TC02181

Appeal number: TC/2010/09473

Fuel benefits charges –inadequate records -whether National Insurance payable – Yes-whether penalties for negligence in submitting returns –No –Appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PMS INTERNATIONAL GROUP PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
CHARLES BAKER FCA, ATII

Sitting in public in London on 25 June 2012

Selwyn Walgate, Head of Tax, Mazars Accountants, for the Appellant

Karen Weare, Officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal against twenty-five separate decisions of which twenty-four relate to car fuel benefits and one to a car benefit and whether the individual is liable for Class I National Insurance.

2. The appeals are against:

> Decisions under Section 8 of the Social Security Contributions (Transfer of Functions, Etc) Act 1999 dated May 2010 and two penalty determinations under Regulation 81(1) Social Security (Contributions) 2001 dated 24 May 2010.

3. The core issues are:

> (a) Whether the Appellant company PMS International Group Plc ("PMS") is liable for Class IA National Insurance Contributions ("NIC") on fuel provided to employees for private motoring.
>
> (b) Whether the company is liable to Penalties under Regulation 81(1) Social Security (Contributions) 2001 under Class IA NIC in respect of company car and company car fuel benefits for the periods 2003-4 to 2007-8 inclusive.
>
> (c) Whether Mr Paul Beverley is liable to assessment on the provision of a car available for private motoring provided to him by virtue of his employment whilst visiting the UK under the provisions of Section 7(3) Income Tax (Earnings and Pensions) Act 2003.
>
> (d) Whether the company has been negligent in submitting incorrect returns under Regulation 80 in respect of Class 1A NIC.

4. The total amount of tax claimed is £43,281 which includes interests (the breakdown being £37,436.56 and £5,601.92 of interest). A chart is provided explaining the matters under appeal.

Matters under Appeal

Year	Nature	Amount	Nature	Amount	Total
2003-04	Section 8 decisions	£3,725.28	Penalty determination	£ 559.00	£4,284.28
2004-05	Section 8 decisions	£4,533.33	Penalty determination	£ 680.00	£5,213.33

2005-06	Section 8 decisions	£5,237.47	Penalty determination	£ 786.00	£6,023.47
2006-07	Section 8 decisions	£6,756.92	Penalty determination	£1,013.00	£7,769.92
2007-08	Section 8 decisions	£8,734.74	Penalty determination	£1,310.00	£10,044.74
2008-09	Section 8 decisions	£8,448.82			£ 8,448.82
Total		£37,436.56		£4,348.00	£41,784.56

The Appeals are against:

- Decisions under Section 8 of the Social Security Contributions (Transfer of Functions, Etc) Act 1999 dated May 2010.
- Penalty Determinations under Regulation 81(1) Social Security (Contributions) 2001 24 dated May 2010.

The Law

5. **Income Tax (Earnings and Pensions) Act 2003**

(a) Section 114 defines the conditions for a car benefit charge to apply. The charge appears if the car is made available to an employee, by reason of his employment and is available for his private use.

(b) Section 118 states that where a car is made available by reason of an employee's employment, then it will automatically be treated as having been made available for private use unless private use is specifically prohibited and it is not used privately.

(c) Sections 149 to 153 sates that a fuel benefit charge applies automatically where fuel is provided for a car that is made available b reason of the employment, for private use. The legislation defines how the benefit is calculated.

Social Security Contributions (Transfer of Functions, etc) Act 1999

(d) Section 8 provides for a decision to be made by the Officer of the Board in respect of National Insurance Contributions.

The Social Security Contributions and Benefits Act 1992

(e) Section 10(1)(b) defines that Class 1A National Insurance Contributions are due on benefits provided to directors and certain other persons in controlling positions.

Social Security (Contributions) Regulations 2001

(f) Regulation 80 provides that where a Class 1A Contribution is payable the employer is required to make a return.

(g) Regulation 81(1) provides for the charging of penalties due where an incorrect return under Regulation 80 in respect of Class 1A NIC is made. This Regulation also species the time limits by which a determination must be made.

