, there must be a benefit to the employee in the ordinary sense of that word. It is not a case of implying a requirement or condition into Chapter 6. It is simply a case of giving meaning and effect to its express terms."

And at [73] that:

> "For all these reasons, I conclude that the Upper Tribunal and the First Tier Tribunal were right to decide that a charge to income tax arises under Chapter 6 only if the terms on which a car is leased to an employee confer a benefit on the employee in the ordinary sense of that word. The employees in this case received no such benefit."

121. It is necessary to look at the decision of the First-tier Tribunal, [2013] UKFTT 350 (TC) (Judge David Demack and Ms Ann Christian, the member also of this tribunal) to see what amounted to provision without there being a benefit in the general sense used in s 114(1). In that decision the tribunal said:

> "17. Having recognised that if company cars were to be withdrawn from use by its employees, the Group would have to dispose of the cars in some way, Mr Lawtey considered the "least disruptive option", and one which provided such of them as wished to lease cars on arm's length terms, would be to hire to the employees the very cars with which they had previously been provided. His proposal in that behalf was accepted by Holding's directors and the Group's employees were initially offered the continued use of their cars. Alternatively, they were offered the hire of a vehicle of their choice. If an employee chose to exercise the alternative option, since the car was probably not a model currently owned by the Group and thus not immediately

available, Mr Newell explained that the Group would attempt to accommodate him by purchasing the model in question second-hand at a motor auction.

18. He also recognised that to ensure the Group's employees were not provided with benefits on which they would be liable to tax, any hire arrangements would have to be at full market rental.

19. Mr Lawtey explained how he then went about calculating a suitable market value rent for each car, saying:

> '… I considered the cost to the group of providing the vehicles and added what I considered to be a reasonable profit of 10%. To calculate the likely cost of each vehicle over a three year period I first calculated the loss in value of the car. For each vehicle I established the current value using the CAP car value guide and Glass's car value guide. I also used these guides to establish the likely value in three years by looking how much each individual vehicle's value changed over a three year period. For example if the vehicle in question was registered in 1999 I looked at what a vehicle registered in 1996 was now worth and compared this to the value of the 1999 vehicle to calculate the expected drop in value over 3 years. I divided this figure by 36 to give a monthly loss in value figure. I then added a further 10% to give what I considered to be a commercial return on the hire of these vehicles for the group. This established the annual hire charge excluding VAT for the vehicles. VAT was subsequently charged and accounted for on hire charges. I then compared the rental charges to information from advertising flyers sent to the company by vehicle leasing companies and magazine and newspaper advertisements for the hire of similar types of vehicles. The hire charges calculated as above were compared to those charged by other hire companies for similar model cars to see how the figures compared.
>
> To make the comparisons I found examples of similar vehicles and looked at how much they were hired for and on what terms. The cars hired by third parties were brand new or nearly new, i.e. under 12 months old vehicles (as opposed to the group's which were older vehicles) and often models of a higher specification. The group hire figures as calculated above were usually lower than the third party hire but I thought this was reasonable and to be expected because we were hiring older vehicles. The main reason for this comparison was carried out (sic) was to ensure the hire charges calculated were reasonable given the age and type of vehicles to be hired.'

20. Mr Newell confirmed that the Group accepted Mr Lawtey's recommended hire charges and adopted them for the purpose of its car leasing scheme.

21. The Group also offered to maintain the cars hired to employees, that offer including insurance, car tax, tyres servicing and repairs. The offer involved them paying a standard monthly charge of £85, plus VAT."

122. The position in that case was that there was a detailed explanation by the employer of how the hire charge to the employees had been calculated and why it represented a fair bargain. But we do not think that the Court of Appeal was holding that for there not to be a benefit, there had to be a minute consideration of the terms of arrangement. So much is apparent from their endorsement of the Upper Tribunal's reliance, as strongly supporting the employees case, the appellate decision in *Mairs v Haughey* and that in *Wilson v Clayton*. In the latter case the Court of Appeal referred to *Mairs v Haughey* saying:

