



TC02825

Appeal number: TC/2011/3346 & TC/2011/3352

INCOME TAX – R&W CONCESSIONS – *Discovery Assessment valid – Assessment in relation to section 419 claim upheld – NI Section 8 Decision out of time 2000/01 to 2003/04 – Liable to pay class 1A NI 2004/05 & 2005/06 – Penalty at 20% - Appeal allowed in part.*

INCOME TAX – Mr RHODES – *Discovery Assessments valid except 2004/05 loan benefit – 2005/06 loan benefit upheld – Car and fuel benefits in respect of Porsche and Mercedes motor vehicles upheld – Benefit re transfer of Mercedes reduced to £6,000 – Benefit re transfer of Volvo discharged Penalty reduced to 20% - Appeal allowed in part.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MR RAY RHODES
R&W CONCESSIONS LIMITED**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE
PETER LAING FCIB**

**Sitting in public at Eastgate House, Newport Road, Cardiff CF24 0YP on 2 & 3
May 2013**

John Brooks counsel instructed by Geldards, solicitors, for the Appellants

Simon Foxwell, Presenting Officer of the Appeals and Reviews Unit for HMRC

DECISION

The Appeals

1. R&W Concessions appealed against a discovery assessment dated 19 January 2009 in the sum of £62,835.79. The assessment was raised on the basis that the relief
5 claimed by R&W Concessions on 6 January 2007 in relation to the repayment of a director's loan was excessive. R&W Concessions also appealed against the decision on 11 May 2010 requiring it to pay Class 1A National Insurance Contributions to the value of £37,077.35 in respect of the benefits provided to Mr Rhodes as company director during the period 6 April 2000 to 5 April 2006. Finally R&W concessions
10 appealed against a penalty determination which was loaded at 20 per cent of the tax owing, and stood at £12,567.

2. Mr Rhodes appealed against discovery assessments issued on 8 July 2008 (tax years 2003/04; 2004/05 and 2005/06), 16 December 2008 (tax years 2000/01 and 2001/02), and on 15 January 2009 (tax year 2002/03) which were varied on review
15 dated 23 March 2011. The discovery assessments related to car and fuel benefits, transfer of vehicles at undervalue, and a beneficial loan. The total value of the assessed benefits as at the date of hearing was £236,385. Mr Rhodes also appealed against penalty determinations which were loaded at 35 per cent of the tax owing, and stood at £44,066.

3. On 24 May 2011 the Tribunal directed that the appeals of Mr Rhodes and R&W Concessions be heard together at the same time and by the same Tribunal.
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4. The Tribunal heard the Appeal on 2 and 3 May 2013. Mr Rhodes and Mr David Beckett gave evidence for the Appellants. Mr Beckett had acted as the Appellants' accountant since around 2002. The Tribunal received two bundles of documents in
25 evidence. At the commencement of the hearing HMRC after argument withdrew its application to admit into evidence Mr Rhodes' tax returns.

The Issues

5. The issues in dispute have been classified by the Tribunal as procedural and substantive. The outcome of the substantive matters will be largely dependent upon
30 the Tribunal finding in favour of HMRC in respect of the procedural issues, which in those circumstances will be examined first by the Tribunal. The procedural issues are as follows:

(1) Whether the discovery assessments against R&W Concessions and Mr Rhodes were validly made (*Discovery Issue*). The discovery assessments in
35 respect of Mr Rhodes for years 2000/01 and 2001/02 required an extension to the time limit of six years by virtue of negligent conduct (section 34 of TMA 1970).

(2) Whether the decision on 11 May 2010 requiring R&W Concessions to pay Class 1A National Insurance Contributions for the years 2000-01 to 2003-04 fell
40 within the provisions of section 32 of the Limitation Act 1980 (*Limitation Act Issue*).

6. The substantive matters are as follows::

(1) Whether the relief given by HMRC to R&W Concessions in relation to the repayment of the director's loan was excessive.

5 (2) Whether Mr Rhodes received a benefit following the overdrawn director's loan account.

(3) Whether a company car (Porsche 911, registration number T82 RHR) was made available to Mr Rhodes by the reason of his employment and available for his private use during the years 2000/01 to 2002/03.

10 (4) Whether a company car (Mercedes SL500, registration number 92 KR) was made available to Mr Rhodes by the reason of his employment and available for his private use during the years 2000/01 to 2004/05. .

(5) Whether car fuel benefits arose in respect of the Porsche 911 and Mercedes SL500 company cars in the years 2000/01 to 2002/03.

15 (6) Whether the Mercedes SL500 and a Volvo (Y352 NAX) were transferred to Mr Rhodes from R&W Concessions at undervalue in year 2004/05. Mr Rhodes accepted that the Porsche 911 company car had been transferred to him at an undervalue of £7,000.

20 (7) Whether R&W Concessions was liable to pay Class 1A National Insurance Contributions in respect of the benefits provided to Mr Rhodes as company director during the period 6 April 2000 to 5 April 2006.

(8) Whether a penalty arises on R&W Concessions due to its negligence at a loading of 20 per cent.

(9) Whether a penalty arises on Mr Rhodes due to his negligence at a loading of 35 per cent.

25 **The Agreed Facts**

7. A statement of agreed facts was provided to the Tribunal.

8. Mr Rhodes was the sole director and shareholder of R&W Concessions Limited which was incorporated on 21 February 1992. Mr Rhodes and his former wife, Mrs Velma Rhodes, were the company's original directors and shareholders.

30 9. R&W Concessions' business primarily involved the production and organisation of food and beverages for music festivals such as *T in the Park*, *the V Festival* and *Glastonbury* with R&W Concessions purchasing food and beverage contracts, and making its profit by selling food concessions to third parties whilst retaining the alcohol contracts.

35 10. At its peak, in 1997/98, as a result of the close relationship that Mr and (the then) Mrs Velma Rhodes had with music promoters, R&W Concessions had a turnover of approximately £5 million and employed 45 staff.

11. *Mr Rhodes asserted that*¹, although no fraud was found to have taken place, an investigation by HMRC in 1996 during which over 60 officers visited the company's major suppliers and contacts caused irreparable damage to R&W Concessions' business. HMRC did not, however, accept that the investigation caused irreparable damage to R&W Concessions' business.

12. Mr and Mrs Rhodes separated in 1999 and their divorce was finalised on 28 November 2000. A consent order dated 27 March 2001 relating to the divorce stated:

10 “The Respondent (Mr Rhodes) undertakes to indemnify the petitioner (Mrs Rhodes) against all liabilities, damages, costs and demands which may be made or awarded against Mrs Rhodes arising from her involvement with R&W Concessions Limited”.

13. Under the terms of the settlement Mrs Rhodes was to transfer her shares in R&W Concessions to Mr Rhodes and resign as a director of the company. However, due to an error by her solicitors, Mrs Rhodes did not resign as director of R&W Concessions until 1 March 2007.

14. From 2002 Mr Rhodes suffered a marked deterioration in his health. He began to have panic attacks and was treated for his severe anxiety forcing him to give up work in September 2002.

