[2021] UKFTT 0300 (TC)

TC08242

Benefit in kind – cars acquired by employer on lease purchase and made available to employees – full costs recharged to the directors – whether class 1A NICs and income tax under Chapter 6 Part 3 ITEPA 2003 due – whether a "benefit" arose up to 2015-16 – Apollo Fuels considered – whether arrangements constituted employer as agent such that cars not "made available" by it – limitation of charge when property in cars transferred to directors on exercise of purchase option – whether any omission from income tax returns and inaccuracy in Class 1A returns brought about by carelessness – appeal allowed in part in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2019/02475
TC/2019/02480
TC/2019/02481

BETWEEN

SMALLMAN & SONS LIMITED (1)
LISA GARRITY (2)
BRIAN GARRITY (3) **Appellants**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
JULIAN SIMS

The hearing took place on 28 June 2021. The hearing was held by video using the Tribunal's own video hearing system. All the participants (including the Panel) attended remotely by video. A face to face hearing was not held because of the social distancing requirements necessitated by the Covid-19 pandemic. The documents to which we were referred are described in the decision.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Dougal Powrie of Kibworth Tax Services, instructed by Smith Hannah Ltd, Chartered Certified Accountants, for the Appellants

Paula O'Reilly, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. These appeals are concerned with liabilities to income tax and Class 1A national insurance contributions (and associated penalties) imposed on the Appellants in respect of company cars acquired on lease purchase in the name of the first Appellant ("SSL") and used by the second and third Appellants ("LG" and "BG" respectively) and a member of their family during the tax years 2011-12 to 2016-17 inclusive.

2. The main distinguishing feature of the appeals is that HMRC are seeking to impose those liabilities in spite of the fact that the full lease purchase costs (and indeed all other costs in relation to the cars) incurred by SSL were recharged to and paid by LG and BG through their joint directors' loan account (which had a credit balance on it at all material times, i.e. SSL always owed money to LG and BG).

THE EVIDENCE

3. We received a document bundle in electronic form, running to 514 pages. We also received written witness statements from BG and from officers Brian Vass and David Dalton on behalf of HMRC. We heard oral testimony from BG and Mr Vass (who had taken over the case in November 2020, Mr Dalton having left HMRC). We also received a short written witness statement from Ms Rosemary Oldfield, the bookkeeper of SSL.

4. We find the following facts.

THE FACTS

5. Following a routine compliance visit to SSL on 19 April 2016, various employee benefit and CIS issues were identified, the bulk of which have subsequently been resolved by agreement. The remaining issue before us, upon which the parties could not agree, was as to the appropriate tax treatment of four cars which were available for private use by BG, LG and a member of their family (believed to be their daughter).

6. SSL was at all material times wholly owned by BG and LG and they were its directors.

7. The cars in question had all been acquired in the name of SSL by lease purchase agreements with Lombard North Central plc ("Lombard"), a leasing company with which SSL had a very good working relationship established by the financing through Lombard of various pieces of equipment for use in SSL's construction business.

8. The cars in question were all second hand, and no VAT was charged on their sale or claimed as input tax by SSL. They were roughly three to five years old when acquired. Essentially, BG and LG chose the cars they wanted and then those cars were financed by lease purchase agreements entered into between SSL and Lombard. All costs in relation to the cars (including the cash deposits paid to Lombard, the servicing costs, the finance charges under the agreements with Lombard and the purchase option payments) were debited to the joint directors' loan account of BG and LG, which they maintained at all times with a credit balance. Thus although SSL actually paid those costs, it did so at the direction of BG and SL, using money which it already owed to them. SSL was the registered keeper of the vehicles at DVLA.

9. The reason for doing things this way was to take advantage of the good finance rates offered by Lombard to SSL (presumably by reason of its financial standing and the established relationship with Lombard), which would not have been available to BG and LG as private individuals. There was no evidence before us as to the actual amount of costs saved as a result of these arrangements (obviously the underlying purchase price of the cars was unaffected) but it was referred to by the Appellants' accountants in correspondence as being "much cheaper"

to acquire the vehicles in this way rather than directly. When the cars were used on company business, a mileage allowance was claimed.

10. SSL's bookkeeper made all appropriate entries in SSL's records to reflect these arrangements, and the cars did not appear in SSL's assets as shown in its accounts.

