[2018] UKFTT 346 (TC)

TC06561

Appeal number: TC/2016/03038

FIRST-TIER TRIBUNAL
TAX CHAMBER

EXEL COMPUTER SYSTEMS PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MOHAMMED FAROOQ

Sitting in public at Nottingham Justice Centre on 17 and 18 April 2018

Gary Brothers, Independent Tax & Forensic Services LLP, for the Appellant

Mrs P Checkley and Pallavika Patel, Presenting Officers of HM Revenue & Customs, for the Respondents

With further written submissions from the parties on 22 April and 2 May 2018

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DECISION

1. The Appellant appeals against National Insurance Contribution ("NIC") decisions made by HM Revenue & Customs ("HMRC") pursuant to Section 8, Social Security Contributions (Transfer of Functions etc) Act 1999 (section 8 decisions). By those section 8 decisions, HMRC notified the Appellant it was required to pay Class 1A NIC in respect of the following tax years:

2005-06 for £12,254.74 of NIC

2006-07 for £11,62.41 of NIC

2008-09 for £8,440.19 of NIC

2009-10 for £7,480.69 of NIC

2010-11 for £8,158.97 of NIC

Total: £47,961.00

2. In respect of the earliest two tax years, those ending 5 April 2006 and 2007, the section 8 decisions were issued by HMRC on 11 July 2012 and 14 June 2013. HMRC issued protective claims at the County Court in respect of the liability in relation to these years on 24 July 2012 and 12 July 2013 respectively in order to safeguard the revenue.

3. The decisions in respect of the later three tax years were issued by HMRC on 20 May 2016.

4. The Appellant appealed the decisions for Tax Years 2005-2006 and 2006-2007 outside of the time limit for appeals to Tribunal. Nonetheless HMRC informed the Appellant they would not oppose the Tribunal granting permission to extend time for those appeals to be brought. The Tribunal grants such permission.

The issues in the appeal

5. The issues in the appeal relate to the Appellant's payment for car fuel for its employees and its liability to NIC upon these payments in the relevant years.

6. The first issue is one of limitation in respect of tax year 2008-09 ("the limitation issue"):

HMRC identified a liability for the Tax Year 2008-2009 which was not treated as a protective claim through the County Court as payment was provided by the Appellant. HMRC argue that a specified payment on account was made by the Appellant on 19 May 2015. This is disputed by the Appellant who asserts that HMRC is not able to recover the NIC liability said to be due. It argues that the six-year limitation period expired between time after the end of the Tax Year in which NIC would be due (19 July 2009) and the date of decision requiring payment (20 May 2016). The Appellant

therefore submits that HMRC's claim for NIC in their 20 May 2016 decision is now time barred.

7. The second issue is whether or not the Appellant's employees benefited from arrangements to supply them fuel for private and personal use in their company vehicles ("the benefit issue"):

The Appellant does not accept that a benefit has been provided to its employees for the purposes of Income Tax (Earnings and Pensions) Act 2003, Chapters 2 and 6 (or "ITEPA") as interpreted by the Court of Appeal in *Apollo Fuels v HMRC* [2016] EWCA Civ 157. HMRC submits the benefits code is engaged for those employees, with any resultant benefit in kind being taxable pursuant to the provisions of ITEPA.

8. The third issue, if the provision of fuel constitutes a benefit for the purposes of ITEPA, is whether the Appellant's employees failed to meet the requirement to facilitate the "making good "*in the year* of the incurred costs in respect of private fuel in compliance with section 151 ITEPA and whether, as a result, Class 1A NIC becomes due.

9. The fourth issue is whether the section 8 decisions as to the NIC due from the Appellant should be reduced or whether the decisions notified are based on best judgement and information available at the time.

The Facts

10. The Tribunal received four volumes of material from the parties. It heard oral evidence from four witnesses who had provided statements on behalf of the Appellant: Richard King, Antony Pottle, Paul Brundell (Financial Controller and accountant) and Rue Dilhe (Managing Director).

11. The Tribunal heard oral evidence from HMRC officer Martin Allsopp who had provided a statement on behalf of HMRC.

12. Each of these witnesses was cross examined.

13. The Tribunal finds the following facts on the balance of probabilities.

14. Exel Computer Systems Plc, the Appellant, has been trading for approximately 30 years in the provision and support of software packages for IT purposes. It operates in the business of the provision of and support with information technology software packages.

15. A review of corporation tax and employer taxes matters was commenced by HMRC in November 2010.

16. As part of the employer taxes review, the forms P11d (returns of expenses and benefits) were reviewed.

17. The forms P11d showed that cars were provided to employees and were correctly reported, in all instances, by the Appellant to HMRC.

18. As part of the same review, the practice of providing car fuel was also reviewed.

19. The review showed that a number of employees were office based and did not receive the provision of fuel for their cars. This was accepted by HMRC and does not form part of these proceedings.

20. The review also showed that the non-office employees were able to purchase fuel for their cars though the use of an “Arval” fuel card, for which the Appellant paid the cost on a regular basis.

21. The Appellant’s policy for the operation of the Arval fuel card required all employees to reimburse the Appellant for the private element of their fuel purchases. The Appellant had what they considered suitable systems to ensure that no private fuel was provided and believed fuel benefit in kind was not incurred by these employees and, correspondingly, no fuel benefit in kind was entered on their individual forms P11D.

22. A Corporation Tax Review, to include Employer Compliance (EC), was commenced on 22 November 2010. An initial meeting was held 20 January 2011. The EC element was commenced on 23 May 2011. By letter on 19 July 2011 the review was extended to include Tax Years 2005/2006 to 2008/2009 (inclusive).

23. As a result of the EC Review and subsequent correspondence, the following was established.

24. During the 2009/2010 Tax Year thirty two employees of the Appellant were provided with company cars. This Benefit in Kind (BIK) was reported on the Annual Form P11D for each respective year. The number of the Appellant’s employees receiving this benefit increased to thirty four in the 2010/2011 Tax Year.

25. Car fuel was provided to twenty of these employees in the 2009/2010 Tax Year by way of the provision of Arval Fuel cards. This purchase of fuel by use of Arval cards covered both business and private miles. These employees were therefore receiving fuel for personal use or private purposes - ‘private fuel’. Whether this was a ‘benefit’ in fact and a law is decided below.

26. The remainder of the employees did not receive the Fuel cards and purchased fuel privately and were reimbursed for any expense on fuel for business purposes by invoicing the Appellant: thus receiving car benefit only. The taxation of these employees is therefore not in dispute in this appeal.

27. On 26 September 2012, a comprehensive report was provided by the Appellant and considered by the CT Inspector, Decision Maker (DM) and HMRC’s witness, Mr Allsopp. The conclusion was that there was a lack of systems in place by the company to prevent a car fuel benefit charge from arising.

28. The Appellant relied upon its document ‘Terms and Conditions of Employment’, issued as at 5 August 2009, as being representative of company procedures from that date onwards.

29. The Appellant’s company practice was relevant employees, in possession of the Arval Fuel card, would email at the end of the tax year providing business and private mileage records for that year. They had been told orally by the company Accountant to provide the details before or shortly after the end of the year. They were then told

that after they provided the details the company would raise an invoice for private fuel which the employee should pay by return.