15. *When Mr Rhodes was* in a small or enclosed space *it* would trigger an attack making driving or indeed travelling as a passenger in a car impossible. During this period he (*Mr Rhodes*) had limited contact with the outside world, being virtually housebound until 2004/05².

16. In the circumstances it was decided in early 2004 to cease trading from R&W Concession's premises and warehouse on the Star Trading Estate in Pontir, Gwent and all company records and correspondence were put into storage with Hazells storage in Newport.

17. However, Hazells ceased trading in 2005 and all of R&W Concessions' records held including those relating to the years under appeal were destroyed when the storage company ceased trading.

18. A “Hansard enquiry” by HMRC's Special Compliance Office which was commenced in May 2001 was settled on the basis of a letter of offer from Mr Rhodes and R&W Concessions dated 12 February 2004. This was accepted by the Inland Revenue on 5 March 2004.

¹ The italics have been inserted by the Tribunal to make it clear that the agreed fact was in reality a statement of the parties' conflicting views. The Tribunal did not consider the determination of whether the previous investigation caused irreparable damage material to the disputed issues in this Appeal.

² The italics are the Tribunal's.

19. There was an enquiry by HMRC into the 2003/04 self assessment tax return of Mr Rhodes.

20. During the course of this enquiry, in a meeting on 22 March 2006, it was accepted by Mr Andrew Thorne of HMRC that, because of his inability to use the car due to his ill health and keys being held by an employee, a Volvo was not available for the use of Mr Rhodes in 2003/04. Subsequently, it was explained by HMRC's review officer in his letter of 23 March 2011 that he considered that Officer Thorne's decision was wrong in principle, and acceptance of the position regarding the Volvo for 2003/04 did not preclude HMRC from raising a discovery assessment in respect of the Porsche and the Mercedes.

21. The beneficial loan arising from the overdrawn director's account was also considered at the meeting on 22 March 2006. Officer Thorne subsequently confirmed in a letter dated 5 April 2006 that

"Following our meeting I have discussed the matter with my colleagues who previously dealt with the enquiry into R&W Concessions Limited. Given the specific circumstances of the case it has been agreed that the position for 2004 is as originally returned i.e no loan benefit is due".

In view of Mr Thorne's decision, the review officer did not consider that HMRC had sufficient grounds for including this loan benefit in the discovery assessment for this year and accordingly cancelled the decision with regard to the beneficial loan charge in respect of 2003/04 only.

22. Mr Thorne's letter dated 5 April 2006 continued:

"...if the director's loan account is overdrawn after February 2006 this fact will need to be included in your client's SA return and P11D as a loan benefit will be chargeable".

Notwithstanding Mr Thorne's confirmation following his discussion with the Special Compliance Officers that the section 160 ICTA 1988 (*section 175 ITEPA 2003*) would need to be declared by Mr Rhodes if the director's loan account remained overdrawn after February 2006, the decision to assess the benefit for 2005/06 was upheld by HMRC in view of the notes of the meeting held with the officers of the Special Compliance Office on 12 February 2004 which indicated that the section 160 ICTA 1988 liability would need to be declared by Mr Rhodes for the tax year 2003/04.

23. On 6 January 2007 R&W Concessions submitted a claim to relief under section 419(4) ICTA on the basis of a reduction in the director's overdrawn loan account to £94,148 as at 28 February 2004 as the result of a balance owed to "*Wham Bang*", an adjustment to reduce sales by £56,640 in respect of cash held that did not relate to sales income, a further reduction in sales of £56,091 in respect of bank deposits unrelated to business income, £200 business expenses paid out of pocket, and £70,000 which should have been allocated to Mrs Velma Rhodes.

24. R&W Concession's Corporation Tax Return for the year ended 28 February 2006 was subject to an enquiry under paragraph 24, schedule 18 of Finance Act 1998 which commenced following a letter dated 22 February 2008 from HMRC.

5 25. Formal enquiries and meetings with Mr Rhodes and his accountant, Mr David Beckett, led to discovery assessments being made on Mr Rhodes in respect of benefits of kind from R&W Concessions.

The Discovery Issue

The Law

10 26. The statutory provisions for making discovery assessments on a company are found in paragraphs 41, 42 and 43 of schedule 18 of the Finance Act 1998. In relation to this Appeal the relevant provisions are as follows:

“41(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that

(c) relief has been given which is or has become excessive,

15 The officer may make an assessment (a discovery assessment) in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax”.

20 43 A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if the situation mentioned in paragraph 41(1) is attributable to fraudulent or negligent conduct on the part of

(a) the company

(b) a person acting on behalf of the company”

25 27. Section 29 of the TMA 1970 sets out the law relating to discovery assessments on individuals. The relevant provisions to this Appeal are as follows:

29(1) If an officer of Revenue and Customs discovers as regards any person and a year of assessment –

a) that any income which ought to have been assessed to income tax have not been assessed,

30 b) that an assessment to tax is or has become insufficient or

c) that any relief which has been given is or has become excessive.

35 the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below make an assessment in the amount or further amount which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

29(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment he shall not be assessed under subsection 1 above –

- a) in respect of the year of assessment mentioned in that subsection;
and
- b) in the same capacity as that in which he made and delivered the
return,

5 unless one of the two conditions mentioned below is fulfilled

29(4) The first condition is that the situation mentioned in subsection
(1) above is attributable to fraudulent or negligent conduct on the part
of the taxpayer or a person acting on his behalf.

10 29(5) The second condition is that at the time when an officer of the
Board –

- a) ceased to be entitled to give notice of his intention to enquire into
the taxpayer’s return under section 8 or 8A of this Act in respect of
the relevant year; or
- b) informed the taxpayer that he had completed his enquiries into that
return,

15 the officer could not have been reasonably expected, on the basis of the
information made available to him before that time, to be aware of the
situation mentioned in subsection (1) above.

20 28. HMRC has the burden of establishing that the conditions for making a
discovery assessment are satisfied. If the Tribunal is satisfied that HMRC is entitled to
make the discovery assessments it is for the Appellants to displace the assessments.

25 29. The Appellants accepted that HMRC had made discoveries in respect of the
matters under Appeal³. The dispute between the parties was whether the loss of tax
was due to the negligence of the Appellants or persons acting on their behalf. In
respect of Mr Rhodes HMRC did not rely on the second condition as set out in section
29(5) of the 1970 Act (*the officer could not have been reasonably expected to be
aware of the tax loss*). In those circumstances the Tribunal restricted its consideration
to whether HMRC had satisfied the requirement of negligent conduct, in relation to
the discovery assessments against both Appellants.

30 30. The Court of Appeal in *Hankinson v HMRC* [2011] EWCA Civ 1566 decided
that the question of whether there has been negligence was a matter for the Tribunal
and not the individual tax inspector who made the discovery.