11. According to the terms of the lease purchase contracts, the cars remained the property of Lombard unless and until the option to purchase was exercised, whereupon we infer that title would have passed to SSL under the standard form documentation. Given that the cars were entirely paid for by BG and LG, were never included in SSL's accounts as assets of the company, and SSL paid a mileage allowance to BG and LG for all use of the cars on company business, we infer that the mutual intention of SSL, BG and LG was that ownership of them would then immediately pass to BG and LG. In his evidence, BG referred to the whole arrangement as being "personal purchase financed through our DLA". The status as "registered keeper" for DVLA purposes is an entirely separate matter from ownership, and it is quite clear that on any subsequent sale of the cars, BG and LG would have been entitled to the proceeds of sale (having paid for the cars in the first place). It would certainly have assisted if some written confirmation of the arrangement had been created as between BG, LG and SSL, but in the nature of small family controlled companies, such formalities are often not observed and we do not consider the absence of such written confirmation negates the obvious understanding between the parties.

12. Relations with Lombard were cordial. SSL's account manager there, a Miss Gail, was herself keen on cars and when BG or LG had identified a car they wished to acquire, there would be a conversation with her to arrange the finance, using SSL as the lessee/purchaser in order to access its preferential rates. She knew that these were effectively private purchases and that BG and LG would effectively be paying for the cars themselves, but she did not know the detail of the arrangements.

THE ASSESSMENTS

13. Following various meetings and lengthy correspondence, the outstanding liabilities which are the subject of this appeal are, in outline, as follows:

(1) Addressed to SSL: Class 1A NICs for the 6 years from 6 April 2011 to 2017 in respect of LG – £12,864 and in respect of BG – £32,654; penalties totalling £4,600 for failure to deliver forms P11D(b) in respect of the years 2011-12, 2012-13, 2015-16 and 2016-17; and penalties for the 2 years from 6 April 2013 to 5 April 2015 under Schedule 24 Finance Act 2007 for inaccuracies in SSL's forms P11D(b) – £2,718.60.

(2) Addressed to BG: Discovery assessments and a closure notice imposing income tax liabilities for the years 2012-13 to 2016-17 totalling £66,824.84.

(3) Addressed to LG: Discovery assessments and a closure notice imposing income tax liabilities for the years 2012-13 to 2016-17 totalling £23,475.17.

14. We do not consider it necessary to set out the various assessments, closure notices, determinations, etc in detail as the parties have specifically invited the Tribunal to give only a decision in principle at this stage on the significant points in issue between them, following which they consider it will be straightforward for them to agree on any actual liabilities.

THE LEGISLATION

15. Section 114 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provided, so far as relevant, as follows (we have included a note of the changes made to it over the period covered by these appeals):

114 Cars, vans and related benefits

(1) This Chapter applies to a car or a van in relation to a particular tax year if in that year the car or van—

(a) is made available (without any transfer of the property in it) to an employee or a member of the employee's family 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 or van—

(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,

…

(3) This Chapter does not apply if an amount constitutes earnings from the employment in respect of the benefit of the car or van by virtue of any other provision (see section 119).

16. Subsection 114(3) was deleted with effect from 6 April 2014, and the following subsection (1A) was added with effect from 6 April 2016:

(1A) Where this Chapter applies to a car or van, the car or van is a benefit for the purposes of this Chapter (and accordingly it is immaterial whether the terms on which it is made available to the employee or member constitute a fair bargain).

17. Thus s114 identifies the situations in which Chapter 6 of Part 3 ITEPA applies to bring into account a potential charge to income tax arising in respect of a car or van. Any such charge in respect of a car is imposed (if at all) by s120 ITEPA (set out below).

18. Under s114(1)(a), the first precondition to potential liability under the car tax code in any particular tax year is that the car in question must be "made available (without any transfer of the property in it)" to the employee or a member of his/her family or household. S116 ITEPA, which explains when (not, on its face, if[1]) a car or van is "available", has provided as follows at all relevant times:

116 Meaning of when car or van is available to employee

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

(2) References in this Chapter to—

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

[1] S116 does not appear to add anything to ss114 and 117 in terms of the circumstances in which liability arises, only clarifying when the period of availability starts and ends. This is particularly relevant to s143, for example.

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

(3) This section does not apply to section 124A or 138 (automatic car for a disabled employee).