30. The Appellant's Company Policy, where car fuel benefit was provided, required the employee to reimburse the cost of all private fuel provided to them. Clause 13 in "TERMS AND CONDITIONS OF EMPLOYMENT" manual (issued to employees) made this clear:

"Where a vehicle is provided to the employee the company will insure and maintain the vehicle and shall pay or reimburse all reasonable expenses relating to fuel usage.

Detailed rules are outlined in the Procedure Manual."

31. Within the document "COMPANY CARS PROCEDURE 2009" at Appendix 2, paragraph 2 makes clear that the provision of a company car to an employee is entirely at the company's discretion within the policy laid down and the conditions set out within the document will apply.

32. Paragraph 3 headed "Dial Cards (Arval)" provides guidance to employees as to when to produce the fuel receipts and statements to the Appellant:

"If you are allocated a dial card as part of your remuneration you must provide petrol receipts every month for the company vehicle it is registered to. A Dialcard (Arval) statement will be sent to you every month and this, along with the petrol receipts must be forwarded straight back to the Accounts department."

33. The Appellant also provided a document titled 'Employees with Dial Cards Reimbursing Exel for Private Fuel Usage'. It begins:

'Certain Exel employees (consultants and salesmen) who spend most of their working time away from the office have been given dial cards due to the volume of business miles undertaken. As part of their induction, employees are asked whether they wish to take a benefit in kind on private fuel consumption or reimburse Exel for private fuel consumed during the tax year.

……

Some employees do not take a benefit in kind and as such are requested to keep detailed mileage records for business mileage and overall car mileage for each tax year. They have been instructed to provide these details by the end of the tax year such that Excel can invoice them for the private fuel consumed.

See Appendix 1 for examples of mileage records submitted by employees to Exel's accounts team. These examples contain summary information as request by the end of the tax year. As these individuals are not office based and travel to Exel's customer sites, it is sometimes impractical for them to send the details on April 5. However, information is sent as practically possible with detailed records to follow.'

34. Appendix 1 produces examples of employees providing details of mileage shortly after 5 April (up to 11 April) in emails for various years.

35. Some employees provided annual mileage records after the end of the tax year as evidenced for the 2008/2009 Tax Year where, for example, on 11 June 2009 an

email was issued to eleven employees requesting their business mileage records; more than thirty days after the relevant Tax Year end.

36. Likewise, an email was issued on 25 October 2010 to eleven employees in respect of mileage records for the year 2009/2010. Again, well after the end of the tax year.

37. The Appellant used a miles per gallon rate *excluding Value Added Tax* (VAT) in their calculations. Figures were derived by the employee using the calculation provided; invoices were not braised until 25 October 2010 or later in some instances.

38. On 23 June 2011 the Appellant's previous agent (Cooper-Parry) agreed by letter that, at 23 May 2011 when the EC visit was made, at least seven, out of all the employees provided with a company car and fuel benefit, had not reimbursed the Appellant at the time of the visit.

39. For the Tax Year 2010/2011, private use fuel was not invoiced until 20 June 2011, again more than thirty days after the Tax Year End of 5 April 2010. Further it was acknowledged that there were issues with the timing of submission of private fuel details after the Tax Year End.

40. The mileage records provided by the Appellant demonstrate that the claims submitted by employees covered the full year; not just the last month of March, with those identified by HMRC in the base year as failing to meet the requirement of Condition A of s151 ITEPA 2003; many reimbursements were not made until well after the Tax Year ended.

41. This failure was repeated over a number of years. The Tribunal is satisfied that this demonstrates that the Appellant did not have a robust method of monitoring this benefit to ensure compliance with the legislation.

The oral evidence on the issue

42. In oral evidence it was established that not all employees repaid the company in full by the end of 2011 for private fuel in respect of the years in question.

43. Some employees submitted their private mileage shortly after the tax year end and were invoiced thereafter by the Appellant and paid those invoices by return such that the payment would be made by the June following the tax year end in April.

44. For example, Richard King, an Implementation Consultant of the Appellant gave evidence as to how the fuel card worked for him. This was in line with his witness statement:

'6. Like some other company car drivers, I was given the option to have a company funded fuel card to pay for all of the fuel for my company car and to pay a fuel scale charge benefit in kind. Alternatively, I could record all mileage, both business and private and submit these details on an annual basis for the Financial Controller to calculate the cost of private fuel used.

7. The Financial controller would calculated the full cost of the fuel that I had used for private mileage and I would receive an invoice from the Company for the calculated

amount. This would be paid by me through bank transfer from my personal Santander bank account.

8. To enable the Financial Controller to make an accurate calculation of the costs of the fuel that I had used for private mileage, at the start of each year I would record the total mileage of my car. I would then record the mileage of each business journey made through the year. At the end of each financial year I would send an email to the Financial Controller detailing starting and finishing total mileages, along with a split of business and private mileages. This was volunteered by me as soon as practically possible after the year end.'

45. The previous accountant of the Appellant had told employees orally to submit their mileage for private fuel by the end of tax year or shortly after and then they would be invoiced by the Appellant, typically in the June or July following the 5 April year end, and the employee would make payment to the Appellant on the invoice by return.

46. Nonetheless, Mr Brundell, the subsequent financial controller of the Appellant, accepted in oral evidence that while around 20% of employees supplied their private mileage usage within the tax year (by 5 April), 60% did it shortly after the beginning of the new tax year (after 5 April), 10% within 2-6 months after 5 April and 10% outside the following tax year. Therefore 80% of employees were not even submitting their private fuel mileage within the tax year.

47. Further, a majority of the Appellant's employees were submitting their private fuel details and being invoiced and repaying the company by the end of July following the tax year ending 5 April. However, a significant minority were not even submitting their private mileage within the tax year following the tax year in which the private fuel was incurred ie. not even by 5 April of the following year.

48. For example, the Tribunal was shown examples of: invoices raised by the Appellant on 20 June 2011 for one employee in relation to private fuel used in the tax year ending 5 April 2010; and invoices raised on 12 September 2012 in respect of an employee for private fuel in the tax year 2008-2009.

Protective claims and Specified payment

49. To safeguard the duties for 2005-2006 and 2006-2007 the duties have been lodged with County Court as protective measure.

The facts concerning the 'specified payment on account for tax year 2008-2009

50. Between January and July 2015 the Appellant and HMRC were in correspondence in an attempt to settle various issues including the 2008-09 Class 1A NICs.

51. On 27 May 2015 the Appellant wrote to HMRC stating that there were errors in HMRC's assessment of 1 December 2014 relating to Class 1A NIC in respect of fuel for tax years 2008-09 to 2010-2011 inclusive which they detailed in an attached schedule. Taking this into account they calculated a reduction in the claim of £31,370.56 to £23,771.81 and enclosed a cheque in settlement. The schedule for 2008-2009 recorded a total sum of £8,331.16 made up of class 1A contributions of £7,683.07 and £648.09 in interest.