Limitation Act 1980

(h) The legislation limiting the time in which NIC can be recovered is the Limitation Act 1980. The issue of a protective claim through the County Court is put in place in order to protect a debt from the effects of the Limitation Act 1980.

Case Law

King v UK 76 TC 699 sets out that unreasonable delay by the taxation authorities in raising penalty determinations may be a violation of the right to a fair trial.

Agreed Facts

(a) The Company is PMS International Group Plc.

(b) The Company owns a fleet of cars which are made available to certain categories of the Company's Employees.

(c) The Company provides fuel cards with the Company cars.

(d) The fuel cards are used to purchase fuel and to access other benefits including roadside recovery.

(e) Not all Company car drivers use the company fuel card to purchase fuel.

(f) At the time of the inspection of the Company's records by the HMRC decision makes the Company car drivers recorded their business and private mileage in a number of different ways.

(g) The Company did not restrict the Company car drivers to using the company cars solely for business purposes.

(h) The company did not declare fuel benefit on forms P11D for the majority of employees provided with Company cars.

(i) One of the Company Directors – Mr P Beverley is provided with a Company car when he visits the United Kingdom from his home in Hong Kong.

(j) The Company had not declared a car benefit on form P11D for Mr P Beverley.

(k) HMRC has confirmed that no liability to Class 1 National Insurance Contributions arises in respect of Mr Paul Beverley.

Background

6. The Appellant company PMS together with its subsidiary (Gosh and Ethos) engaged in the manufacture, marketing, distribution and supply of toys, houseware, giftware, stationery, novelties, sundries and electronic gadgets in the United Kingdom. The company's products include soft toys, inflatables and outdoor toys, dolls, action vehicles and figures, hardware, Christmas products and gardening products. It offers products to among others amusement and leisure industries, including resorts, holiday parks and bingo centres. PMS serves customers through its showrooms in Basildon, Essex and central Manchester. It also has some Far Eastern operations. The company's headquarters is based at International House, Cricketers Way, Basildon, Essex SS13

7. The company owns a fleet of cars which are made available to certain categories of employees. The company provides fuel cards with the company cars and these fuel cards are used to purchase fuel and to access other benefits including roadside recovery. Not all the car drivers use the fuel card to purchase fuel. In cases where employees use their own money to purchase fuel they are reimbursed by the company from petty cash.

8. The company did not restrict the employees from using the company cars for private purposes. The employees recorded their business and private mileage in a number of different ways. They were required to provide an expenses sheet with a business and private account. The calculation was done by the company for the business and for the private expenses including allocations of mileage for both categories. The number of private miles travelled with the company car was tallied up and multiplied by a price per mile (approximately 13p) which was then deducted from the employee's salary on a monthly basis. The employees were supposed to have provided their expenses sheets on a monthly basis. This was not always done by

all employees. The expenses sheets which detailed the mileage for business and personal purposes was given to the manager in charge, Mr Mark Benson, Finance Director of the Company. He would check the expenses and then sign the forms and authorise payments. Some employees had their own private car and therefore showed no private use of the company car. Where an employee received a car benefit and the private use of the car was not repaid to the company by the employee, the company would make the appropriate return on the Form P11D. The core issue in this case concerns National Insurance charges on fuel provided to employees for private motoring. We are not here concerned with the benefits charge which may arise on the employee.