19. The second precondition to liability (set out in s114(1)(b) ITEPA) is that the car in question must be "so" made available (i.e. without any transfer of the property in it to an employee or a member of an employee's household) "by reason of the employment". S117 ITEPA provides further clarification of this concept. Up to 5 April 2016, it provided as follows:

117 Meaning of car or van made available by reason of employment

For the purposes of this Chapter a car or van 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 unless—

(a) the employer is an individual, and

(b) it is so made available in the normal course of the employer's domestic, family or personal relationships.

20. From 6 April 2016, it provides as follows:

117 Meaning of car or van made available by reason of employment

(1) For the purposes of this Chapter a car or van made available by an employer to an employee or member of an employee's family or household is to be regarded as made available by reason of the employment unless subsection (2) or (3) excludes the application of this subsection.

(2) Subsection (1) does not apply where-

(a) the employer is an individual, and

(b) the car or van in question is made available in the normal course of the employer's domestic, family or personal relationships.

(3) Subsection (1) does not apply where-

(a) the employer carries on a vehicle hire business under which cars or vans of the same kind are made available to members of the public for hire,

(b) the car or van in question is hired to the employee or member in the normal course of that business, and

(c) in hiring that car or van the employee or member is acting as an ordinary member of the public.

21. Whichever version of s117 is under consideration, it is agreed that the crucial issue is whether each car was "made available by" SSL to BG, LG and their daughter, as none of the specified exceptions in either version of the section apply to the present case.

22. The third preconditions to liability (set out in s114(1)(c) ITEPA) is agreed to be satisfied in the present case; it is accepted that the cars were available for private use. It is not therefore necessary for us to set out s118 ITEPA which provide further interpretation of that precondition.

23. As stated above, in respect of cars (as opposed to vans) the primary charging section (which actually imposes the charge to tax) is s120 ITEPA, which provided as follows for all relevant periods up to 5 April 2016:

> **120 Benefit of car treated as earnings**
>
> (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.

24. For the subsequent year, up to 5 April 2017, an extra subsection (3) was added and some additional text was inserted into subsection (2), as follows (the amendments are italicised):

> **120 Benefit of car treated as earnings**
>
> (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 *(including a case where the cash equivalent of the benefit of the car is nil)* the employee is referred to in this Chapter as being chargeable to tax in respect of the car in that year.
>
> *(3) Any reference in this Act to a case where the cash equivalent of the benefit of a car is treated as the employee's earnings for a year by virtue of this section includes a case where the cash equivalent is nil.*

25. It is not necessary to set out the detail of how the "cash equivalent of the benefit of the car" is established for the purposes of s120. The various steps of the calculation and associated provisions are set out at ss121-148 ITEPA.

THE ARGUMENTS

Liability to benefit in kind charges

26. Mr Powrie on behalf of the Appellants argued essentially as follows.

27. There was one primary reason why the appeals should be allowed. This was that when SSL acquired the vehicles, it did so acting purely as agent for the directors. It was therefore never in a position to make the vehicles available because it never had power over the vehicles in the first place. It simply acted as agent, on instructions from its two principles, in obtaining the vehicles for them. To argue otherwise was akin, in his submission, to saying that if a vehicle was bought using a cheque drawn on a bank account, it was the bank (rather than the seller of the vehicle) that was making the vehicle available to the drawer of the cheque.

28. Mr Powrie had a secondary argument, which only referred to the periods up to 5 April 2016 (when changes were made to the legislation in response, he submitted, to the judgment of the Court of Appeal in *HMRC v Apollo Fuels Limited and others* [2016] EWCA Civ 157). The Court of Appeal had decided that no liability would arise in respect of the provision of a car unless there had been a "benefit" to the employee in the ordinary sense of the word; and where the car had been leased to the employee on arm's length commercial terms, including lease charges at full market value, there was no such benefit. Even if his primary argument failed, he submitted that the principle set out in the *Apollo Fuels* decision would apply here to all periods up to 5 April 2016 because all the costs of acquiring and running the cars were simply recharged to BG and LG, meaning that there was nothing that could be regarded as a "benefit" to them. He acknowledged that this argument was "unlikely to find favour" in respect of the period from 6 April 2016 in the light of the introduction of the new s114(1A) ITEPA with effect from that date.