52. On 10 June 2015 Officer Allsop of HMRC wrote back thanking the Appellant for its willingness to settle all matters informally. The letter went on to state:

'Accordingly, I shall invite you to enter into a contract settlement via a letter of offer and acceptance based upon our without prejudice offer sent to your agent at that time, Gary Brothers. A suitably worded letter of offer will be sent to you for consideration once we have agreed the final figures.

With regard to the car fuel benefit, I confirm that the settlement will cover the 2008-09, 2009-10 and 2010-11 tax years only……I therefore calculate the total Class 1A NICs relating to car fuel benefit as £25,594.09 (see attached)'.

53. The schedule was titled 'Proposals for final settlement in 2015/15 on a without prejudice basis'. The sum in respect of 2008-09 was £9,197.31.

54. On 6 July 2015 there was a telephone call between Officer Allsopp of HMRC and Paul Brundell, Financial Controller of the Appellant. Mr Brundell explained that Dr Ellis of the Appellant was only provided with private fuel for one of his company cars and after discussing the matter Officer Allsopp agreed to take out the class 1A NICs for the 2 years involved. Mr Allsopp explained that the Class 1A NICs relating to this vehicle for 2008-2009 was about to go out of date and he wanted to avoid having to take formal action before the Court to protect it, if necessary, as the Court costs would be passed on to the Appellant. Officer Allsopp said he would contact the company to set out exactly what they needed to do.

55. On 8 July 2015 HMRC Officer Allsopp emailed the Appellant stating that he would revise his computations. He also stated:

'You may recall in my reply dated 10 June 2015 that I mentioned that Class 1A NICs for 2008-2009 will go out of date on 20 July 2015 without a specified payment on account. The only amount at stake is the £757.13 (plus interest due of £) not yet agreed to by the company in respect of your car.

Your previous letters and payments on account relating to the class 1A NICs count as specified payments on account for the remainder of the liability.

I need to stress that a specified payment on account does not indicate the company's acceptance of the liability at this moment in time but merely specifies that if the Class 1A NICs is due the company agrees it will be in the sums indicated.

I shall confirm the above in a letter to you next week.'

56. On 9 July 2015 Paul Brundell of the Appellant replied by email.

'We note as per your letter of 10 June 2015, that we have made payments totalling £41,924.09 and you had proposed a settlement figure of £37,686.58 which included the liability for two cars for Dr Ellis. Accordingly, it appears that we do not need to make a further payment of £757.12 plus interest, the figure mentioned in your email, to cover the potential liability to save you having to take protective court action, as we have already made payments exceeding that amount. I trust this agrees with your expectation but if not would you please advise us.'

57. On 17 July 2015 Officer Allsopp wrote a letter to Dr Ellis of the Appellant which included the following:

‘Thank you for the email from your colleague Mr Brundell which is accepted as a specified payment on account relating to the Class 1A NICs on your car. As the whole of 2008-2009 is now covered, there is no need to go to Court to protect the NICs while we await the decision.’

The Law

First Issue – Limitation Period and recoverability by reliance on specified payment

58. Class 1A National Insurance Contributions are payable on the cash equivalent of the benefit of a car or fuel made available by reason of an employed earner’s employment by virtue of section 10(4) of the Social Security Contributions and Benefits Act 1992.

59. By virtue of section 8(1)(c) of the Social Security Contributions (Transfer of Functions, etc) Act 1999, it shall be for an officer of the Board to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay. Decisions of the officer of the Board may be appealed to the Tribunal under section 11 of the Act.

60. Decisions under section 8 of the Act must be made to the best of the officer’s information and belief by virtue of the Social Security Contributions (Decisions and Appeals) Regulations 1999.

61. Section 9 of the Limitation Act 1980 provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years form the date on which the cause of action accrued.

62. Mr Justice Briggs provided guidance on the recoverability and limitation period for claims for NIC at paragraph 5-8 of his judgment in *HMRC v Benchdollar Ltd & others* [2009] EWHC 1310 (Ch):

5. Claims by the Revenue for recovery of employers' NICs, which are made by litigation in the ordinary way, are subject to a 6 year limitation period, pursuant to section 9 of the Limitation Act 1980 as actions "to recover any sum recoverable by virtue of any enactment". Time runs from the date upon which each relevant payment of NICs became due. It is common ground that NICs become due and payable on the 15th day after the end of the income tax month during which the relevant earnings were paid to the employee. Income tax months run from the 6th of each calendar month to the 5th day of the following month.

6. The running of time under section 9 in relation to claims against employers for NICs is not postponed by the existence of appeal proceedings before the General or Special Commissioners concerning liability. Rather, section 117A(5) of the Social Security Administration Act 1992 (as amended in 1999) provides that where an appeal against liability has been brought but not determined then:

> "The court shall adjourn the [*recovery*] proceedings until such time as the final decision is known; and that decision shall be conclusive for the purpose of proceedings."

7. It readily became apparent to the Revenue that issues as to liability for NICs in cases where employers were relying upon payment in kind schemes would be unlikely to be finally determined before the General or Special Commissioners, or on appeal to the High Court, before the expiry of the limitation period affecting recovery of all or at least part of the NICs in issue. Entirely understandably, the Revenue did not view with enthusiasm the prospect of having to commence and then have adjourned for substantial periods thousands of recovery claims all round the country, while entirely separate litigation was proceeding to resolve questions of liability. The process of issuing and then adjourning thousands of claims involved potential both for wasted costs and time-consuming administration, both for the Revenue and for the employers concerned. In most cases employers might be expected to pay arrears if their liability was established, so that the issue of recovery proceedings purely to ward off the limitation period would be likely to be a disproportionately expensive and cumbersome procedure.

8. Accordingly, the Revenue looked for some more cost-effective and proportionate way of preserving their potential recovery claims from becoming statute barred, pending the resolution of the liability issues. To a litigation lawyer, the obvious solution is what is generally known as a "tolling agreement", namely a contract between the parties to the relevant dispute that the defendant will not raise a limitation defence to a claim started after the expiry of the limitation period, during a specific further period identified in the contract. Tolling agreements are a common feature in the resolution of commercial disputes, all the more so since the general recognition among the litigation community of the desirability of seeking to settle disputes, if at all possible, without recourse to court proceedings, which is a fundamental plank of the reforms to civil procedure introduced by Lord Woolf.

63. Briggs J dealt with the principles relating to estoppel by convention and reliance on specified payments at paragraphs 31-52 of his judgment:

31.By that date the primary limitation period in respect of claims arising from the 1994/95 tax year had expired, but numerous claims arising under the subsequent two tax years could still have been preserved from becoming statute barred by the prompt issue of protective claims in relation to them. ……. Neither the documents nor Mr Wythes' research suggested that Mr Smith, or anyone else within the Revenue considered that the exchanges with the relevant employers placed the Revenue under any contractual restraint from issuing protective claims if they wished to do so. In any event, the result was that all the present claims were instituted well outside the primary limitation periods relating to them, so that they are all statute barred unless the defendant employers are disabled from relying upon section 9, either by contract or by estoppel.