9. The assessments arose as a result of a visit by Susan Cormack, Revenue Compliance Officer, who conducted an employer compliance review of the company on 16 January 2009. The company had provided Miss Cormack with forms for employees who had used a fuel card in purchasing fuel for the company cars. The employees who were provided with company cars were travelling salesmen who operated in different parts of the country to sell the company's products. In examining the forms, Miss Cormack noted that there were no details of business journeys, opening and closing mileage with a breakdown of business and private mileage and there was not a list of individual business journeys to support the business mileage. The forms (some) simply had an opening and closing milometer reading and a total amount of miles travelled. There was simply an allocation through boxes on the form of the total business miles and private miles. It was Miss Cormack's view, which she explained to Mr Benson, that all employees who were provided with fuel or reimbursed fuel by the company should maintain a mileage log with details of the date and business journeys undertaken. She said that in the absence of these details it was not possible to confirm that sufficient sums had been reimbursed to the company to cover all private mileage and therefore fuel benefit charges could be due. It was her view that certain employees who were supplied with a fuel card and did not reimburse any private mileage charges since they had a second car that they used for private journeys. It was felt that they should also maintain a mileage log to confirm that fuel purchased was only provided for business journeys and no private element had arisen. Miss Cormack, during her visit, found that the records dealing with mileage fuel and reimbursement for private miles were not adequate and in some cases there were no records at all. There was no mileage log for business journeys undertaken which would have allowed a corroboration with the amount spent on fuel. In some cases the records were non-existent or were not presented on a period by period basis. In the circumstances. it was found that an accurate calculation of business and personal miles was not possible in all cases.

10. In arriving at her findings, Miss Cormack divided the employees into groups according to their potential use of the fuel card. In Group 1 were certain employees who attended the company's headquarters periodically; Group 2 were those who were not office based and Group 3 were those who were office based. In Group 1, Miss Cormack found that in the absence of mileage logs, the company was unable to confirm that fuel provided was for business journeys and therefore a fuel benefit charge was raised. In Group 2, there were several different findings. There was

reimbursement for private mileage but no clear evidence of the private mileage, incorrect calculation of reimbursement, insufficient reimbursement and poor records. In Group 3, while mileage logs were available there was not sufficient detail of business journeys to support the business mileage travelled. In a few cases, where employees provided a satisfactory explanation and evidence, then no fuel benefit charge was levied.

Chronology of events

11. There were two meetings between officers of the Respondents and those of PMS. The first meeting took place on 16 January 2009 at J & M Payroll Services Ltd, 12 West Avenue, Hullbridge, Essex SS5 6JU, where the computerised payroll records were maintained. The second meeting took place on 22 January 2009 at the business premises of PMS to review the systems and processes relevant to the expenses operated by the company for employees. The company confirmed fuel cards for 36 employees who had company cars .It became apparent that PMS did not have adequate logs showing business and private mileage and the private use of fuel. Mr Benson indicated that employees with their own private car, who did not use the company car for private travel and consequently did not complete mileage logs.

12. On 11 February 2009, the Respondents wrote to the Appellant to confirm their post visit findings .In order to properly assess individual employees private use of their car, a request was made for mileage logs, fuel cards statements or other records to confirm whether a fuel benefit had or had not arisen on the employees.

13. Between March and June 2009 there was communication between the parties with respect to a pool car which had been used by Mr P Beverley, a director who was UK non-resident. This was another outstanding matter.

14. On 3 July 2009, HMRC acknowledged receipt of fuel card statements provided by the Appellant. The Respondents indicated that the fuel benefit would be raised for three employees who were seen to attend the business premises regularly and who had not been seen to reimburse any private mileage. On 7 September 2009, the Respondents informed the Appellant that they were not satisfied with the mileage logs provided by the Appellant and indicated that fuel benefit charges would be made in some cases. On 14 September 2009, the Respondents identified 26 employees on whom fuel benefit charges were to be raised due to the unavailability of adequate records.

15. On 16 October 2009 PMS offered a £20,000 payment to resolve the matter. This was rejected. The company disputed the final charges. In March 2010 the Respondents advised that computation for Class 1A NIC for 2003/4 to 2008/9 amounting to £43,281 was being assessed.

16. A protective claim was issued by the Respondents on 11 March 2010 for the 2003/4 Class 1A NIC due as Limitation Act 1980.

17. On 27 May 2010, Mazars(advisers) appealed the penalty determination and on 28 May 2010 appealed the Class 1A NIC charge.

18. On 17 June 2010, Mazars elected for an Independent Review, which they understood did not preclude the company from taking the matter to a tribunal. The case was subject to a review concluded in November 2010 which upheld the charges being taken forward formally. A ruling was made by the Respondents in December 2010 that confirmed that Mr P Beverley was not resident in the UK and therefore should not have been applicable to Class 1 NIC and consequently Class 1A NIC charge for the car benefit being pursued from him was not due.