29. In response to Mr Powrie's primary argument, Ms O'Reilly submitted that there was no principle emerging from the cases that the existence of some kind of agency relationship would

take the facts outside the scope of s114; here she referred to the FTT decision in *Stanford Management Systems Limited v HMRC* [2010] UKFTT 98 (TC), in which the employer had leased expensive cars for use by its directors but with all the leasing charges and other costs of running the cars being recharged to the directors. The Tribunal had found there to be no documentary evidence of any nominee or agency arrangement for the leasing of the cars, but that "even if there had been such an agreement, the legislation was not concerned with agency or any other law. It stipulated the correct tax treatment to be used when an employer provides a car for its employees. The contract was in the name of the Company, the legislation was satisfied and so a benefit arose."

30. Mr Powrie countered the argument based on *Stanford* with a reference to *Victor Baldorino v HMRC* [2012] UKFTT 70 (TC), in which the Tribunal specifically disagreed with the above comment. It said this at [16]:

> The legislative question is whether a car is made available to a person "by reason of his employment". If the car was made available because the company acted as the employee's agent in forming a contract between the employee and the lessor, it may well be the case that the car cannot be said to have been made available by reason of the employment. Whether or not that is the case will depend on the facts. The nature and circumstances of the agency relationship will affect the answer to the statutory question, but the mere fact that the company has acted as the employee's agent in forming the contract will not determine the answer. Further if the employer has acted as the employee's agent in leasing the car, then the car is not made available by the employer but by the lessor and the deeming of section 117 does not automatically cause the car to be treated as having been made available by reason of the employee's employment.

31. In *Baldorino*, however, the Tribunal went on to find on the facts that the employer had not been acting as the employee's agent in leasing the relevant cars (even though the lease charges in relation to one car were recharged to the employee); they were made available to him by his employer and therefore the liability arose.

32. Ms O'Reilly also referred to *Southern Aerial (Communications) Ltd and another v HMRC* [2015] UKFTT 538(TC), where a company had entered into hire purchase agreements for cars but the sums due under the HP agreements had been recharged to a partnership between the two directors (husband and wife). It was argued that since the substance of the arrangement was that the directors were paying for the cars through the partnership, it was the partnership and not the company that had made the cars available, so the arrangements fell outside the car benefit provisions in ITEPA. The FTT had said this:

> But however commercial the arrangements might be we do not think they can override the effect of the HP contracts, in the absence of evidence that those contracts are not to be taken at face value because they were shams or entered into as nominee or agent for someone else. As it was the company that entered into the HP contracts, it was the company to whom the cars were delivered by the dealers and it was the company which was the only person in a position legally to make the cars available to its directors, and during the currency of the HP agreements that continued to be the case throughout the tax years involved. We therefore hold that s 117 applies and that the "by reason of employment" test is presumed passed.

33. Ms O'Reilly submitted that a similar analysis should be applied here, the absence of an intervening partnership only strengthening the case.

Validity of assessments

34. Certain of the assessments issued by HMRC rely for their validity upon alleged careless or deliberate behaviour on the part of BG and/or LG in order to extend the "normal" four year time limit in s34 Taxes Management Act 1970 ("TMA") to six years under s36 TMA. Without going into details, the parties asked the Tribunal to adjudicate in principle on whether any failure to make a return or pay any amounts due had been brought about carelessly, so that compliance with applicable time limits could be resolved by agreement between them. Ms O'Reilly submitted that in all the circumstances there had been carelessness in not taking specific advice on the appropriate tax treatment of the company cars, Mr Powrie submitted that there had not, largely on the basis that it was at the very least counter-intuitive to expect a tax liability on a benefit that had been paid for in full, and in any event SSL's accountants were fully aware of the arrangements, responsible for dealing with its returns and had not raised the issue.

Carelessness

35. In similar vein, we were asked to adjudicate in principle, in respect of the penalties imposed, on whether the supposed inaccuracies in various returns which failed to include reference to the car benefit charges had been brought about carelessly. The respective submissions of the parties effectively repeated the same points as had been made in relation to the time limits issue.

DISCUSSION

Liability to income tax and class 1A NICs

36. The question of any liability must be decided by reference to the statutory wording.

37. The first question to be asked in respect of each car and each tax year, therefore, is that set out in s114(1)(a) ITEPA, namely whether the car was "made available (without any transfer of the property in it) to" BG, LG or their daughter. In answering this question, it is irrelevant by whom the car was made available.

38. Standing back and considering the undisputed facts, it is clear to us that each car was "made available (without any transfer of the property in it)" to BG, LG or their daughter for so long as that car was subject to the relevant lease purchase agreement with Lombard.