35 31. HMRC said that the test for negligence was that articulated by Baron Alderman
in *Blyth v The Company of Proprietors of the Birmingham Waterworks* [1856] EWHC
Exch J65:

40 “Negligence is the omission to do something which a reasonable man
guided upon those considerations which ordinarily regulate the conduct
of human affairs would do, or doing something which a prudent and
reasonable man would not do. The defendants might be liable for
negligence, if unintentionally, they omitted to do that which a prudent

³ See paragraph 24 of the Appellant’s skeleton dated 24 April 2013

and reasonable person would have done or did that which a person taking reasonable care would not have done”.

32. The Appellants’ submitted that omission of items from a return did not in themselves amount to negligent conduct. The Appellants relied on the Upper Tribunal
5 decision in *Colin Moore v HMRC* [2011] UKUT 239 and the Special Commissioners’ judgment in *AB (a firm) v HMRC* [2007] STC (SCD) 99 for their proposition that the issue of whether person was negligent with the completion of his return was a question of fact. The Special Commissioners in *AB (a firm) v HMRC* said at [105]:

10 “We are of the view that the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue. We also
15 accept that a taxpayer who takes proper and appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it not obviously wrong), would not have engaged in negligent conduct”.

33. HMRC also referred to the decision in *Williams (HM Inspector of Taxes) v The Trustees of W W Grundy (Deceased)* (1933) 18 TC271 which stated that a change of
20 opinion can constitute a discovery. The Appellants accepted that a discovery had been made in respect of the disputed assessments.

34. The Tribunal now considers in turn the discovery assessments against R&W Concessions and Mr Rhodes.

25 ***R&W Concessions Section 419 ICTA Relief***

35. Section 419(1) provides that where a close company makes any loan or advance of money to a director there will be a charge to corporation tax equal to 25 per cent of the loan on the close company. Section 419(4) enables relief from tax to be given to the close company where the loan or part of it is repaid to the company or the loan or
30 advance is released or written off.

36. On the 19 January 2010 HMRC issued a discovery assessment in the sum of £62,835.79 against R&W Concessions on the ground that its claim for relief under section 419(4) was excessive.

37. On 12 February 2004 R&W Concessions made an offer to HMRC in settlement
35 of its tax liabilities following an enquiry into its affairs by HMRC Special Compliance Office for years up to and including 28 February 2003. HMRC accepted the offer from R&W Concessions which was reduced to writing. Schedule 2 of the agreement dated 12 February 2004 stated that the total amount due was £428,100 which was to be paid in instalments:

40 (a) £46,250.63 to be satisfied by relief already due under section 419(4) ICTA 1988.

(b) £37,216.50 already paid against assessments.

(c) £185,337.40 already paid on account.

(d) £72,992.68 on or before 1 March 2004.

5 (e) £86,372.79 being the final payment to be paid on 1/12/06 provided that this sum shall not be payable, then or at all, if, before the date on which the payment becomes due, the Inspector has received a claim under section 419(4) ICTA 1988 and agreed relief from an amount of tax equal to the instalment.

10 38. The sum of £86,372.79 represented the 25 per cent tax charge on outstanding loans to Mr Rhodes totalling £345,491.00. R&W Concessions did not pay this tax charge by the due date of 1 December 2006 which was specified in the agreement.

39. On 6 January 2007 Mr Beckett, the accountant for R&W Concessions wrote to HMRC stating that

15 “Please accept this as a section 419(4) claim to reduce the amount you are claiming on the basis that the overdrawn loan account balance was reduced to –

Year ended 28/2/2004 £94,148

Year ended 28/2/2005 £94,148

20 Year ended 28/2/2006 £92,043”.

40. On 13 March 2007 HMRC requested information from R&W Concessions in support of its claim.

25 41. On 25 April 2007 Mr Beckett on behalf of R&W Concessions stated that £70,000 of the loan related to Mrs Rhodes. Further Mr Rhodes had identified a number of accounting errors in R&W Concessions’ accounts in the year ended 28 February 2003 which had the effect of reducing the value of the loan to £164,147. The accounting adjustments were:

(1) A purchase ledger balance of £68,593 owed to *Wham Bang* cleared by personal monies introduced into the business.

30 (2) An adjustment to reduce sales by £56,460 in respect of cash held that did not relate to sales income.

(3) A further reduction in sales of £56,091 in respect of bank deposits that were unrelated to business income.

(4) £200 business expenses paid out of pocket.

35 42. HMRC failed to open an enquiry into the claim for relief before the closure of the window for doing so on 31 January 2008.

43. On 7 August 2008 HMRC wrote to Mr Beckett rejecting that £70,000 of the loan should be allocated to Mrs Rhodes because:

- (1) The contract settlement between R&W Concessions and HMRC dated 12 February 2004 was reached on the basis of £365,491 being owed by Mr Rhodes to the company.
- 5 (2) The payment was made into Mr Rhodes' bank account, and, therefore, the money was owed to R&W Concessions by Mr Rhodes.
- (3) Mrs Rhodes denied that she had received the £70,000. Her agent wrote to Mr Beckett on 22 October 2008 stating that Mrs Rhodes had no involvement with the company or Mr Rhodes at the time the director's loan account became overdrawn in the year ended 28 February 2004. Mrs Rhodes' agent pointed out that R&W Concessions had never requested repayment of the £70,000 loan.
- 10 44. On 6 November 2008 Mr Jackson, HM Inspector of Taxes, met with Mr Rhodes and Mr Beckett to discuss the claim for section 419(4) relief, amongst other matters. Mr Beckett said in response to questions about the accounting adjustments that he did not know when and how the errors had been discovered, and who had identified them.
- 15 45. On 14 August 2009 HMRC explained to R&W Concessions that it should accept the section 419(4) claim because an enquiry had not been opened in time into the claim for relief. HMRC, however, advised that it would be giving consideration on whether a discovery assessment should be issued.
- 20 46. On 12 October 2009 HMRC formally accepted the claim for section 419(4) relief.
47. On 19 January 2010 HMRC issued a discovery assessment in the sum of £62,835.79 in respect of the section 419(4) claim for the accounting period ending 28 February 2004.
- 25 48. Mr Beckett in evidence stated that Mr Rhodes had instructed Kilsby Williams, Chartered Accountants, to act in relation to the Hansard investigation conducted by HMRC's Special Compliance Office. Mr Rhodes, however, had serious concerns about the advice given by Kilsby Williams with the result that he withdrew his instructions shortly before the settlement. At that stage Mr Beckett had had no involvement with the Hansard investigation even though the meeting to finalise the settlement with HMRC took place at his offices. After the settlement in late summer 30 2004. Mr Beckett prepared the company accounts for R&W Concessions. By that time Mr Rhodes' health had improved which enabled him to consider more fully the director's loan account of £345,491.
- 35 49. Mr Rhodes explained to Mr Beckett that the nominal ledger entry regarding monies received of £75,000 from Wham Bang related to sales of four fast food trailers. Mr Rhodes owned the trailers from a former business known as *Rhodes Catering* which ceased trading in or around 1996. In Mr Beckett's view, the £75,000 should be regarded as capital introduced by Mr Rhodes into R&W Concessions and be set off against the £345,491 in the director's loan account. According to Mr 40 Beckett, the only record of the transaction was the nominal ledger entry because all of R&W Concessions' accounting records had been destroyed by Hazell's storage.