The Appellant's contentions

19. The Appellant makes the following points:

1. The Appellant contends that sufficient records had been kept to demonstrate that no fuel for private motoring has been provided. The employer pointed out that it knows the individuals, the business journeys undertaken and knows whether or not the claims are reasonable. It is adamant that there have never been any intention to supply fuel for non business journeys that would not be charged for and it is unreasonable for the Respondents to demand that records be produced by the employer when those records did not exist.

2. Enquiries into their potential fuel benefits should have been put on hold until it had been established that the individuals concerned were liable to car fuel benefits.

3. It is premature to make a penalty determination as it has not yet been determined that the fuel benefits charge arises. The company has done anything wrong in that the records maintained by the company were sufficient for its purposes and they were made available to the Respondents.

4. The Respondents are alleging that the individuals concerned must have fraudulently completed their expenses claims by claiming that non business journeys were business journeys. The employees concern have been totally excluded from the process notwithstanding that the point at issue is whether they are liable to recharged tax on a car fuel benefit. Further there is no evidence of mass fraud as the Respondents seem to have alleged.

5. If no benefits exist, there can be no consequent Class 1A charge. In the circumstances therefore the employees should be assessed first before any Class 1A assessment is made.

6. In accordance with Section 118 and 171(1) Income Tax (Earnings and Pensions) Act 2003 the onus is on the taxpayer to demonstrate that there has been no private use of the car. In these circumstances the taxpayer means the individual employees.

The Respondents' contention

20. The Respondents contend that:

(a) A fuel benefit automatically follows from the provision of a car benefit unless records are maintained that demonstrate that no fuel for private motoring is provided.

(b) The company used several different methods of maintaining records. Where the inspecting officer was satisfied that records were sufficient to demonstrate that no fuel for private motoring was provided then no fuel benefit was charged in respect of the employees concerned.

(c) The inspecting officer raised section 8 decisions where records were insufficient to demonstrate that no fuel for private motoring had been supplied.

(d) In order for a liability to Class 1A NIC to arise it is not necessary for the underlying tax charge to be assessed, charged or collected. Section 10 of the Social Security Contributions and Benefits Act 1992 requires only that an earner is chargeable to Income Tax under ITEPA 2003 on an amount of general earnings.

(e) HMRC accepts that no class 1A charge arises on the provision of a car to Mr Paul Beverley as he does not fall within the scope of the charge to national insurance contributions as he is resident in Hong Kong and the Section 8 Decision should be discharged.

(f) The appellant has been negligent in submitting incorrect returns under Regulation 80 of the Social Security (Contributions) Regulations 2001.

(g) Penalty determinations have been raised under Regulation 81(1) Social Security (Contributions) Regulations 2001.

(hg) Penalty determinations have been raised under Regulation 81(1) Social Security (Contributions) 2001 24 dated May 2010 as a result of this negligence.

(ih) The determinations should be reduced to allow for the discharge of the class 1A national insurance charge for Mr Paul Beverley.

Evidence

21. The Tribunal was provided with a documents and an authorities bundle.

22. Oral and written evidence was given by Mark Benson, Finance Director with the Appellant Company; Selwyn Walgate, Head of Tax, and adviser to the Appellant and Susan Cormack, Employer Compliance Officer (Southend) HMRC.

23. A material evidence paper was provided by each of the Appellant and Respondents after the hearing to allow further submissions to be made and supportive evidence to be provided.

24. An important point to make at the start is that both the Appellant and the Respondents rely on written records or employee expenses claim forms which show, inter alia, business and private mileage, petrol purchase and other expenditures.