Law and Analysis

32.The first question is whether the exchanges between the parties which I have described were contractual in nature. An essential feature of a contract is that one or both parties must have offered, and had accepted, a promise to do something or, as in the present case, to abstain from doing something. The common feature of both Mr Jones' contractual submissions was that the Revenue promised, upon receipt of an acknowledgement or part payment, not to bring recovery proceedings against the relevant employer.

33.The express terms of the written exchanges between the parties do not disclose any such promise by the Revenue. Although differently worded, the initiating letters from the Revenue in each of Types (1) and (2) referred, first, to the Revenue's duty to protect its claims for NICs from becoming time-barred and secondly to there being "no requirement" or no "necessity" for the Revenue to bring such claims in cases where the running of time was postponed by an acknowledgement or part payment. In Type (3), the relevant employer's agent simply proffered a part payment and asked the Revenue "to consider refraining from taking action at this time since, … you will now have 6 years from this date in which to commence proceedings …". In all three types, the common assumption was not that it was necessary for the Revenue to promise not to bring proceedings but that, upon receipt of an acknowledgement or part payment, the discharge of the Revenue's duty to protect its NIC claims would no longer make the early bringing of proceedings necessary.

……………………………..

52.In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, to be derived from Keen v. Holland, and the cases which comment upon it, are as follows:

i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

The Second Issue of Benefit

64. Part 2, Chapter 2 ITEPA 2003 charges tax on employment income whether "general earnings" or "specific employment income", under Section 6(1) ITEPA 2003.

65. Section 7 defines these terms:

(1) This section gives the meaning for the purposes of the Tax Acts of "employment income", "general earnings" and "specific employment income".

(2) "Employment income" means—

(a) earnings within Chapter 1 of Part 3,

(b) any amount treated as earnings (see subsection (5)), or

(c) any amount which counts as employment income (see subsection (6)).

(3) "General earnings" means—

(a) earnings within Chapter 1 of Part 3, or

(b) any amount treated as earnings (see subsection (5)),

excluding in each case any exempt income.

(4) "Specific employment income" means any amount which counts as employment income (see subsection (6)), excluding any exempt income.

(5) Subsection (2)(b) or (3)(b) refers to any amount treated as earnings under—

…

(b) Chapters 2 to [10] of Part 3 (the benefits code),

66. Chapter 1 of Part 3, at Section 62 of ITEPA 2003, defines "earnings" in relation to employment to mean:

(a) Any salary, wages or fee
(b) Any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
(c) Anything else that constitutes an emolument of the employment

67. Section 62 (3) ITEPA 2003 goes on to define "money's worth" as something that is either:

(a) Of direct monetary value to the employee or
(b) Capable of being converted into money or something of direct monetary value to the employee

68. Section 63 (1) ITEPA 2003 introduces the "benefits code" and Section 64 ITEPA 2003 deals with the "Relationship between earnings and the benefits code" providing that:

64(1) This section applies if, apart from this section, the same benefit would give rise to two amounts ("A") and ("B") –
(a) A being an amount of earnings as defined in Chapter 1 of this Part and
(b) B being an amount to be treated as earnings under the benefits code.
(2) In such a case –
(a) A constitutes earnings as defines in Chapter 1 of this Part and
(b) the amount (if any) by which B exceeds A is to be treated as earnings under the benefits code

69. The word "benefit" in the opening part of Section 64(1) of ITEPA is not defined but is subject to discussion by the Court of Appeal in its judgment *Revenue and Customs Commissioners v Apollo Fuels Ltd and others* [2016] EWCA Civ 157. The application of this authority to the meaning of 'benefit' is discussed below.

The Third Issue of Section 151 ITEPA – limited exemption for fuel benefit

70. Section 114 of ITEPA provides:

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).

[(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).]

(2) Where this Chapter applies to a car or van—

…….

(c) sections 149 to 153 provide for [an amount in respect of] the benefit of any fuel provided for the car to be treated as earnings, . . .

71. Section 149 ITEPA provides:

149 Benefit of car fuel treated as earnings
(1) If in a tax year—

(a) fuel is provided for a car by reason of an employee's employment, and

(b) that person is chargeable to tax in respect of the car by virtue of section 120 [or 120A],

the cash equivalent of the benefit of the fuel is to be treated as earnings from the employment for that year.

(2) The cash equivalent of the benefit of the fuel is calculated in accordance with sections 150 to 153.

(3) Fuel is to be treated as provided for a car, in addition to any other way in which it may be provided, if—

………….

(b) a non-cash voucher or a credit-token is used to obtain fuel for the car,

……………………………….

(d) any sum is paid in respect of expenses incurred in providing fuel for the car.

………

72. Section 150 ITEPA provides:

150 Car fuel: calculating the cash equivalent
(1) The cash equivalent of the benefit of the fuel is the appropriate percentage of [£23,400].

(2) The "appropriate percentage" means the appropriate percentage determined in accordance with sections 133 to 142 for the purpose of calculating the cash equivalent of the benefit of the car for which the fuel is provided.

(3) But the cash equivalent may be—

(a) nil where either of the conditions in section 151 is met;

…….

73. Section 151 ITEPA as was in force at the time of the relevant tax years (it has subsequently been amended as a result of the Finance Act 2017) provided:

"(1) The cash equivalent of the benefit of the fuel is nil if condition A or B is met.

(2) Condition A is met **if in the tax year** in question—

(a) the employee is required to make good to the person providing the fuel the whole of the expense incurred by that person in connection with the provision of the fuel for the employee's private use, and

(b) the employee does make good that expense.

(3)Condition B is met if in the tax year in question the fuel is made available only for business travel (see section 171(1))."

[Emphasis added]

Onus of Proof

74. The onus of proof is on HMRC to demonstrate that the Appellant has provided Car and Car fuel benefit to its employees for the purposes of sections 149-151 ITEPA.

75. The onus of proof is on HMRC to demonstrate that the section 8 decisions are based on their best judgement if not on precise figures.

76. The onus of proof is on HMRC to demonstrate that the section 8 decision and claim for NIC for the tax year 2008-2009 is not time barred.

77. The standard of proof is the ordinary civil standard of the balance of probabilities.

Discussion and Decision

First Issue – limitation issue – 2008-2009

78. Section 9 of the Limitation Act 1980 does not permit HMRC to enforce payment of Class 1A NICs which were due to be paid more than six years prior, unless there has been particular action like deliberate concealment or fraud, which exceptions do not apply in this appeal.

79. NICs are due to be paid by 19 July following the end of the tax year. Therefore, for the tax year 2008-2009 the limitation period began to run on 19 July 2009 and the period in which HMRC should have made their claim would normally expire on 19 July 2015. HMRC's decision was outside this period being made on 20 May 2016.

80. The question is whether the payment made by the Appellant on 27 May 2015 was a specified payment on account such that the limitation period has not expired.

81. Where a liability was notified in respect of the earlier Tax Years of 2005-2006 and 2006-2007, and was in danger of becoming time barred, HMRC informed the Appellant, that the debt could be placed in County Court to safeguard HMRC's position unless a payment, accepted on a without prejudice basis to the Court Proceedings, was made. Protective claims were issued in respect of these two years within the six year time limits as set out above. Therefore, the issue of limitation does not therefore arise for these two years.