50. Mr Rhodes informed Mr Beckett that £56,460 of the £126,000 cash element of the director's loan account was his personal monies comprising the sale monies of a Winnebago camper van owned by him, and inheritance from his late brother's estate. Finally £56,091 of the bank deposits included in the loan account consisted of a
5 £20,000 repayment of a loan which Mr Rhodes had personally made to colleagues of his, the Steadmans, whilst the remaining £36,091 related to various monies banked by Mrs Rhodes which had no connection with the business of R&W Concessions.

51. Mr Beckett accepted that he did not inform HMRC about the adjustments to the director's loan account until January 2007 even though he received confirmation of
10 the adjustments from Mr Rhodes in September 2004. Mr Beckett stated that he tried to discuss the matter with Officers Hicks and Maggs of HMRC's Special Compliance Office but they were not prepared to engage because in their view the terms of the agreement stood. Mr Beckett was unable to produce records of any contacts made with Officer Maggs and Hicks during this period. Mr Beckett agreed that he made no
15 contact with Mrs Rhodes regarding her purported liability for £70,000 of the loan account.

52. Mr Beckett stated that he just had Mr Rhodes' word for the various accounting adjustments in the claim. Mr Beckett did not consider the records substantiating the adjustments were relevant to the section 419(4) claim. Mr Beckett accepted he had not
20 seen any of those records when he prepared the company's accounts for the year end 28 February 2004 and could not recall when the records were destroyed. Mr Rhodes in his witness statement acknowledged that the destruction of the records by Hazells happened around October 2005.

53. At this stage the Tribunal is considering whether the requirement of negligent
25 conduct had been met for the issue of a discovery assessment against R&W Concessions in respect of the section 419(4) claim. The Tribunal finds that Mr Rhodes and Mr Beckett's actions on behalf of the company fell below the standard of what a reasonable and prudent person would have done in the same circumstances. In the Tribunal's view a reasonable and prudent person would have advised HMRC of the
30 adjustments to the director's loan account in or around September 2004 when they were approved by Mr Rhodes. Mr Beckett offered no plausible explanation for waiting until January 2007 to submit the claim. Further a reasonable prudent person would have taken steps to substantiate the adjustments by checking the accounting records and contacting Mrs Rhodes. Mr Beckett did nothing except to rely entirely on
35 the say so of Mr Rhodes. At the time when Mr Beckett was investigating the director's loan account in summer 2004, the accounting records were still in existence. According to Mr Rhodes, the destruction of the records occurred around October 2005.

54. R&W Concessions accepted that there had been a discovery. The Tribunal is
40 satisfied on its findings in paragraph 53 above that the discovery was attributable to the negligent conduct of Mr Rhodes and Mr Beckett when acting on behalf of R&W Concessions. **The Tribunal, therefore, holds that the discovery assessment of 19 January 2010 in respect of the section 419(4) claim was validly made.**

Mr Rhodes

55. HMRC issued three sets of discovery assessments dated 8 July 2008, 16 December 2008 and 15 January 2009 against Mr Rhodes in respect of benefits received from his employment as a director for R&W Concessions from 2000/01 to 2004/05.

56. HMRC argued that Mr Rhodes had been negligent by omitting details of the various benefits from his returns, which in turn justified the issue of the various discovery assessments. Mr Rhodes accepted that the various benefits had not been declared in his tax returns. Mr Rhodes, however, contended that he had good reason for not including the benefits, and that a prudent taxpayer exercising reasonable diligence in the same circumstances would have done nothing different.

Car and Fuel Benefits

57. The first set of benefits to be considered concerned the car and fuel benefits associated with a Porsche 911 registration number T82 RHR and a Mercedes SL500 registration number 92KR.

58. Mr Rhodes explained that on 23 July 1999 R&W Concessions purchased the Porsche 911 for the sole use of Mrs Rhodes in her capacity as director. The total purchase price of the Porsche 911 was £90,340 of which R&W Concessions received £43,940 in part exchange for a Porsche Boxer, which was previously used by Mrs Rhodes.

59. According to Mr Rhodes, Mrs Rhodes continued to use the Porsche 911 until the vehicle was garaged at R&W Concession's warehouse in early 2000. Mr Rhodes said that Mrs Rhodes had always found the vehicle difficult to drive and that it had sustained paint damage as a result of vandalism and minor damage to its wheels. Mr Rhodes separated from Mrs Rhodes in September 1999 and divorced on 28 November 2000. As part of the divorce settlement Mr Rhodes agreed to provide Mrs Rhodes with a more sensible vehicle which was a Renault Clio.

60. Mr Rhodes stated that the Porsche 911 was not used after it was garaged in 2000 until it was sold in February 2003 for which Mr Rhodes received £32,000. Mr Rhodes said that he was unable to drive the vehicle from the time he withdrew from company's affairs in September 2002 due to illness. Mr Rhodes asserted that he did not have access to the Porsche because the keys were held and collected by his personal assistant, Rachel Smith, who was responsible for the day to day running of R&W Concessions. Mr Rhodes, however, accepted that Rachel Smith would not refuse to give him the keys if he had asked for them.

61. Mr Rhodes acknowledged that throughout the period of 2000 to 2003 the Porsche 911 continued to be taxed and had MOT tests, which according to Mr Rhodes was necessary for R&W Concessions to comply with the requirements of its operators licence.

62. Mr Rhodes stated that on 8 October 1997 R&W Concessions purchased the Mercedes SL 500 second-hand for his use. According to Mr Rhodes, whilst on a trip to Prague in January 2001, the Mercedes sustained a serious mechanical fault when it froze in temperatures of approximately minus 15 degrees Celsius. Mr Rhodes explained that the vehicle was inspected at a Mercedes dealership in Germany which confirmed that there was possible crack in the engine block and a problem with the engine management system. Mr Rhodes was able to nurse the vehicle back to the United Kingdom where it was left in R&W Concessions' warehouse until July 2004 when Mr Rhodes purchased the vehicle from the company for £10,000. Mr Rhodes accepted that R&W Concessions taxed the Mercedes and had an MOT certificate throughout the period from January 2001 to July 2004.

63. The Porsche and the Mercedes were covered by the fleet car insurance held by R&W Concessions. The values of the vehicles were separately identified in the capital allowances computation for R&W Concessions during the relevant years.

64. HMRC argued that the reason why it had not discovered the car and fuel benefits associated with the Porsche and Mercedes motor vehicles was that Mr Rhodes had negligently omitted the benefits from his tax returns for the years in question.

65. Mr Rhodes disputed that he had been negligent. Mr Rhodes argued that he did not use the said motor vehicles during the periods in question, and that in any event he could not drive the vehicles from September 2002. Mr Rhodes also added that the mechanical condition of the Mercedes prevented it from being used from January 2001.

66. HMRC stated that Mr Rhodes' liability for car and fuel benefits arose from the availability of the vehicles to Mr Rhodes for his use. In those circumstances the question of whether he actually used the vehicles was irrelevant. In response Mr Rhodes contended that even if he was wrong on the legal requirements for declaring the said benefits, it did not necessarily follow that he was negligent in omitting the benefits from his tax returns.