25. As part of the material evidence paper the appellant provided an extract from the expenses policy under the heading "Daily Business Mileage" provides as follows:

> "The employee is required to record for taxation and Company usage purposes, his daily business mileage, which must be recorded with each purchase for fuel.
>
> The employee may be provided with a Business Drive Card, for which fuel receipts must be submitted once a month. Employees are reminded that they are not permitted to use the fuel card for purchases of confectionery and other miscellaneous items which are not a direct business expense. The Company will not pay for fuel for private mileage and this would be recovered at a rate of 10p per mile or such other rate as the Company may from time to time deem appropriate from cash expense claims, by deducting from wages or other method being acceptable to the Company.
>
> The above policy has been drawn up because it is important that employees know exactly what expenses are allowable and are aware of the consequences of abuse.
>
> An abuse of this procedure will cost you the disciplinary offence which should be dealt with under the Company's Disciplinary

Procedure. Where it appears, after thorough investigation, that an employee has intentionally sought to defraud the Company or there is a persistent breach of the Policy, an abuse(s) could be treated as gross misconduct without any Dismissal".

26. The current Expenses Policy was last updated on 16 November 2004. All employees were subject to this policy statement. Consequently, most employees completed expenses sheets which required the disclosure of the milometer reading and total business mileage from which the private mileage was calculated.

27. All salesmen were responsible for arranging their visits to customers. There was no central input in arranging business journeys. The prime record of business mileage covered had to be created by the individual salesmen. It was their decision how they completed the forms and how much information was provided. The forms provided to the Tribunal were varied, some were completed in full, some partly and some were not completed at all. The salesmen were largely home based though some worked from the company's offices.

28. The Appellant says that the expenses forms were sufficient and adequate for purpose. They could not reasonably be expected to keep more information than was provided by the expenses form. They say that based on the expenses claim forms; there was an accurate statement as to the amount of private usage undertaken by employees. The Respondents contend that the company was required to obtain a journey by journey mileage log forms for each driver in order to ensure that they obtained reimbursement for the cost of any fuel used for private purposes. The tribunal does not agree with this position. Whilst it would have been the best practice to have records of each individual journey undertaken by employees, there was no statutory requirement to have such records. The company had in place a system for correctly completing their annual returns for benefits and kind and for paying Class 1A National Insurance Contributions. Employees were largely travelling salesmen whose job was to travel from customer to customer throughout the day and to meet sales targets. A journey by journey log would have been both unnecessarily and unduly burdensome and it is understandable that such a log was not available or completed by the employee.

29. What evolves from the evidence given by Mr Benson is that employees were required to make periodic expenses claims. The forms allowed for a deduction for the claimed expenses of an amount derived by multiplying the private mileage in the period by an appropriate mileage rate. At the bottom of the form, there was a mileage summary listing opening and closing milometer

readings, the calculation of the total mileage in the period and the total divided between business and private miles. The form did not require any explanation of how the employees had divided the total mileage between business and private. He explained that he was familiar with the working patterns of individual employees. Most of these employees travelled extensively within designated areas. For example one sales area was Scotland, another South West and another North East. It would have been difficult for the Finance Director to question the returns as to pattern of work so wide and determined entirely by the employee.

30. The reviewing HMRC officer said that the expenses forms provided by the Appellant showed total monthly mileage and the breakdown between business and non-business mileage was not sufficiently clear. She would have preferred an individual journey breakdown of mileage.

31. It is the view of the Tribunal that the system of record keeping as described by the Finance Director could have be sufficient to enable the company to complete its annual returns .Indeed , the annual returns were completed using the employee forms. A question may have arisen on the accuracy of the information presented by employees and concerns would be raised where the forms were not completed or not properly completed in individual cases.

32. Mr Benson said that the employees understood how to complete the expenses forms and could distinguish between business and private mileage. A system of checking was in place to ensure that the forms were accurately completed and were consistent with the employee's pattern of working. The forms were submitted promptly and regularly and any apparent anomalies were investigated while the facts were still fresh.

33. Miss Cormack cast doubt on whether the conditions laid out in the Company's policy statement were met. Using the group classification of employees, as indicated earlier, she found as follows:

Group 1

That for employees Mr Fuente and Mr Davis, there were no mileage logs and therefore she was unable to confirm that fuel provided by the company to them was for business use and therefore raised a fuel benefit charge. In her view, the fuel benefit charged can only be reduced if it can be confirmed that all private fuel has been made good. If this cannot be demonstrated the fuel benefit charge applies without any reduction for the repayments made by the employees.