The parties' submissions

82. In respect of 2008-09 the Appellant submits that recovery is time barred because HMRC raised its decision on 20 May 2016, over seven years after the time period in respect of which the NICs are sought. They submit that HMRC's claim is time barred by nearly one full year.

83. HMRC assert that a "specified payment on account" was made by the Appellant in respect of the 2008-09 year on 27 May 2015 which preserved their rights to recover for this year. They assert that payments made by the Appellant during the course of their discussions were "specified" for particular liabilities and, as such, they are constitute acceptance of HMRC's rights to recover the duties concerned. HMRC therefore claim that the nature of the payments as "specified" precludes them from being barred from formal action in respect of the tax year 2008/09.

84. The Appellant does not agree that the payment on account was paid in such a way as to allow HMRC to recover. The Appellant submits that HMRC are out of time to make a claim.

85. The Appellant submits that the evidence shows that any payments were made on an entirely without prejudice basis and were not in any way an admission of liability. By implication it submits that there was no contract agreed with HMRC in relation to the 2008-2009 Class 1A NICs nor does any estoppel apply as the conditions for such are not met.

86. HMRC submit that they received a 'specified payment on account' on 27 May 2015 in respect of this liability, as agreed in the Appellant's email of 9 July 2015, which is why a protective claim was not made to the County Court. HMRC contends that in these circumstances, the 2008-2009 duties are not time barred.

87. HMRC submit that both parties had been working towards a settlement on Tax Years 2008-2009 onwards and a specified payment on account was received by them to safeguard the position of a decision at a later date. They submit the behaviour is evidenced in accordance with paragraph 52 of the judgment in *HMRC v Benchdollar Ltd And others* 79 TC 668 where reliance on an estoppel by convention is explained as above.

88. HMRC submit that this specified payment on account was made to save having to take protective court action; payment had not been disputed until this appeal.

The Tribunal's decision

89. The Tribunal is not satisfied that there was a contract between HMRC and the Appellant or that there was a non-contractual agreement to which estoppel applies such that the sum paid by the Appellant was a specified payment on account for the NICs in respect of 2008-2009 sought by HMRC in their section 8 decision.

90. The Tribunal is satisfied that the limitation period continued to run from 19 July 2009 and expired on 19 July 2015. Therefore, HMRC's decision in 2016 is subject to a limitation defence and time barred.

91. The emails and course of conduct between May and July 2015 set out above do not reveal that an explicit agreement or contract was agreed between the parties that the payment made on 27 May 2015 was in respect of £8,440.19 of NICs now claimed by HMRC in its 2016 decision.

92. The correspondence back and forth between the parties reveals an attempt to arrive at an agreed figure in settlement of a larger claim that is never formally agreed in the sum sought. Further it is an attempt to identify a sum in respect of part of a larger sum (over £25,000) paid on 27 May 2015 as an attempted settlement. At no point is there is a clear agreement that the payment of the sum has agreed to stop the limitation period running.

93. In HMRC's correspondence of 8 July and 17 July 2015, they attempt to re-define the words used by the Appellant in its correspondence so as to accept the payment as a specified payment on account relating to the 2008-2009 class 1A NICs. This is not what the Appellant has specifically stated or agreed in its correspondence. The closest the Appellant comes is in its email of 9 July 2015 from Paul Brundell, which mainly disputes that further payment is required to settle a larger claim. It mentions HMRC avoiding the need to take protective court action but is not an explicit agreement for this to occur nor in respect of the sum sought for the specific year.

94. Likewise, in relation to non-contractual dealings, the requirements in paragraph 52 (i), (ii) and (iii) of *Benchdollar* for an estoppel are not met. The common assumption upon which the estoppel is based had not been understood by the parties in the same way and expressly shared between them. HMRC has relied upon its own independent view of the matter which was not commonly held by the Appellant. The best example of this is HMRC's letters of 8 and 17 July 2015 in which they tell the Appellant that their previous payment was a specified payment on account without that ever been the express terms of the payment at the time it was made nor subsequently expressed or agreed to be by the Appellant.

95. It is also worth noting that HMRC Officer Gunfield in correspondence with the Appellant in 2013 set out much more explicit and specific language she required the Appellant to use in order that HMRC would accept payments as specified payments on account. She required the Appellant to state the that the sums in at issue at that time were 'specific payments specifically on account of the identified NICs and associated interest'.

96. The Appellant made no such specific statement or any similar specific statement in relation to the 2015 payment and how it was to be applied to the 2008-2009 NICs.

Second Issue – Fuel Benefit or not

97. Before a benefit in kind can be considered it must be established that a 'benefit' existed in law. A benefit in the ordinary sense of the word is not the same as a benefit in kind for tax purposes. A benefit is something that provides the employee with special bounty. The employee must get something over and above what the employer gives as a fair bargain or would be prepared to give as a fair bargain to a member of the public or other independent third party dealing on arm's length terms with the employer.

98. Therefore, something provided by an employer, on identical terms both for employees and for the general public does not become a benefit within the legislation simply because it is provided for people who happen to be employees of that employer. If the employees receive on the same terms exactly what they would have received if they were not employed then that indicates that what they get is fair bargain and there is no benefit.

99. The taxation of car fuel benefits in kind, along with other benefits, is conferred by Chapter 2 of ITEPA 2003, also known as the "benefits code".

The parties' submissions

100. HMRC assert that "benefits" arise to various employees from the provision of private fuel and that a car fuel benefit in kind is thus chargeable on those employees under Chapter 6 of ITPA 2003, section 149 ITEPA 2003 onwards.

101. It is the Appellant's case that HMRC's approach ignores the need for there to be "benefit" or bounty to the employees to engage the car fuel benefit in kind charges of Section 149 ITEPA 2003 and onwards and that to apply the Chapter 6 ITEPA 2003 charges is incorrect. They did not receive 'something for nothing' and reimbursed the full costs of the private fuel to the Appellant, hence there was no benefit.

102. In short, it is the Appellant's case is that if there no "benefit" in the ordinary sense of the word to the employees, then there should be no consideration of the benefit in kind legislation and quantification exercise in later legislation. The benefits code is not engaged in the absence of "benefit" in the ordinary sense of the word and it is incorrect then to move on and to apply Chapter 6 ITEPA 2003.

103. The Appellant submits that the need for there to be "benefit" was explained by the Court of Appeal in the case of *Apollo Fuels Ltd v HMRC [2016] EWCA Civ 157.* Moreover, the Appellant also submits that HMRC is aware of the deficiency in the ITEPA legislation as was in force at the time and as applies to this appeal, given the subsequent changes within Finance (No.2) Bill 2016, enacted as response to the Court of Appeal's ruling in the *Apollo Fuels* case.

104. The Appellant's argument was that, as all of the cost of the private fuel purchases have been borne by the employees, there has been no provision of a benefit at either below market value or for no consideration and therefore this is a "fair value" situation which Parliament did not intend to charge to tax when enacting the benefit in kind legislation.