67. Mr Rhodes accepted that ignorance of the law did not constitute a valid reason for not declaring the benefits. Mr Rhodes, however, argued that there was a qualitative distinction between basic ignorance of the primary law governing tax liability and ignorance of aspects of law which less directly impinge upon such liability. If it is the latter, the Tribunal should take it into account as part of the overall facts of the case (see the judgment of Simon Brown J in *Neal v Customs and Excise Commissioners* [1988] STC 131 at 135 and 136).

68. Mr Rhodes contended that availability for use fell within the category of aspects of law which less directly impinge upon liability. Given those circumstances it was not unreasonable for Mr Rhodes to conclude that the benefits associated with the Porsche and Mercedes motor vehicles should not be included in his tax returns.

69. In support of his proposition Mr Rhodes referred to Office Thorne's earlier enquiry into his 2003/04 tax return. Office Thorne accepted that a Volvo motor vehicle was not available to Mr Rhodes for his use. Officer Thorne decided that Mr Rhodes had no access to the Volvo, and that in any event he could not drive it because of his illness⁴.

70. HMRC considered Officer Thorne's decision mistaken⁵. HMRC also pointed out that Officer Thorne made no ruling on whether Mr Rhodes received benefits in kind from the Porsche or Mercedes motor vehicles.

71. HMRC's comments regarding Officer Thorne's mistake have overlooked Mr Rhodes' argument about availability for use falling within the category of aspects of law which less directly impinge upon liability. Officer Thorne's purported mistake of confusing use with availability lends support to Mr Rhodes' argument that it was not obvious that the car benefits should have been declared in the tax returns.

72. Despite Officer Thorne's mistake, the Tribunal is not convinced by Mr Rhodes' argument. In assessing the question of negligence the Tribunal is required to judge the actions of Mr Rhodes against those of a prudent taxpayer exercising reasonable foresight and due diligence in the same circumstances as Mr Rhodes when completing and submitting his tax returns.

73. Mr Rhodes was an experienced company director and well versed in the completion of tax returns. His situation was very different from that of Ms Neal, a freelance model of 19 years of age without any previous experience of tax, business, or law. The Tribunal is satisfied that Mr Rhodes knew about the requirement to declare car benefits, and presumably had done so in respect of the Mercedes vehicle which had been purchased for his use. Mr Rhodes knew that his former wife had ceased to use the Porsche from early 2000 and that the Porsche in all intents had been returned to the company, R&W Concessions, which was effectively under Mr Rhodes' control following the separation from his wife in September 1999. Mr Rhodes acknowledged that the Porsche and Mercedes motor vehicles were trophy vehicles used by the directors to impress the customers of R&W Concessions.

74. Given the above factual background, the Tribunal considers that even if Mr Rhodes did not understand the precise legal requirements of having the vehicle available for use, he was on notice that he may have to declare car benefits in relation to the Porsche and Mercedes motor vehicles. A prudent tax payer in the same circumstances as Mr Rhodes would at the very least have taken advice on whether he was obliged to declare such benefits. Mr Rhodes gave no evidence that he sought advice on these matters. Mr Rhodes simply assumed that as he was not using the vehicles no benefits arose. **The Tribunal finds that Mr Rhodes' actions were not**

⁴ See notes of interview 22 March 2006 exhibited at pages 2-4 of Volume 1 of the Documents' Bundle.

⁵ See the review decision of Officer Musgrove dated 23 March 2011 at page 328 of Volume 2 of the Documents Bundle.

those of a prudent tax payer and that he was negligent in omitting the car and fuel benefits associated with the Porsche and the Mercedes from his tax returns.

Transfer of Vehicles at Undervalue

5 75. The next item to be considered is the transfer at under value of the Mercedes and Volvo motor vehicles from R&W Concessions to Mr Rhodes. In this situation an employment related benefit arises with the level of the benefit being determined by the market value of the asset at the time of the transfer. Mr Rhodes accepted that the Porsche motor vehicle had been transferred to him at an under-value of £7,000 in the year 2003/04.

10 76. The disputed discovery assessment related to the 2004/05 tax year issued on 8 July 2008. The discovery of the transfers at undervalue followed an enquiry into the accounts of R&W Concessions which showed that the Mercedes and Volvo motor vehicles had been transferred to Mr Rhodes at £5,000 each in the accounting period ending 28 February 2005. HMRC stated that the Glasses Guide valued the Mercedes
15 at £16,000 (low book price) and the Volvo at around £15,000 which resulted in undervalues and taxable benefits of £11,000 and £10,000 respectively.

77. HMRC argued that Mr Rhodes' failure to include details of the transfers in his tax return for 2004/05 constituted negligent conduct.

20 78. Mr Rhodes stated that R&W Concessions' invoice dated 21 July 2004 recording the sale of the Mercedes and Volvo motor vehicles to him was incorrect. First, the sale price of £10,000 referred solely to the Mercedes motor vehicle. Second, the invoice referred to a Volvo motor vehicle registration number R280 RWO which had been previously sold in 2001 to the then events manager for R&W Concessions, Roger Wilson. The error regarding the Volvo motor vehicle was repeated in R&W
25 Concessions' accounts for the period ending 28 February 2005.

30 79. Mr Rhodes considered the £10,000 paid for the Mercedes was both fair and reasonable having regard to its mechanical state of disrepair. SG Motors, which held the Mercedes dealership in Newport, estimated that it would cost in the region of £20,000 to put the Mercedes in a driveable condition. Mr Rhodes stated that the only real value of the Mercedes was in its interior and exterior which were in good condition. Mr Rhodes decided to purchase the Mercedes in the hope that it could be repaired but in the end he did not have the funds to effect the necessary repairs.

35 80. Mr Rhodes stated that there had been confusion over the identity of the Volvo motor vehicle in the accounts of R&W Concessions. During March 1997 R&W Concessions purchased a Volvo Estate registration number R280 RWO ("the First Volvo") which was used by Mr Rhodes as his main company car until February 2001. The First Volvo was then sold to R&W Concessions' events manager, Mr Roger Wilson, which was evidenced by an invoice in the bundle⁶.

⁶ See exhibit 338

81. Mr Rhodes explained that the First Volvo was mistakenly included in the R&W Concessions' accounts for the financial years 2001/02 onwards. This mistake happened due to a mix up with the book-keeping as the sale was inadvertently included in general sales for the year, on which corporation tax was paid, instead of
5 being allocated to miscellaneous sales and then treated as an asset disposal within the accounts. Mr Rhodes stated that he would have normally identified such an error when discussing matters with his accountant but unfortunately these discussions did not occur at the time because of Mr Rhodes' illness.

82. Following the sale of the First Volvo, R&W Concessions obtained a Second
10 Volvo Y382 NAX on contract hire from a company named Key Fleets. Mr Rhodes used the Second Volvo as his main company car until around November 2003. As the Second Volvo was obtained on contract hire it was not listed as an asset in the accounts of R&W Concessions. On 22 July 2003 Key Fleets provided R&W
15 Concessions with details of the purchase price for the Second Volvo which was £14,950. Key Fleets also advised that there would be an early termination charge of £779.61.