Another employee in this category, Mr Barrett gave no details of business journeys to support the business mileage listed. The officer thought she was unable to confirm whether all private mileage had been reimbursed by Mr Barrett and therefore raised a fuel charge.

Group 2

The Respondents reviewed the expenses form of N Davidson, C Drysdale, I Henley, J McGriffen, A Radcliff, J Robinson, T Singh, A Wilson and T Keen.

With the exception of C Drysdale, whose records were found in order, the Inspector raised fuel benefits charges for all employees.

It was found that in the case of N Davidson there was no mileage logs to support the mileage for business journeys and on viewing the expenses claim forms for I. Henley there were no details of business journeys and the mileage was not broken down into specific weeks or days and in the absence of details of business journeys undertaken a fuel benefit charges was therefore appropriate. For J McGriffin there were no detail provided of business journeys or a mileage breakdown of weekly, daily mileage and there appears to be confusion over the mileage undertaken for the period. The records of A Radcliff showed there had been a reimbursement for private element but there were no mileage logs with details of business journeys and a fuel benefit charge was therefore applied.

J Robinson had not provided details of actual business journeys and the private element reimburse appeared to be reimbursed on the wrong basis. A fuel benefit charge was raised. With M (Tony) Singh there was no business journeys listed to consider the business mileage claim. He did not reimburse any private fuel and in the absence of any other information to support this declaration, the Respondent felt that a fuel charge benefit should be made.

With A Wilson and I Keen there was no mileage logs received and the expense forms submitted had not listed any details of mileage. In the absence of any information to confirm that all fuel was provided for business journeys, a fuel benefit was applicable.

The last set of employees in this group were those who were supplied with their company car and a fuel card but did not submit an expenses claim form for the period and therefore had not supplied any mileage records to demonstrate that all the fuel supplied was for business purposes. The employees in this category are Messrs Bromley, Keen, Green, Huntley, Murphy, Sheldon, D Smith, C Stopforth and Pengelly.

Group 3

In this group Mr Ashcroft and Webb did not provide details of business journeys to support the business mileage. It was found that the rural mileage listed on the expenses claim forms for Mr Webb differed from that on the fuel card statements. In the case of Mr Webb there were instances when the amount given for fuel purchases showed that the mileage done was in excess of that listed on the claim form. This suggested a private element to the usage.

The other employees in this category M Smith, D Beverly and I Mottershead did not provide mileage logs to support the business journey undertaken.

The last employee in this category Mr Brown did not provide a mileage log was not provided to support the business journeys undertaken and a fuel benefit charge was applied.

34. Certain employees had a second private car and claimed to have done no mileage in the company car. These were Mr T Singh, Mr I Keen, M R Huntley, Mr M Smith and Mr I Pengelly.

35. It seems from the evidence of Miss Commack, which was comprehensive and well presented, that the conditions listed above which would have allowed the company to complete accurate returns were not met. The employees did not understand properly how to complete the forms and to distinguish between private and business mileage. It was not shown at the hearing that there were any instructions or guidance material provided by the company to employees to explain how the forms were to be completed, checked or submitted. It is a fair assumption therefore that the employees did not properly understand or were not properly briefed on the distinction between business and private travel. None of the employees gave evidence to show their understanding and briefing on this matter.

36. The declared company policy in this area failed to explain the distinction between business and private miles. The policy statement itself requires a record of "daily business mileage, which must be recorded with each purchase of fuel". This is inconsistent with practice since the expenses claim sheet only reported monthly totals. The evidence of Miss Cormack for the Respondents clearly demonstrated a number of unresolved inconsistencies in the monthly expenses sheets.

37. The Tribunal has concluded that the system operated by the company was not sufficiently robust to ensure a reliable reimbursement by the employee of the cost of fuel used for private purposes. Except those employees who owned a private second car (who are listed above) and who stated that they had no private use because of the availability of alternative vehicles for private use, the

Tribunal feels that the fuel benefit charge should be applied. The Tribunal believes that in those cases where there was an offer of a token payment by employees with self-owned cars, this can be taken as an indication that they did not really believe that they had done anything wrong. They were merely offering a token in the mistaken belief that they would bring matters to an end. With regard to those stated employees therefore the appeal is allowed. With regard to the other employees the appeal is upheld.