105. In short, there is not "something for nothing" for the employees. The Appellant submits that, as was found by the First-Tier, the Upper Tier and the Court of Appeal in *Apollo Fuels Ltd v HMRC,* for the benefits code to be engaged, then a benefit needs to be first provided to the employee in the ordinary sense of the word. It is the Appellant's case that there was no "benefit" conferred to the employees in the ordinary sense of the word, but rather all employees paid in full for their private fuel. Given that full payment, and the absence of any "benefit", it is clear that the benefits code was not engaged.

The Apollo Fuels case and the need for a "benefit" to be conferred

106. The judgment of the Court of Appeal in *HMRC v Apollo Fuels Ltd [2016] EWCA Civ 157*, related to car benefit rather than fuel benefit but is central to the Tribunal's decision on this issue.

107. The first point to consider is whether Chapter 6 of Part 3 ITEPA is engaged in the Appellant's case.

108. In *Mairs v Haughey (HL) [1994] 1 AC 303* Hutton LCJ, sitting in the Court of Appeal of Northern Ireland, approved the following from the decision of the Special Commissioner (page 288 of *Mairs*):

> "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."

………………………………..

> "All kinds of benefits are covered: but whatever they are, they must still be capable of being described as benefits".

109. The Appellant submits that its employees subject to the section 8 decisions have received no overall financial benefit. In the *Apollo Fuels* judgment Lord Justice Richards stated 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. 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."

110. The Appellant submits that a fair bargain existed in its case and that Chapter 6 ITEPA does not therefore apply as it is clear that no "benefit" was to be received by the employees nor was one received.

111. The Appellant submits that the fair bargain is evidenced by the clear intention of the parties that the full cost of private fuel should be reimbursed to the company by the employees, resulting in there being no benefit to the employees. To support this contention, the Appellant relied on the following:

1. There was a clause in the Terms and Conditions of Employment requiring employees to make good the cost of private fuel.

2. The company issued emails to employees following the end of the tax year requiring them to submit information to enable the private fuel cost to be reimbursed.
3. The private fuel cost was reimbursed by the employees.
4. The Appellant followed the guidance given by HMRC on such matters.

The Tribunal's decision

112. Mr Brothers, on behalf of the Appellant, argued that following the decision in *HMRC v Apollo Fuels Limited* the Appellant's employees were in receipt of "Fair Bargain" in respect of their provision of private fuel and that they were not receipt of any benefit.

113. The concept of fair bargain applies where an employee receives something from his/her employer under exactly the same terms and conditions that would apply to an independent third party or member of the general public.

114. In the *Apollo Fuels* case the issue was whether an employee was liable to income tax on a car leased to him by his employer on arm's length commercial terms, including lease charges at full market value.

115. Richards LJ at [3] of the Court's judgment stated:

'Income may be received in other forms, such as benefits in kind….Goods or services supplied to an employee for full value would not ordinarily be regarded as conferring a benefit on the employee or as involving the receipt of income by him…Of course it is open to Parliament to deem the value the value of such goods or services, or indeed anything else, to be income, but one would expect Parliament to do so in clear terms.'

116. A key part of the *Apollo Fuels* judgement was Richards L J conclusion at [73]:-

"For all these reasons…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 the word. The employees in this case received no such benefit."

117. It is important to remember that a "benefit to the employee in the ordinary sense of the word" is not the same as a benefit-in-kind.

118. In the *Apollo Fuels* case the employees paid an arm's length commercial terms, market rate, for the vehicle in the tax year concerned. They leased the cars on exactly the same terms and conditions to any deal that could be made by any member of the public.

119. In this appeal the facts are distinct from those in *Apollo Fuels*.

120. It is already accepted by both sides that a car benefit charge arises in accordance with the legislation within Part 2, Chapter 6. The facts in this case are therefore different and the issue is of that fuel benefit.

121. Turning to the provision of car fuel to employees of the Appellant, the Tribunal is satisfied that the provision of fuel has been a "benefit" to employees in the ordinary sense of the word.

122. The Tribunal must consider fuel provided to employees of the Appellant for business and private journeys. Many employees have received fuel for free from their employer until such time as they have chosen to repay.

123. A member of the public would NOT be able to receive free fuel either from Exel or any garage that sells fuel. They have to pay for the fuel themselves. The provision of fuel to employees in not on the same terms as to a member of the public.

124. Even if a member of the public could claim the cost of the fuel as a business journey in their Self-Assessment Return they would only receive tax relief at say 20 or 40% against the cost of the fuel incurred. They still do not have a benefit of free fuel for extended periods.

125. For the years in question fuel for private and personal travel was provided to the employees who were able to use the Arval Cards. While the amount paid for fuel may be the same as would be paid by a member of the public, it was not paid on the same terms.

126. In relation to *this appeal* the following facts have been found:

Fuel has been provided for a car that is taxable under Chapter 6;

This fuel is provided by way of a company fuel card;

In the tax year no employee who used a card has made any payments in respect of this fuel;

Sometime after the end of the tax year (for the majority, at least 3 months and for a significant minority far longer) the employee makes a payment for private mileage only.

127. In this case, it was admitted that, of those employees provided with a company car and fuel card, at least 80% of employees have received fuel in April one year and will not have made a payment of any sort until July the following year at the earliest. Of this 80% a significant number did not make any payment in respect of the fuel for a further year.

128. A member of the public would not be able to defer payment for at least 12 months, sometimes up to two years or employees, as employees of the Appellant have done, without there being a cost such as a penalty or interest for late payment. There were no contractual terms or deadlines by which such reimbursing payments were required to be made by employees.

129. The employees have received something, there has been a benefit in the ordinary sense of the word. They have been able to purchase fuel for private use without repayment for very extended periods of time at no risk of interest or penalty payments.

130. They have received the convenience of paying for fuel effectively on the company's credit using cards provided to them. There has been no formal or explicit contractual terms that require repayment from the employees by a specified date to the Appellant employer with penalties for any breach of those terms.

131. Unlike ordinary member of the public, some of the Appellant's employees have had open ended interest free loans – during this time they have had available money for their private use which otherwise would have had to been spent on fuel. They have been able to earn interest on this money or indeed invest it. Indeed, the length of some of the repayment periods has meant that the amounts repaid may not represent the cost in real terms given the potential for inflation. These 'benefits' of the fuel cards provided would not be available to a non-employee of the Appellant.

132. This arrangement does not appear to accord with the facts in *Apollo*. Therefore, the Tribunal is satisfied there is a benefit to the employees of the Appellant in money or money's worth. These include the following benefits as already set out above:

a) being able to defer the cost of paying for private fuel by at least 12 months and significantly longer; and

b) receiving fuel for business travel without having to pay for it by an enforceable deadline.

133. The terms of this arrangement do not represent an arm's length commercial arrangement as an independent third party would be able to enjoy. For some employees, they have enjoyed free fuel for private journeys for over two years without paying anything towards it. These employees have received something of benefit because of their employment.

134. Further, a benefit in the real sense of the word has been provided in the tax year in the form of a car (accepted) and all the fuel to run it (business and private) without any requirement to pay for the fuel in the tax year.