39. Upon payment of the final purchase option fee under each such contract, however, we have found that property in the relevant car passed to SSL and immediately thereafter to SG and LG; from that point on, therefore, the car was available with (and indeed by virtue of) the transfer of the property in it and therefore in subsequent tax years the car would fall outside the scope of s114(1)(a). In *Apollo Fuels*, the Court of Appeal confirmed that "'the property' in a chattel, such as a car, is a long-established and well-understood concept connoting, in effect, legal title to the chattel"; we are satisfied that the property in the cars, as so understood, was transferred first to SSL and then immediately to BG and LG upon payment of the purchase option fee in each case. We note that s143 ITEPA makes provision for an apportionment where the car was not "available" for part of a tax year, which would apply where the property in the car was transferred during that year.

40. In considering s114(1)(a), we do not consider the question of whether there was some kind of agency arrangement around the lease purchase contracts to be relevant. Even if there had been the clearest possible agency arrangement, each car would still have been "made available" to BG, LG or their daughter for the purposes of s114(1)(a). We consider the agency question below in its proper context.

41. Insofar as the requirement of s114(1)(a) is satisfied, therefore, the real underlying issue would be whether the car was made available "by reason of the employment" under s 114(1)(b), the question to which we now turn.

42. In considering s114(1)(b), we must also of course take account of s117, which essentially provides that where a car is made available by an employer, it will be regarded as being made available "by reason of the employment" except in certain very limited situations (none of which apply in the present case).

43. The key question therefore is whether, when the cars were made available to BG, LG and their daughter, they were made available by SSL or by some other person (the only apparent possibilities being Lombard or BG and LG themselves). If they were made available by SSL, then all the requirements of s114 would be satisfied (there being no dispute that the cars were available for private use as required by s114(1)(c)).

44. This is where Mr Powrie's agency argument arises. He submits that because SSL was acting purely as agent for BG and LG in entering into the contracts with Lombard, it was not itself making the cars available to them, rather they were making them available to themselves and their daughter; and insofar as there might be any residual argument under s114(1)(b) that they were doing so by reason of their employment (a question which, as Judge Hellier put it in *Baldorino* at [11], is "at large" where the cars are not made available by the employer), the same submission provides a complete answer – they were making the cars available by reason of the fact that they had appointed SSL as their agent to acquire them on lease purchase through Lombard, not by reason of their employment.

45. Like the FTT in *Baldorino*, we do not rule out the possibility that such an argument might in principle succeed. But we consider it must fail on the facts of this case. To create an agency of the type which Mr Powrie contends for would not be a straightforward matter and might not be possible at all given the terms of the contract between SSL and Lombard (of which we do not have detailed evidence). Whilst we accept that Miss Gail at Lombard was clearly aware of the intended use of the cars, there is no evidence that she accepted SSL was contracting merely as agent for BH and LG, or that she would have agreed that any such agency arrangement was permissible so far as Lombard were concerned (even if she had actual or ostensible authority to agree to any such arrangement, for which there was again no evidence before us). The Appellants must therefore be seeking to rely on an undisclosed agency.

46. The leading case on undisclosed agency is *Siu Yin Kwan and another v Eastern Insurance Co Ltd* [1994] 2 A.C. 199 in which the principles were summarised by the Privy Council as follows:

> (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

47. There was no evidence before us that SSL had intended, in entering into the lease purchase agreements, to act on behalf of BG and LG so as to make them directly liable to Lombard for performance of the contracts with it, or that it had been given actual authority to do so. The detailed terms of each lease purchase contract were not in evidence before us, only the short summary contracts which referred to standard terms and conditions available

elsewhere, so we were not able to establish whether the terms of the contracts would have permitted an undisclosed agency to arise.

48. We therefore find that the Appellants have not established the existence of an agency arrangement (disclosed or not) such as would entitle them to argue that SSL had not made the cars available to BG, LG and their daughter.

49. We now turn to the relevance of the *Apollo Fuels* decision in respect of the years up to 5 April 2016.

50. Mr Powrie argues that as BG and LG met the full costs of acquiring and running the cars (subject only to them claiming mileage allowance when used on company business), there was no "benefit" of the cars upon which tax and NICs could be charged. As was said in *Apollo Fuels* at [45]:

> …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.

and at [73]:

> … a charge to income tax arises under Ch 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.