38. The Tribunal would dismiss the appeal for the following reasons. First, the lack of evidence to support the view that the employees understood the distinction between business and private mileage. Secondly, the system of checking was not sufficiently thorough to pick up obvious anomalies. There were several anomalies identified by Officer Cormack in the Company information. For example, the manager of the Manchester office (Mr M Bromley), would have had significant private travel in attending the office. In order to provide accurate P11D information, it would have been necessary to make detailed checks on his expenses claim form. This appeared not to have been done.

39. The Appellants questioned whether an assessment on the individual employee is a prerequisite for a Class 1A liability. The Tribunal does not agree that this is a prerequisite. Regulation 80 of the Social Security (Contributions) Regulations 1992 requires the employer to make a return of general earnings in respect of which a Class 1A contribution is payable. These are commonly referred to as benefits in kind and the return is on a form P11D. The employer is required to submit the return by 6 July following the end of the tax year and to pay the corresponding Class 1A by 19 or 22 July. Regulation 80 implements section 10, Social Security Contributions and Benefits Act 1992 which defines a liability to Class 1 and Class 1A contributions where "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 words "chargeable to income tax under ITEPA 2003 on an amount of general earnings" identifies the amount on which Class 1A contributions are calculated. The words "is chargeable" means "is liable to be charged" and not "has been charged". We do not therefore agree with the Appellant's argument that the imposition of a charge to income tax on the employee is a prerequisite for a charge to Class 1A contributions on the employer

40. Further, the Tribunal notes that many employees are not formally charged to income tax. Rather the PAYE scheme operates to collect an equivalent amount of income tax either in the tax year concerned or, by amendment of a PAYE code, in a subsequent year. The tax may be collected by this simple administrative procedure.

41. We also do not agree with the Appellant's argument that it is unfair to determine the company's Class 1A liability without offering the employees the opportunity to make representations. The Tribunal can see the logic in the Appellant's argument because in order to determine the liability to National Insurance, if any, it would first be necessary to determine whether or not any of the employees involved were liable to be charged fuel benefit. This interpretation however is not borne out by the legislation. The views of Simon Bates, HMRC, Gloucester, who agrees with the Appellant, are noted.

42. The Appellant also says that the tax charged on the individual and on the company are time barred and that only the 2008-09 year assessments can be made. The Tribunal understands the time limits to be six years and therefore does not agree with the Appellant's submission. There is no unfairness in the time taken to investigate the matter.

43. Another point made by the Appellant in their submissions is that certain employees were employed by Ethos and Gosh (group companies) and not by PMS. It should be noted that all staff were paid through the PMS payroll and the forms P11D shows PMS as the employer. It is also established from the evidence that the keeper of the car as shown at the DVLA records to be PMS. The Tribunal therefore accepts the Respondents' submissions that all employees are considered to be employees of PMS.

Penalties

44. The Respondents say that penalties under Regulation 81(1) Social Security (Contributions) Regulations 2001 are due on the Class 1A NIC in respect of the omitted company car and company car fuel benefits for 2003-4 to 2007-8 inclusive. They say this because the company has been negligent by not keeping such records as are necessary to enable it to make accurate returns in relation to the submission of correct P11D returns.

45. Rather unfortunately HMRC provided copies of legislation that had superseded the relevant legislation. As it applied for the relevant years, the legislation read:

> **81.**—(1) Where a person fraudulently or negligently makes an incorrect return of contributions referred to in regulation 80(1) the Board may, within 6 years after the date of making such a return or at any later time within 3 years of the final determination of the amount of a Class 1A contribution by reference to which the amount of the penalty is to be ascertained, impose a penalty not exceeding the difference between—
>
> (a) the amount payable by him in accordance with the regulations for the year to which the return relates; and
>
> (b) the amount which would have been so payable if the return had been correct.