> "There the Lord Chief Justice was answering what he called the third question, which was whether the receipt of the cash payment by Mr. Haughey constituted a benefit within the meaning of s. 154, having regard to the fact that he received the benefit in return for surrendering his contingent right to receive payment under the redundancy scheme. The Lord Chief Justice said:
>
>> 'The third question was answered by the Special Commissioner in the negative in favour of the Respondent. He stated, at page 17B of his decision.
>>
>>> "The consequences of adopting the Crown's approach are, to my mind, so appalling that something must be wrong. The situation has been created by the 'cash benefit' decision in *Wicks v Firth* [[1982] Ch 355]: if that was wrong, *cadit quaestio*. But on the assumption that it is right, it seems to me that Parliament must have intended Mr. Park's approach to 'benefits' to be right also. Section 154 brings benefits into charge. All kinds of benefits are covered: but whatever they are, they must still be capable of being described as 'benefits'. The legislation is aimed at profits (in a broad sense) which escape taxation under the mainstream Sch E provisions for one reason or another. It is not aimed at receipts resulting from fair bargains.
>>>
>>> The bargain in the present case had, as its constituents, more than just the surrender of rights against a money payment. It would not be realistic to ignore another factor: the offer of continued employment. But at the end of the day I do not think that matters. I would adopt the words of Viscount Simonds in *Hochstrasser [v] Mayes* [[1960] AC at p. 390]:
>>>
>>>> 'Nor, if it became relevant, should I in the present case feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain, and as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and "reject the lore of nicely calculated less or more'.
>>
>> In my judgment, the payments made to Mr. Haughey were not chargeable under s. 154."
>>
>> In my opinion, the decision of the Special Commissioner on this point was correct. The Respondent received the payment of £4,506

in return for surrendering his contingent right to receive a payment under the enhanced redundancy scheme, and the Special Commissioner held, at page 4D of his decision, that the payment did not overvalue that right. Therefore, I consider that the Respondent did not receive a "benefit" within the meaning of s. 154 where the money received was paid to him, by way of fair valuation, in consideration of his surrender of a right to receive a larger sum in the event of the contingency of redundancy occurring.'"

123. What we take from this is that determining whether there is a benefit conferred does not require a scientific weighing up of the value of what passes, "the lore of nicely calculated less or more[18]" but at whether there is a profit "in the broad sense". And despite what is said by the Court in *Apollo CA* at [73] (see §120) we cannot read their decision as being confined to arrangements which amounted to a hiring of goods. That is clear from their reliance on *Mairs v Haughey*.

124. What we have seen in this case is the evidence of the DLAs. HMRC's criticisms of the appellant's case on the DLAs is aimed solely at the question whether there had been a payment for private use falling within s 144. They do not say that a debit to a DLA will not count in deciding whether there is a benefit at all: indeed they accept that a DLA debit in an account which is not overdrawn will count for s 144 purposes and they accept that a debit in an overdrawn DLA can amount to making good in other parts of the benefits code.

125. We can see no reason for not taking the DLA debits into account. Those debits are the amounts of the hire purchase and rental payments made by HSL to the leasing companies. They are the costs incurred by HSL in acquiring the unconditional use of the vehicles for the periods of the rental. By acknowledging the obligation to pay the company these amounts through the DLA the directors are paying for precisely what HSL is able to give them and had itself paid for, the right to use the vehicles for whatever they wish whether for HSL's business or for their own private purposes. There is no benefit to them in the arrangements and so s 114 ITEPA does not apply to the provision of cars to the directors.

126. We add that the amount calculated under s 121 ITEPA in respect of the cars is neither here nor there. It is a conventional amount not aimed at measuring the "true" value of the benefit, but takes in other policy considerations such as cleaner fuel usage.

127. We say also that we did not find Mr Outhwaite's notions of oral or de facto contracts of leasing convincing. If the appellants wished to convince us of its correctness then at the very least one of them should have given oral evidence about which they could have been cross-examined. We agree with HMRC that the evidence

[18] A quotation from William Wordsworth in his Ecclesiastical Sonnet XLIII "Inside of King's College Chapel, Cambridge." It is "High Heaven" which rejects the lore. The opening line is apposite here: "Tax not the royal Saint with vain expense".

was sorely lacking. But it was not in the end necessary for the appellants to prove the existence or terms of this contract.

128. Finally in this section we should deal with Mr Outhwaite's argument from the change in s 114 made by FA 2016. We agree that the change, to ensure that a car benefit charge arises even where there is a fair bargain, was made purely as a result of the decision in *Apollo CA*. What Parliament is doing in making the change is to recognise that as at the date of Apollo CA s 114 did not apply if there was a fair bargain and so no "benefit". It is possible that had there been an appeal to the Supreme Court, the pre-FA 2016 law would have changed and the amendment found to be unnecessary. But it was not necessary for Mr Outhwaite to pray in aid FA 2016, as Apollo CA had established what the pre-2016 law was. And as HMRC correctly point out FA 2016 was not retrospective: if it had been we would not be having this discussion. The FA 2016 changes are in fact wholly irrelevant to the question we have to decide which is whether the arrangements between HSL and the directors amounted to a fair bargain, given that the law was that a fair bargain nullified the charge under s 114.