83. Mr Rhodes asserted that he paid the purchase price of £14,950 for the Second Volvo direct to Key Fleets. Mr Rhodes was unable to produce copies of his bank statements to evidence the payment. Mr Beckett, however, confirmed that R&W
20 Concessions did not pay the purchase price. The only payment shown in the accounts of R&W Concessions related to the early termination charge for the Second Volvo.

84. Mr Rhodes pointed out that the entry in the DVLA form V5/2 New Keeper's Supplement for the Second Volvo showing R&W Concessions as the new keeper from 28 November 2003 was an administrative error by his Personal Assistant,
25 Rachel Smith.

85. HMRC contended that Mr Rhodes had adduced no evidence to demonstrate that it should have been aware of the tax benefits associated with the transfer of the Mercedes and Volvo motor vehicles at undervalue prior to the issue of the discovery assessments. HMRC argued that the reason for not discovering the tax loss was
30 because of Mr Rhodes' negligent conduct in not disclosing the tax benefits in his tax return.

86. Mr Rhodes, on the other hand, submitted that he had no reason to declare details of the transfers in his return because he believed that there had been no transfers at undervalue. Mr Rhodes stated that he paid a fair price for the Mercedes. Further he,
35 not R&W Concessions, had purchased the second Volvo direct from Key Fleets. Mr Rhodes asserted that his actions were those of a prudent tax payer.

87. The Tribunal at this stage is considering whether Mr Rhodes was negligent in not including details of the transfers in his tax return. The Tribunal disagrees with Mr Rhodes' assertion that at the time of completing the 2004/05 return his actions were
40 those of a prudent tax payer.

88. The invoice that gave rise to the discovery assessments was dated 21 July 2004 which recorded the sale of the Mercedes and Volvo motor vehicles to Mr Rhodes for a purchase price of £10,000. Mr Beckett gave evidence that in or around the summer of 2004 Mr Rhodes had made sufficient recovery from his illness to consider the 2004 accounts for R&W Concessions. The Tribunal is satisfied that if Mr Rhodes had been acting as a prudent taxpayer he would have questioned the correctness of the July 2004 invoice, and been aware of the implications of that invoice for his 2004/05 tax return. The evidence suggested that Mr Rhodes only challenged the details of the invoice after the appeal had been commenced before the Tribunal.

89. **In view of the above findings the Tribunal holds that Mr Rhodes was negligent when he failed to make reference to the transfers of the Mercedes and Volvo motor vehicles in his 2004/05 tax return.**

Beneficial Loan

90. HMRC contended that Mr Rhodes derived a benefit from the overdrawn director's loan account of R&W Concessions which stood at £345,491 at 28 February 2004 in accordance with section 175 of ITEPA 2003. HMRC stated that Mr Rhodes' failure to declare this benefit in the tax returns for 2004/05 and 2005/06 was as a result of his negligent conduct. According to HMRC, at the end of the Hansard enquiry Mr Rhodes was made fully aware of his obligation to disclose this benefit in his tax returns for 2003/04 to 2005/06.

91. Mr Rhodes disagreed with HMRC's interpretation of events. Mr Rhodes stated that the settlement agreed with HMRC on 12 February 2004 was signed on the basis that there would be a moratorium on the payment of the section 419 liability for three years to the financial year ending 28 February 2006. Mr Rhodes further asserted that HMRC also accepted there would be no benefit in kind tax charge under section 175 ITEPA 2003 against him in relation to the director's loan account for three years to the financial year ending 28 February 2006.

92. Mr Rhodes relied on Officer Thorne's conclusions arising from the closure of the enquiry into his amended tax return for the year ended 5 April 2004 in support of his interpretation of the events regarding the Hansard enquiry. Officer Thorne in a letter dated 5 April 2006 to Minty Jones & Beckett, the Appellants' accountants, stated that

“Following our meeting I have discussed the matter with my colleagues who previously dealt with the enquiry into R&W Concessions Ltd. Given the specific circumstances of the case it has been agreed that the position for 2004 is as originally returned, i.e, no loan been is due.

As discussed during our meeting, if the director's loan account is overdrawn after February 2006 this fact will need to be reflected in your client's (*Mr Rhodes*) SA return and the P11D as a loan benefit will be chargeable”.

93. HMRC conceded that in view of Officer Thorne's decision in respect of the 2003/04 return that it had not made a discovery in respect of that year with the result that on review HMRC cancelled the discovery assessment for the loan benefit in 2003/04. HMRC, however, maintained that Mr Rhodes was told by the Special Compliance Office that he was required to declare the loan benefit from 2003/04. HMRC referred to a meeting on 12 February 2004 between Officers Hicks and Maggs of the Special Compliance Office and Mr Rhodes, Ms Smith and Mr Beckett. The minutes of the meeting stated that

“Officer Hicks said that the only difference between Mr Kilsby's computations of the liability and her schedule of the computations was that she had omitted the s160 ICTA 1988 benefit (*predecessor to section 175 of ITEPA 2003*) on the overdrawn loan account. Officer Hicks explained that this was because the company (*R&W Concessions*) offer included the additional CT and s419 and by concession the s160 was not pursued on the individual (*Mr Rhodes*). Since the company offer was up to and including the year ended 5 April 2003 the s160 liability would not need to be declared by Mr Rhodes until the 2003/04 return.

Mr Rhodes said that he had been unaware of this personal liability. Officer Hicks pointed out that it had been set out in the disclosure report. Mr Rhodes said that he had presumed this was included in the £67,000 sum that Mr Kilsby had advised him of. Mr Rhodes said that as far as he was concerned the £67,000 had been the bottom line”.

94. The Tribunal finds that Mr Rhodes was fully aware of his obligation to declare the loan benefit for the 2005/06 return. On 5 April 2006 Officer Thorne advised Mr Rhodes of his responsibility to do so, if the director's loan account for R&W Concessions was overdrawn after February 2006. R&W Concessions' claim for section 419(4) relief on 6 January 2007 stated that the loan account was overdrawn as at 28 February 2006, albeit with a lower amount of £92,043. Mr Rhodes had agreed the figures in the section 419(4) claim with Mr Beckett in the summer of 2006. Mr Beckett acknowledged in the presence of Mr Rhodes at the meeting with Officer Jackson on 6 November 2008 that Mr Rhodes had not declared the benefit for 2005/06 because it would only arise for one month and not, therefore, worth declaring.⁷ **Given those facts the Tribunal is satisfied that HMRC's discovery of the tax insufficiency arising from the non declaration of loan benefit in 2005/06 was due to Mr Rhodes' negligent conduct.**

95. The Tribunal considers the position regarding the 2004/05 return problematical. HMRC maintained that the Special Compliance Officers told Mr Rhodes that he must declare the loan benefit for 2003/04 to 2005/06. Mr Rhodes stated that he was not so informed and that the requirement to declare the benefit only arose after the end of the three year moratorium on the payment of the section 419 liability by R&W Concessions. Officer Thorne's conclusions on the enquiry into Mr Rhodes' 2003/04 return supported Mr Rhodes' stance. Officer Thorne's conclusion was reached after discussing the matter with his colleagues in the Special Compliance Office. HMRC

⁷ See page 116 of First Bundle of Documents.

accepted Officer Thorne's decision in respect of no loan benefit for 2003/04. At the hearing HMRC did not make a substantive challenge to Mr Rhodes' understanding of the position for the 2004/05 return. The minutes of the meeting on 12 February 2004 referred only to the year 2003/04. Given the above facts the Tribunal considers on
5 balance that HMRC had failed to undermine Mr Rhodes' version of events of requiring him to declare the loan benefit only after the end of the three year moratorium, namely 1 December 2006.