51. In *Apollo Fuels*, the cars (which were second hand and were owned by the company) were leased to the employees by their employer. The lease charges were calculated so as to afford the employer a 10% "commercial return" on its own costs. The Upper Tribunal had considered there to be no benefit on the basis that "fair bargains are excluded from the regime for taxing benefits…" and the leases had been "at arm's length".

52. Whilst the amounts paid by SSL and recharged to BG and LG were set at arm's length rates as between SSL and Lombard, it was quite clear that a significant purpose of structuring the arrangements through SSL was in order to access the preferential rates available to it – making the cars "much cheaper" to the directors. Thus, whilst the benefit to them was clearly much smaller than the entire value of the cars, there was still clearly a benefit arising to them from the arrangements. Mr Powrie sought to persuade us that since this benefit came at no cost to SSL, it was irrelevant in terms of the test in *Apollo Fuels*.

53. We are unable to accept his submission. *Apollo Fuels* was concerned with the particular circumstances of lease costs which were fixed at amounts which represented (according to the Upper Tribunal) fair bargains, agreed at arm's length. Once it is accepted (as it must be in the present case) that the employee has derived a benefit from the arrangement, we do not consider that *Apollo Fuels* can be relied on to take the arrangements entirely outside the scope of the car benefit charge provisions. Obviously the result can be that the employee suffers tax on a statutorily fixed benefit far greater in value than the benefit actually received, but that is a feature of a legislative code such as the present and we see no legitimate way to address it other than to give credit for the payments actually made for the use of the cars (which, to some extent, is afforded in s144 ITEPA).

54. Thus in respect of each tax year during which each car was on hire, we consider the requirements of s114 to be satisfied such that liability to income tax and Class 1A NICs arises (subject to adjustment where the hire started after the beginning of the tax year or subsisted for less than the whole year before the option to purchase was exercised). In respect of tax years after the option fee had been paid and property in the car passed to SSL and immediately to BG and LG, no such liability arises.

Carelessness – time limits for assessment and penalties

55. As these two matters were addressed together by the parties, it is appropriate to consider them together. Clearly the statutory wording and context in respect of the two different matters is different (whether any loss of tax had been "brought about carelessly", and whether any inaccuracy in a return was careless, i.e. "due to failure by [the taxpayer] to take reasonable care") but the key underlying issue in each case, as advanced by both parties, was whether the Appellants had been careless or, to put it another way, had failed to take reasonable care. In these matters, the burden lies on HMRC to show, on the balance of probabilities, that the Appellants had been careless in bringing about the loss of tax or failed to take reasonable care in making an inaccurate return.

56. In a situation where (1) the full details of the arrangements were known to SSL's advisers, upon whom SSL and the directors reasonably relied to deal with any necessary returns, and (2) it was not unreasonable for the Appellants to believe that no "benefit in kind" liability could arise in respect of the provision of cars that they had paid for in full themselves, we consider that the Appellants' failure to include the liabilities in their returns cannot properly be regarded as careless. We therefore hold that the extended time limit in s36 TMA does not apply, and that the penalties under Schedule 24 Finance Act 2007 should be discharged.

SUMMARY AND CONCLUSION

57. The provisions of Chapter 6 of Part 3 ITEPA apply in principle to give rise to income tax and Class 1A NIC liabilities in respect of the various cars for all the tax years under consideration, but only for the respective periods during which they were leased and not for the periods after the property in them had been acquired by virtue of payment of the option fees (see [54] above).

58. The extended time limit in s36 TMA does not apply, so that the normal four year time limit in s34 TMA applies. Any assessments issued in reliance on s36 are therefore discharged (see [56] above)

59. To the extent that any relevant inaccuracies remain in returns which are subject to penalties under Schedule 24 Finance Act 2007, such inaccuracies were not careless and the penalties are therefore discharged (see [56] above).

60. In passing, we should also mention that any penalty determination under Regulation 81(2) Social Security Contributions Regulations 2001should be reduced as necessary to take account of the provisions of Regulation 81(5) of those Regulations (which limit the amount of such penalties to the amount of Class 1A NICs found to be payable in respect of the relevant period).

61. If the parties are unable to agree on the final figures in the light of this decision in principle, they are to make application to the Tribunal for a final determination. If they reach agreement, they are to notify the Tribunal in writing within 14 days thereafter so that the Tribunal can close its file and dispose of the papers.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 24 AUGUST 2021