(b) s 114(1) ITEPA and "making available" and "by reason of employment

129. In the light of our decision in relation to *Apollo* we do not strictly need to go further, at least in relation to cars. But as we had full argument on all the issues we have narrated we will give our views.

130. We find that HSL made the cars available to the directors. It is not we think necessary for the person making a car available to have any particular legal right vis-à-vis the vehicles, but in the circumstances of this case HSL did so as the hirer under the hire purchase and leasing agreements. The prohibitions against sale, disposal etc in the agreements have no bearing on this point. Leasing companies dealing with a corporate lessee operating a road haulage business seeking to hire high end vehicles cannot but realise that the vehicles will be made available to the directors for their private use and that that is permitted by the leasing contracts.

131. Because the users of the cars are directors of the person making them available, then by s 117 ITEPA the making available is deemed to be by reason of employment if it would otherwise not be. But it is unnecessary to invoke s 117 as we consider it to be obvious that that was the reason they were made available by HSL. Had it been the case that it was the leasing companies which made the cars available, then our decision would still have been the same.

(c) s 114(1) and transfer of property

132. Another reason for the appellants' insistence that there was an oral leasing agreement between them and HSL was we think their view that such an agreement would have amounted to a transfer of the property in the cars, as was held to be the case by Rose J in the Upper Tribunal in *Apollo*, and that that transfer would have taken the case outside s 114 ITEPA. Unfortunately for them *Apollo CA* overturned that decision, pointing out that it was not a "proprietorial interest" that had to be transferred to oust s 114, but a transfer of "property" in the car. The property in the car lay with the person with legal title which in these cases is the leasing companies. The was no property for HSL to transfer. Had HSL exercised its option to acquire the cars at the end of any hire

purchase contracts the position may have changed but not so as to transfer any property to the directors.

(d) deductions from the amount chargeable

133. Had s 114(1) applied we would have held that the debits to the DLAs did not amount to payments for private use. There was no evidence, as HMRC said, of any requirement imposed by HSL on the directors to make any such payments, or to make them or private use as opposed to anything else – we agree with HMRC that *Quigley* is relevant here.

134. We would not however have dismissed the appellants' claim simply because there were debits to an overdrawn DLA. We can see no relevant distinction between an overdrawn DLA and one not overdrawn. The DLAs here, which are more appropriately referred to in the papers as current, rather than loan, accounts, are typical of the way director controlled companies operate. Debits build up and are then more or less offset by the crediting of salary or dividends instead of those amounts being paid to the directors. This can happen whether or not the opening and closing balances are owed to the company or to the directors.

(e) Fuel

135. What we say at §125 about there being no benefit in the provision of cars applies equally to the provision of fuel, as the amount of the directors' use of the company fuel card is also debited to the DLAs.

136. Even apart from that, s 151 ITEPA provides that there is no cash equivalent under s 114 if the amounts are made good as a result of a company requirement. We consider that this requires less formality than a requirement under s 144 ITEPA and we are prepared to infer such a requirement in the circumstances of this case.

(f) maintenance and insurance

137. There were brief mentions in the documents in the bundle of insurance and maintenance of the vehicles as a separate issue from the benefits from the availability of the cars and of the company fuel cards. HMRC do not seem to have argued that a separate benefit arises to the directors – at most they say they do not have the evidence. The s 8 decision notices do not refer to these items nor are they included in the benefits calculations for the purposes of the discovery assessments on the directors. We were not invited to make any findings about them and are not in a position to do so. We therefore ignore them.

(g) Class 1A NICs

138. Section 10(1) SSCBA can be recast as follows:

> "A Class 1A contribution shall be payable in respect of so much of the earner's general earnings chargeable to income tax under ITEPA 2003 as falls, for the purposes of Class 1 contributions, to be left out of account in the computation of the earnings paid to or for the benefit of the earner."

139. In this reformulation "earner" and "earnings" are terms of art for NICs purposes and are defined in SSCBA, where there is also to be found in Schedule 1 the computational rules for Class 1 contributions. "General earnings" is, as indicated, a term whose meaning is given by ITEPA. It is not used in SSCBA in relation to Class 1 contributions.