46. The word “neglect” has to be read as requiring a level of culpability and not merely mistake. The Courts for many years took the view that negligence in relation to tax statutes means to act in an imprudent or unreasonable manner and in order to establish this an objective test was applied, which compared the actions of the individual with those of a reasonable and prudent individual in similar circumstances. It was therefore possible for an individual to be negligent while acting innocently.

47. The Tribunal believes that in this case the taxpayer company intended to comply with the legislation and established a system which was intended to produce accurate information and forms. The system had some deficiencies.

48. In this case the Appellant has an expenses policy, which one can imagine is more than many companies would have, were advised by well-known firm of tax advisers, had a competent finance director, and employees were encouraged to submit expenses and mileage returns for cars with a view to completing the relevant P11D forms. There were shortcomings in the systems and not all employees provided all relevant information. It is understandable that this would have meant a burdensome task on employees who had sales targets and who had very wide areas of marketing to cover. The expenses records had to be generated by the individual salesman since they were the only ones capable of verifying their business and private travel. It is understandable that the system did not always work properly. The Appellant had to decide on the information needed to complete the annual returns and they believed that the completed forms provided by employees were sufficient for its purpose.

49. The investigation into these matters was carried out over a long period with full cooperation from the Appellant and several discussions and meetings took place between the finance director of the appellant company and the HMRC officer involved in the investigation. At no point was there an allegation of dishonesty or culpability. The reviewing officer simply states that the Appellants are liable to penalties but allowed an abatement of the penalty for disclosure and cooperation.

50. We have found it particularly difficult to decide whether the taxpayer was negligent. This is a borderline case. On balance, we have concluded that the taxpayer behaved more as a reasonable and prudent business would behave than the contrary and so we allow the appeal as regards penalties.

Paul Beverley

51. Mr Beverley had the use of a pool car that was used by more than one employee to drive customers to trade shows and to keep overnight at the person's premises.

52. The evidence provided was that Mr Beverley lives in Hong Kong and visits the UK during the year and during these visits he has the use of the vehicle.

53. The Respondents under Section 118 and 171(1) ITEPA 2003, submitted that where a car is made available by reason of an employee's employment the legislation provides that it will be automatically treated as having been made available for private use except if the terms of the use prohibits private use or it is demonstrated that it is not in fact used privately. The prohibition itself does not prevent a tax charge.

54. The Appellants have submitted that Mr Beverley is neither resident nor ordinarily resident in the UK (and has resided in Hong Kong for the past 15 years). They accept that a car arises but due to his non-resident status he is not liable to Class 1 National Insurance and consequently his UK employer, the Appellant, is not liable to Class 1A National Insurance on the benefit. It is correct to say that Class 1A charge on the employer is only due if the individual employee is himself or herself within the charge to Class 1 National Insurance.

55. It is an understanding of the Tribunal that the Respondents have accepted that Mr Beverley is not liable to Class 1A National Insurance and this matter has been resolved albeit after some prolonged negotiation with the Respondents and the officers involved.

Conclusion

56. The Tribunal therefore allows this appeal in part and concludes as follows.

57. The company is liable for Class 1A National Insurance Contributions on fuel provided to employees for private motoring, as assessed on all the employees except those named employees (five altogether) who had a private second car for their personal use. The appeal on those assessments is therefore allowed.

58. The company would not be liable to penalties under Regulation 80 and 81(1) of the Social Security (Contributions Regulations) 2001 where they had to provide a return or where an incorrect return was provided within relevant time limits, The Company has not been negligent in making these returns.

59. The appeal relating to Mr Paul Beverley is allowed as agreed between the parties.

60. For the reasons above, the appeal is therefore partly allowed. In summary, the appeals are determined as follows:

(1) Section 8 decisions – appeals allowed for the following :

M Smith , T Keen,T Singh (aka M Singh),I Pengelly, MR Huntley

(2) Section 8 appeals in all other cases – Appeal dismissed.

(3) Penalty determination – Appeal allowed in full.

61. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 13 August 2012