96. **The Tribunal, therefore, finds that Mr Rhodes was not negligent in his failure to declare a loan benefit for 2004/05. In those circumstances, the
10 discovery assessment in respect of the loan benefit for 2004/05 was invalid.**

Summary of Tribunal's decision on discovery assessments against Mr Rhodes

97. For the reasons given above the Tribunal holds that HMRC has established that the legal requirements have been met for the issue of discovery assessments for the years 2000/01 to 2005/06 against Mr Rhodes except the assessment concerning the
15 loan benefit for 2004/05. The Appellant conceded that a discovery had been made in relation to each assessment. The Tribunal is satisfied that the discovery of the tax loss for each assessment was attributable to the negligent conduct of Mr Rhodes with the exception of the 2004/05 loan benefit.

98. In view of the Tribunal's finding of negligent conduct in respect of the assessments for 2000/01 and 2001/02, the criterion for extending the six year time
20 limit to twenty years has been met in accordance with section 36 of TMA 1970.

Limitation Act Issue

99. On 11 May 2010 HMRC issued a decision under section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 requiring R&W
25 Concessions to pay Class 1A National Insurance Contributions in respect of cars and fuel made available to Mr Rhodes for private use, beneficial loans and transfer of assets during the period 6 April 2000 to 5 April 2006. The amount of Class 1A National Insurance Contributions assessed was £43,356.62.

100. The limitation period for the recovery of Class 1A National Insurance Contributions by HMRC is six years. The disputed section 8 decision covered the
30 years from 2000/01 to 2003/04 which were outside the six year period.

101. Section 32(1) of the Limitation Act 1980 provides an exception to the six year time limit where in the case of any action for which a period of limitation is prescribed by the Act either –

- 35
- a) the action is based upon the fraud of the defendant; or
 - b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;
 - c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it”.

102. The Officer who made the decision on 11 May 2010 stated that

5 “Under the circumstances I consider that section 32 to the Limitations Act 1980 applies as there is evidence of deliberate concealment or mistake, and therefore the time limit in respect of the years 2000/01 to 2002/03 is extended to six years from the date of the discovery, which was in 2008”.

10 103. The Review Officer in his letter dated 23 March 2011 stated that

“The section 8 NICS decision includes the years 2000/01 to 2003/04. These years would normally fall outside of the time limit for recovery of NICS as the Limitation Act 1980 limits the recovery of NICS to six years from the date on which the cause of action accrued.

15 If, however, there is evidence of fraud, deliberate concealment or mistake within section 32 of the Time Limitation Act 1980 the time limit in respect of the years 2000/01 to 2002/03 is extended to six years from the date HMRC made a discovery”.

20 104. HMRC did not refer to the limitation issue in its statement of case dated 20 July 2011 and in its skeleton argument. Mr Foxwell in closing for HMRC referred to the above comments of the Review Officer in his letter dated 23 March 2011. Mr Brooks for R&W Concessions pointed out that it was not apparent from the various decision letters, statement of case and skeleton argument whether HMRC was relying on fraud, concealment or mistake in support of the claimed entitlement under section 32 of the
25 Limitation Act 1980.

105. The Tribunal considers that HMRC has an obligation to substantiate its claim for relief from the six year time limit under section 32 of the 1980 Act. In the Tribunal’s view, HMRC has made general observations about the application of section 32 to the situation involving R&W Concessions but has failed to specify the
30 particular limb of section 32 relied upon and the evidence to support the application of a particular limb.

106. HMRC adduced evidence of the negligent conduct of the Officers of R&W Concessions to justify the issue of discovery assessments against the company and Mr Rhodes. The Tribunal considers that evidence of negligent conduct is not sufficient to
35 meet the thresholds of fraud (section 32(1)(a) or deliberate concealment (section 32(1)(b). Negligent conduct is qualitatively different from fraud or deliberate concealment, in that negligence arises from a careless act of falling below the standards of a prudent tax payer, and does not involve a deliberate act as characterised in fraud or deliberate concealment.

40 107. HMRC in its various decision letters mentioned the word *mistake*, which was presumably a reference to section 31(1)(c) of *an action for relief from the consequences of a mistake*. HMRC has made no attempt to explain why section 31(1)(c) applied to the circumstances involving R&W Concessions. The Tribunal is

unclear as to whether HMRC's section 8 decision constituted an action for relief. Further HMRC have advanced no argument on whether the mistake is restricted to one on its part or can include a mistake by R&W Concessions. In any event HMRC has not identified the mistake relied upon.

- 5 108. The Tribunal finds that HMRC has failed to put forward a case in support of the claimed entitlement under section 32 of the Limitation Act 1980. **The Tribunal holds that the section 8 decision relating to the years from 2000/01 to 2003/04 is out of time, in which case R&W Concessions is not liable to pay the disputed Class 1A National Insurance Contributions for 2000/01 to 2003/04 inclusive.**

10 Substantive Issues

Whether the relief given by HMRC to R&W Concessions in relation to the repayment of the director's loan was excessive⁸?

- 15 109. R&W Concessions contended that the overdrawn account balance for the director's loan account was reduced from £345,491 to £94,148 as at 28 February 2004. HMRC argued that R&W Concessions' claim for relief under section 419(4) was excessive and not supported by evidence.

110. R&W Concessions' case for the reduction was that there were accounting errors in the original director's loan account which required adjusting. The adjustments were as follows:

- 20 (1) A purchase ledger balance of £68,593 owed to *Wham Bang* cleared by personal monies of Mr Rhodes introduced into the business.
- (2) An adjustment to reduce sales by £56,460 in respect of cash held that did not relate to sales income.
- 25 (3) A further reduction in sales of £56,091 in respect of bank deposits unrelated to business income.
- (4) £200 business expenses paid out of Mr Rhodes' pocket.
- (5) A sum of £70,000 should have been allocated to Mrs Velma Rhodes, in her capacity of company director.

111. The Tribunal makes the following findings of fact:

- 30 (1) The original account balance of £345,491 for the loan account was agreed to by R&W Concessions as part of the settlement dated 12 February 2004 to conclude the Hansard enquiry.
- (2) R&W Concessions did not pay the outstanding tax (£86,372.9) on the loan account by the agreed date of 1 December 2006.