140. HMRC had assumed in this case that what falls to be charged under Class 1A is the amount that falls to be charged to income tax under Chapter 6 Part 3 ITEPA. This reflects what is said (and repeated three more times) in HMRC's National Insurance Manual at NIM15001:

> "There are no separate rules for determining the cash equivalent of a benefit from Class 1A NICs purposes. The amount of general earnings on which an employed earner is chargeable to income tax under ITEPA 2003 …. on the benefit is the amount on which Class 1A NICs are due. This general principle is subject to the exemptions listed at … Section 10(4) SSCBA 1992." [punctuation corrected]

141. This is not what s 10(1) SSCBA says. It says that the Class 1A amount is the amount which falls to be excluded in a Class 1 computation. This is why we directed HMRC to make submissions to us after the hearing on this point.

142. But rather than burden this decision with an account of HMRC's submissions and our decision we have, in the light of our conclusions in relation to car benefits for income tax purposes, decided not to consider this point further. We say only this: it seems to us that applying the thinking of all Tribunals and Courts who have considered the appeals by Apollo Fuels Ltd we can say that the arrangements with the cars do not fall to be treated as earnings for the purpose of Class 1 NICs (and so cannot be excluded from them for the purposes of Class 1A) as they are not "profit derived from an employment" and so are not earnings within the meaning of that term in s 3(1)(a) SSCBA[19].

The s 29 assessments & amendments to the returns

143. We have found that nothing falls to be charged to income tax in relation to cars and fuel. But we have considered what we would have found had we not accepted the directors' case on those benefits.

144. In relation to 2010-11 and 2011-12 there is no point in our considering whether the s 29(5) condition was met, as HMRC have to show that there was careless conduct that brought about a tax loss. In our view the appellants were not careless. They entrusted the making of their returns to Dutton Moore and the position they took on not returning car and fuel benefits was Dutton Moore's. That position was one which in the light of the decision in *Apollo* was not an unreasonable one to take, especially when viewed in the context of the DLAs which we assume were prepared with the assistance of, if not entirely by, Dutton Moore. It was not a position which it was reasonable for

[19] Anyone masochistic enough to want to know more, or at least to know what Judge Thomas thinks about the Class 1/Class 1A interface, is invited to read the Appendix (paras 163 to 211) of his decision in *Couldwell Concrete Flooring Ltd v HMRC* [2016] UKFTT 776 (TC).

the directors to scrutinise or critically examine, and they would not have had the knowledge and skills to do so.

145. In relation to 2013-14 HMRC need only rely on s 29(5). Before 31 January 2016, the end of the enquiry period for that year, HMRC had informed Dutton Moore that the appellants that would be assessing benefits from cars and fuel but would give a concessionary deduction for the costs met by the directors through their loan accounts.

146. In our view by the end of the enquiry period a reasonably skilled officer would have been able to have formed a firm opinion that there had been a loss of tax. This can be seen clearly from the fact that on 28 January 2015 Mr Bullock of Dutton Moore said he had to concede that a charge on benefits was due and Mr Carruthers said HMRC would give them a reduction for the lease payments that had been made. Thus the condition in s 29(5) was not met and no discovery assessment for 2013-14 was valid.

147. Finally we deal with Mr Outhwaite's argument that the 2011-12 amendments to the return were invalid because a discovery assessment had been raised while the enquiry into the return was still under way. We think it is appropriate to treat this argument as being available to Mr Outhwaite on the basis that the directors' appeal against the amendments included a claim under s 32 TMA that it amounted to double "assessment" for the same cause and for the same period.

148. We accept that s 32 TMA would apply to this case if it can be said that an amendment to a return increasing the liability is an "assessment". What s 28A TMA provides for is an amendment of the return. A return includes any self-assessment included with it (s 9(1) TMA), so we see no difficulty in saying that the amendments of the return amounts to double assessing.

149. The claim by the appellants was not responded to by HMRC. Therefore under paragraph 4(1) Schedule 1A TMA HMRC should have given effect to the claim by "vacating" it. The Tribunal has no jurisdiction to require them to do so as there has been no enquiry into the claim.

150. We can though, and do, determine that the returns as amended represent an overcharge of the directors under s 50(6) TMA as we have found that there are no taxable benefits.

151. But that still leaves the question of the s 29 assessment for 2012-13. For the same reason that we have given for the invalidity of the 2013-14 discovery assessment, the 2012-13 assessment was also invalid. But is the appeal against it before us?

152. Mr Bland was asked by Mrs Haigh, the reviewing officer to cancel the s 29 assessment following the realisation by her that it was unnecessary. He does not seem to have done so, perhaps because it would have been the inevitable outcome because of the deemed s 54 TMA agreement provided for by s 49F(2) TMA had the appellants not notified their appeals to the Tribunal. It follows that the discovery assessment remains in existence and is before the tribunal and so we reduce it to nil under s 50(6) TMA. And had the condition in s 29(5) been met, we would still have reduced it to nil because there were no taxable benefits.