135. The Tribunal's view is that the Appellant's employees have received a "benefit" in the ordinary sense of the word; and a benefit in kind for the purposes of section 62(b) of ITEPA.

136. The lease arrangements in *Apollo* were at market rate and paid in the tax year. Any payments for fuel here have not been made in the tax year so at the end of the tax year there is a benefit in the real sense of the word.

137. Even where payment has been made (outside of the tax year as is the case here), this is only for the private element. Section 149 is engaged where any fuel is provided for a taxable car and a benefit arises. This can only be reduced to nil if the conditions at section 151 have been met. They have not been in this case. For the reasons set out below.

138. Therefore the Tribunal is satisfied that Chapter 6 of ITEPA – sections 114 to 154 – as was in force at the relevant time - applies.

Third Issue – compliance with section 151 ITEPA

139. In the alternative, the Appellant submitted that, even if Chapter 6 of ITEPA was found to apply, HMRC would be relying on legislation against them that was previously found to be flawed to the point that it was impractical to comply with, and which has been subsequently amended as a result.

140. They rely on the Explanatory Notes to Finance (No 2) Bill 2016 issued by HM Treasury state that *"As there has been some uncertainty about the applications of fair bargain, legislation is introduced in Finance Bill 2016 to put this matter beyond doubt."*

141. It is the Appellant's case that HMRC sought to apply the benefits code incorrectly and falls foul of the "uncertainty" of the law as HM Treasury described it. Mr Brothers submits that section 151 ITEPA 2003 previously required the cost of the private fuel to be made good within the tax year in question. This caused clear impracticalities – if an employee commenced a journey on 5 April and that journey continued into 6 April there was a practical impossibility in making good any cost incurred on 5 April.

142. The Appellant submits that HMRC recognised this flaw in the legislation by subsequently introducing a concession in their guidance which recognised the need for information to be collated and allowed what they considered to be a "reasonable time period" of 30 days within which the making good should take place. This concession had no statutory backing.

143. It is clear that in practical terms 30 days did not confer a "reasonable time period" as section 151 (2)(b) ITEPA 2003 was subsequently amended to state:

"the employee does make good that expense on or before 6 July following that tax year".

144. The Appellant contended that this represents a clear acceptance on the part of HMRC that both the original wording of section 151(2)(b) ITEPA 2003 and the concession of the 30-day time period were impractical and flawed and prejudicial to the employees' tax position.

The Tribunal's decision

145. Section 151 of ITEPA 2003, as was force at the relevant time, set out the conditions that need to be met for Class1A NIC not to become chargeable:

"(1) The cash equivalent of the benefit of the fuel is nil if condition A or B is met.

(2) Condition A is met **if in the tax year** in question—

(a) the employee is required to make good to the person providing the fuel the whole of the expense incurred by that person in connection with the provision of the fuel for the employee's private use, and

(b) the employee does make good that expense.

(3) Condition B is met if in the tax year in question the fuel is made available only for business travel (see section 171(1))."

146. The Appellant did not seriously suggest that it had complied with section 151(2)(b) of ITEPA such that there was nil benefit. It accepted that the vast majority of the Appellant's employees did not make good the expense in the tax year in question.

147. Further, the Appellant's employees were not, in practice, required to make good and reimburse the whole expense in the tax year such that, in reality section 151(2)(a) was not met.

148. As set out in the Appellant's letter of 17 February 2015, the company's policy consisted of employees being told orally by the accountant that they had to pay for their private fuel by advising the company at the end of the financial year of their private mileage, that an invoice would then be raised by the Appellant company and that the invoice would be paid by the employee. There was no more stringent requirement than this.

149. From the evidence provided to the Tribunal, it is satisfied the Appellant did not have robust procedures in place to ensure that all employees complied with the requirements of the legislation and the "making good" of the private fuel did not occur in the relevant Tax Year where the expense occurred. This is evidenced by the fact that there was only an oral requirement by the accountant to provide records by the end of the tax year or shortly after.

150. There were no chaser emails evidenced as being issued shortly before or after the end of the tax years. Only in June or July would the records be reviewed to determine whether employees' private fuel details were outstanding and whether they were late in providing their records and no sanctions would be enforced. Hence, a significant minority of the Appellant's employees were very late in reimbursing their private fuel costs. This was well outside the ambit of the requirements of section 151 ITEPA.

151. In response to the Appellant's contention that their fuel policy was "operated in line with the contemporaneous HMRC guidance" the Respondent references such guidance at EIM25555, EIM25650 and EIM25660 (Authorities Bundle) and maintain that the guidance and the concession referred recognises the need for information to be collated and *allows a reasonable time period of thirty days* to rectify any errors which is *a policy view* and is not a statutory provision.

152. Further, this reasonable time period of thirty days was not even enforced by the Appellant as set out above. It was not suggested that the majority of the private fuel was reimbursed by the Appellant's employees by 30 days after the end of the tax year. Even if the new and amended section 151 ITEPA applied in this appeal, which it does not, this still requires payment before 6 July following the end of the tax year. The Appellant accepts at least 20% of its employees were not even meeting this requirement and making good the expense for private fuel by 5 July.

153. HMRC rely on the case of *Impact Foiling Limited and Others v Revenue and Customs Commissioners* Spc562 where Dr John Avery Jones at paragraph (10) of the "Decision" stated:

"…that whilst there may be an intention to make good in the relevant tax year the fact that this did not occur means that the first part of the condition has failed. Also that an intention alone is not enough the actual making good in the relevant year should also happen…"

154. At paragraph 11 Dr Avery Jones stated:

"Nor can I take into account the concessionary treatment contained in the Inland Revenue Employment Income Manual at EIM 23782, to the effect that payments are treated as made within the year if they are made without unreasonable delay after the end of the year, or that they are made within 30 days of discovering an unintentional error. No doubt these are extremely sensible administrative concessions, and, it is perhaps surprising that they are not the law, but they are not, and I can only apply the law."

155. Irrespective of whether the request to make good was in fact made by the Appellant before in the tax year the Tribunal is satisfied that the *timing of making good* is the determinative issue. Section 151(2)(b) clearly stipulates the requirement for payment is *within the* relevant Tax Year and Appellant has failed, for the most part, in this respect. As a consequence of this failure, the Tribunal is satisfied that Class 1A NIC charges apply as charged by way of Section 8 Decisions as notified.

156. HMRC reasonably considered the assertions made by the Appellant and referred the discretionary concessions at EIM23782, EIM2555, and EIM25650 to Head Office Technical Specialists. HMRC Technical Specialists responded advising that the concession did not apply to the Appellant for the following reasons:

a. The Appellant has a policy in place that only requires employees to reimburse the cost of all private fuel *after the end of the relevant tax year*;

b. The Appellant sends an email *at the end of the Tax Year* to which responses are received and the Appellant then calculates the miles per gallon rate using the Arval card invoices. Invoices are then issued to the relevant employees;

c. Employees pay at varying times after the relevant Tax Year End; and

d. There were no procedures in place for employees to pay *during the relevant Tax Year* or before the end of the relevant Tax Year.