Penalties on the directors

153. The penalties assessed under Schedule 24 FA 2007 must fall because there were no inaccuracies in the returns. Had that not been the case then we would have cancelled the penalties because of our finding that the directors were not careless in making their returns (see §144). We add that HMRC came nowhere near demonstrating to us that their actions were deliberate, an allegation which is tantamount to fraud.

Penalties on the company

154. The regulation 81(2) SSCR penalties on the company for failing to make P11D(b) returns of benefits do not depend on any kind of careless or deliberate behaviour by HSL. They apply if a P11D(b) was required but not filed in time. It is accepted by the appellants that there were benefits accruing to the directors from BUPA subscriptions etc and HMRC accept that these were returned by the directors. But the fact remains that no P11D(b) return was delivered to HMRC. In our view the penalties under regulation 81(2)(a) are valid. They must however be reduced because under regulation 81(5) the penalties cannot exceed the Class 1A NICs due for the year. We do not have the figures to enable us to do this, and so we make a decision in principle only.

155. As to the regulation 81(2)(b) penalties they must also be reduced to the amount of the Class 1A NICs due on the benefits as returned by the directors.

156. We add that we find it odd that HMRC have sought penalties under regulation 81 SSCR for HSL's failure to make returns of Class 1A liability on the P11D(b), but have not sought penalties for HSL's failure under regulation 85 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) to give HMRC P11Ds showing the benefits on the directors chargeable to income tax. Penalties for breaches of these regulations are imposed by s 98 TMA.

Decisions

157. We decide that Mr Solway is overcharged by an assessment other than a self-assessment for the tax years 2010-11, 2011-12, 2012-13 and 2013-14 and they are accordingly recued to nil.

158. We decide that Mr Harrison is overcharged by an assessment other than a self-assessment for the tax years 2010-11, 2011-12, 2012-13 and 2013-14 and they are accordingly reduced to nil.

159. We decide that Mr Solway is overcharged by a self-assessment (as amended by HMRC) for the tax year 2012-13 and it is accordingly reduced to the figures of income as originally self-assessed.

160. We decide that Mr Harrison is overcharged by a self-assessment (as amended by HMRC) for the tax year 2012-13 and it is accordingly reduced to the figures of income as originally self-assessed.

161. It appears to the Tribunal that the decision under s 8 SSCTFA in relation to Class 1A NICs charged in respect of amounts relating to Mr Solway for the tax years 2010-11 to 2013-14 inclusive and as varied by HMRC should be varied under regulation 10

Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) so as to charge Class 1A NICs in respect of benefits other than car or fuel benefits, and we so vary it.

162. It appears to the Tribunal that the decision under s 8 SSCTFA in relation to Class 1A NICs charged in respect of amounts relating to Mr Harrison for the tax years 2010-11 to 2013-14 inclusive and as varied by HMRC should be varied under regulation 10 Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) so as to charge Class 1A NICs in respect of benefits other than car or fuel benefits, and we so vary it.

163. Under paragraph 17(1) Schedule 24 FA 2007 we cancel HMRC's decision to assess Mr Solway to penalties under paragraph 1 of that Schedule for the tax years 2010-11 to 2013-14 inclusive.

164. Under paragraph 17(1) Schedule 24 FA 2007 we cancel HMRC's decision to assess Mr Harrison to penalties under paragraph 1 of that Schedule for the tax years 2010-11 to 2013-14 inclusive.

165. It appears to the Tribunal that the decision under s 8 SSCTFA in relation to penalties charged under regulation 81 SSCR on HSL for the tax years 2010-11 to 2013-14 inclusive should be varied under regulation 10 Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) to reflect that HSL is liable to pay Class 1A NICs only in respect of benefits other than car or fuel benefits, and we so vary it.

166. Finally, in relation to the matters we were told were agreed, we vary:

(1) the regulation 80 determinations made on HSL in respect of its failure to account for income tax that it deducted or should have deducted from payments made to employees under the Income Tax (Pay As You Earn) Regulations 2003

(2) the decisions under s 8 SSCTFA in relation to the failure to account for Class 1 NICs that it should have paid or which it deducted or should have deducted from payments of earnings made to employed earners under SSCBA and SSCR

(3) the penalties under s 98A TMA determined by HMRC as a result of the failures referred to at (1)

in all cases to the figures as agreed between the parties.

167. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2019