157. The Tribunal agrees with this approach. The Tribunal saw no written instructions for example within The Staff Handbook, Contracts of Employments, emails, or other methods of communications, where employees are informed of the requirement *to make good before the Tax Year End in which* the cost was incurred.

158. Whilst the concession considers "*Delays incurred in normal administration*" may mean meeting the terms of the legislation, providing the making good is made *without unreasonable delay* the expectation was that the 'making good' was within the relevant Tax Year or within a further thirty days of the relevant Tax Year end; the procedures and practices of the Appellant did not enable the requirement to be met.

159. The Appellant has provided no evidence of robust procedures as being in place to enable their employees to meet the then statutory requirements.

160. Further, employees have not been invoiced until *after the end of the relevant Tax Year end.* Reimbursement delays have, in most instances been longer than thirty day after the end of the relevant tax year. Thus, the implication that there were delays in "*normal administration*" is not supported by the fact that the processes did not exist to enable employees to meet payment by 5 April of the relevant Tax Year.

Fourth Issue – Best Judgement

Appellant's submissions

161. The Appellant submits that the section 8 decisions for payment NIC are not calculated to HMRC's best judgement.

162. Mr Brothers respectfully submits that those decisions are not in the now agreed final amounts, which have changed since the decisions were raised. For example, the 2005-06 decision was raised on 11 July 2012 in the sum of £12,254.75 whereas the final formal decision letter of 1 February 2016 (page 800) shows that £7,697.66 is in fact due for that year (page 809).

163. He submits that it was agreed during the Tribunal hearing by the Appellant that approximately 80% of the employees had repaid the company in full within 2 to 3 months of the tax year end. The Appellant contends that this is not unreasonable for a company the size of the Appellant, whose primary role is to ensure company survival and security for its employees. This would fall in line with the HMRC concession in force at the time which has subsequently been introduced into legislation to allow just over 3 months grace (to 5 July) after the tax year end for the cost of private fuel to be made good.

164. Therefore, the Appellant submits that even were the Tribunal against the Appellant on the issues of principle, the sums due, as calculated by HMRC, should be recalculated to reflect the 80% of employees that repaid without unreasonable delay. Mr Brothers therefore requested that, should Tribunal find against the Appellant, a further period was directed during which agreement can be reached on the correct amounts in which the decisions should be determined.

165. Mr Brothers submitted that the Tribunal's directions of 18 April 2018 required HMRC to provide a table clearly setting out the calculations of the quantum of the original decisions alongside the subsequent revisions to those calculations to determine the correct amounts. This does not appear to have been provided by HMRC in their submissions dated 22 April 2018.

HMRC's submissions

166. In response to the Appellant's claim that the determinations within the section 8 decisions are estimated and incorrect HMRC relied on the case of *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* in which Lord Lowry stated:

"… that the assessments had been made to the best of the Board's judgment. It was clearly established that such assessments necessarily relied on an element of guesswork on the Board's part as to the amount of liability. It was sufficient that the assessing officer had not acted dishonestly, vindictively, or capriciously, and had made what he honestly believed to be a fair estimate of the Company's income. The onus was also on the Appellant to show that the assessment should be reduced or set aside. "

167. HMRC maintain that the tax year 2009-2010, for which the Appellant supplied the necessary information, had been used as a basis for calculating the Class 1A NIC tax liability of the earlier years; (2005/2006 to 2008/2009 excluding 2007-2008). They submit that to date the Appellant has not supplied information to HMRC to enable a precise calculation in respect of the earlier years.

168. HMRC submit that within the statement of Mr Allsopp at paragraphs 11 to 13, a full explanation was given with regard to why company car fuel, used for private purposes, was an 'all or nothing charge'. HMRC's belief at that time, and maintained to the present, is that all fuel obtained and used for private purposes was not repaid in the appropriate Tax Year nor fully repaid.

169. HMRC submitted that Officer Gunfield, the original decision maker, identified employees for whom company cars were provided and fuel purchased using the company fuel card; the company cars were used for private journeys. The company cars were reported by the Employer on forms P11D for each year but, car fuel benefit was not included.

170. HMRC submitted that Officer Gunfield used the car benefit information provided on forms P11D to enable a best estimate of the car fuel benefit figure for the years 2005-2006 to 2009-2010. Her belief was that car fuel benefit, as detailed in her letter of 19 July 2011, was appropriate.

171. By reference to the 'Expenses and benefits: company cars and fuel calculator' generally available, Mrs Gunfield calculated the Class 1A NICs as per her section 8 Decision in respect of Tax Year 2005-2006 as notified on 11 July 2012. In correspondence Officer Gunfield fully explained why the whole benefit was subject to a Class1A NIC charge, in particular noting that the End of Year Returns were not accurate as the cost of private fuel provided was not repaid at the time the Returns were completed.

172. During the course of the Enquiry, further information was provided that enabled adjustments and exclusions for some individuals resulting in a reduction to the original figures. These attempts to settle an agreed figure for all years have been dealt with above.

173. Mr Allsopp concluded that the full car fuel benefit charge applied as notified to the Appellant in his decision letter of 1 February 2016. He also explained the action with regard to protecting each of the respective Tax Years.

The Tribunal's Decision

174. In respect of the later two tax years, 2009-2010 and 2010-2011, the Appellant has not satisfied the Tribunal that the amount of the section 8 decisions was not made to HMRC's best judgement. HMRC used the material supplied for 2009-2010 in coming to their judgement. The burden of proof was upon the Appellant to demonstrate that these figures were not to best judgement. It has provided no positive evidence of why these figures are inaccurate. These decisions are upheld and confirmed as calculated by HMRC.

175. In respect of the first two tax years 2005-2006 and 2006-2007, the burden remained on the Appellant to provide evidence and documents to demonstrate that the existing decisions were not calculated to best judgement. It did not do so.

176. Nonetheless, given the length of time since these earlier two tax years and the potential difference in figures suggested by the Appellant, the Tribunal is prepared to give the Appellant a further 21 days from the release of this decision to provide any relevant further material and evidence to HMRC. Thereafter the parties shall have a

further 21 days to attempt to agree a lesser sum for the section 8 decision in relation to 2005-2006 & 2006-2007.

177. In the absence of agreement both parties shall thereafter have a further 21 days to make submissions to the Tribunal as to the appropriate calculation for the section 8 decisions in these two tax years.

Conclusion

178. The appeal is allowed in part. HMRC's section 8 decisions for the following years are confirmed and upheld:

2009-10 for £7,480.69 of NIC

2010-11 for £8,158.97 of NIC

179. However, HMRC's decision of 20 May 2016 in relation to the 2008-2009 tax year is time barred as being made outside the limitation period. The appeal is allowed in respect of this decision and the liability cancelled. The payment by the Appellant of a sum of money on 27 May 2015 does not evidence a contract or an estoppel by convention for the purposes explained in *HMRC v Benchdollar Ltd And others* 79 TC 668 such that the limitation period does not apply.

180. In relation to the years 2005-2006 and 2006-2007, the parties are to attempt to agree the figures in accordance with the directions set out above. In the absence of any agreement then the Tribunal will consider any further written submissions as to the proper figures.

181. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2018