⁸ See paragraphs 35-52 for the law and background to the section 419(4) claim.

(3) Mr Beckett on behalf of R&W Concessions did not inform HMRC about the adjustments to the director's loan account until January 2007 even though he received confirmation of the adjustments from Mr Rhodes in September 2004.

5 (4) Mr Beckett on behalf of R&W Concessions did not check the accuracy of the adjustments with the accounting records which were in existence at the time the adjustments were made. R&W Concessions' accounting records were not destroyed until October 2005.

10 (5) The adjustments were based solely on Mr Rhodes' recollection of events which were not corroborated by documentation and evidence of other participants involved in the transactions, such as Rachel Smith, Personal Assistant to Mr Rhodes.

15 (6) The evidence indicated that the sum of £75,000 from Wham Bang Food Limited belonged to R&W Concessions. The cheque for £75,000 was made out to R&W Concessions, and the amount was entered into R&W Concessions' nominal ledger accounts. Mr Rhodes stated that Rachel Smith had made a mistake by recording the £75,000 in the accounts for R&W Concessions. According to Mr Rhodes, Rachel Smith did not know what the payment related to and raised a dummy invoice. Mr Rhodes offered no explanation as to why Rachel Smith did not check what the payment was for, particularly as it was the
20 second largest transaction recorded in the accounts of R&W Concessions for the period 5 March 2002 to 20 February 2003.

25 (7) The Tribunal was not convinced with Mr Rhodes' justification for the cash adjustment of £56,460. Mr Rhodes stated that £20,000 related to the sale of a Winnebago camper van owned by him personally. Mr Rhodes, however, could not recall the identity of the purchaser of the camper van. According to Mr Rhodes, the remaining £36,460 comprised monies received from his late brother's estate, for which there was no corroboration.

30 (8) The Tribunal was similarly unimpressed with Mr Rhodes' rationale for the adjustment of £56,091 in respect of bank deposits which were paid into Mr and Mrs Rhodes personal bank accounts, and allegedly did not relate to business income of R&W Concessions. Mr Rhodes said that during the course of the Hansard investigation HMRC incorrectly assumed that some bank deposits in the personal accounts related to income belonging to the company. Mr Rhodes estimated that the amount of these deposits was £56,091 of which around
35 £20,000 amounted to a repayment of a loan of approximately £100,000. Mr Rhodes personally made this loan to a colleague, known as the Steadmans. Mr Rhodes did not produce any documentation in support of the loan or adduce evidence from the Steadmans. The persons acting on behalf of R&W Concessions had reached a settlement with HMRC as part of the Hansard enquiry which included the £56,091. Mr Rhodes adduced no persuasive
40 evidence to undermine that agreement.

(9) Mr Rhodes' assertion that he paid £200 business expenses from his own monies was uncorroborated.

(10) Mr Rhodes stated that £70,000 of the director's loan account was owed by the former Mrs Rhodes. Mr Rhodes stated that R&W Concessions were required to pay bonds to its suppliers to secure the contract prior to certain events. In April 1998 R&W Concessions paid a bond of £140,000 to Bass PLC in relation to alcohol sales for an event. According to Mr Rhodes, when the bond was returned it was paid into the joint account of Mr and Mrs Rhodes. After their separation but before the divorce Mrs Rhodes withdrew the £70,000 from the joint account. Mr Rhodes asserted that the £140,000 was included in the directors' loan account, and that the Hansard settlement did not differentiate between the separate liabilities of Mr and Mrs Rhodes, and treated the loan account as one overall balance. Mrs Rhodes on being contacted by HMRC denied that she had received an amount of £70,000 from R&W Concessions⁹. Mrs Rhodes stated that she had no involvement with the company since their separation in September 1999. The consent order for the divorce¹⁰ dated 27 March 2001 made no mention of the £70,000. Further under the terms of the order Mr Rhodes indemnified Mrs Rhodes against all liabilities arising from her involvement with R&W Concessions, and undertook to co-operate fully when requested to do in providing the necessary detail for the completion of Mrs Rhodes' personal tax returns. Finally Mrs Rhodes pointed out the first she heard about the £70,000 was in April 2008 following a letter from HMRC and that R&W Concessions had never contacted her to request repayment. The Tribunal finds that Mr Rhodes has not provided a convincing response to the points raised by Mr Rhodes.

112. Essentially R&W Concessions attempted to undermine the terms of a previous agreement reached with HMRC regarding its tax liabilities. Mr Rhodes argued that at the time of the Hansard investigation he was unwell and unable to consider fully the eventual settlement reached with HMRC. The Tribunal accepts that Mr Rhodes was suffering from poor health during this period, however, R&W Concessions was represented by Kilsby Williams, Hansard specialists, throughout the investigation. Also after Kilsby Williams had ceased to act for the company HMRC gave Mr Rhodes and Mr Beckett opportunities to consider the settlement, and in particular the section 419 liability associated with the outstanding balance on the director's loan account¹¹. Despite being given these opportunities, Mr Beckett and Mr Rhodes did not at that time challenge the amount of the outstanding balance. In the Tribunal's view it was incumbent upon R&W Concessions to adduce persuasive evidence that the terms of the settlement were wrong. Mr Rhodes' evidence was unconvincing, and his credibility was undermined by the inordinate delay in sharing details of the adjustments with HMRC.

113. **The Tribunal having regard to the above findings holds that the evidence adduced by R&W Concessions was weak and insufficient to discharge the discovery assessment dated 19 January 2010 in the sum of £62,835.79.**

⁹ See pages 39 and 102 of the First Bundle of Documents.

¹⁰ See page 42 of the First Bundle of Documents.

¹¹ See page 413 of the Second Bundle of Documents.

Beneficial Loan

114. HMRC assessed Mr Rhodes in the sum of £17,221 for 2005/06 in respect of the benefit in kind he derived from the overdrawn director's loan account. The tax due on this assessment was £5,944. The outcome of the substantive dispute was dependent upon the Tribunal's finding on the section 419(4) claim by R&W Concessions. Mr Rhodes did not make any separate representations on the benefit in kind associated with the loan. The Tribunal has found against R&W Concessions which meant that the average account balance for the director's loan in 2005/06 was £344,439 which resulted in a benefit in kind to the value of £17,221. Mr Rhodes has not challenged the computation of the benefit in kind.

115. The Tribunal, therefore, upholds the assessment of the loan benefit to the value of £17,221 for 2005/06 against Mr Rhodes.

Car and Fuel Benefits

116. HMRC issued assessments against Mr Rhodes for car and fuel benefits in respect of Porsche and Mercedes motor vehicles.¹²

117. The assessments for the Porsche motor vehicle, registration number T82 RHR, covered the tax years 2000/01, 2001/2 and 2002/03. The cash equivalent of the car benefit was £23,782 for each of the years in question. The cash equivalent was based on a list price for the Porsche of £90,340, and that the vehicle was available for use by Mr Rhodes throughout the years in assessment. The cash equivalent of the fuel benefit was £3,200 for 2000/01 and 2001/02, and £4,200 for 2002/03. The cash equivalent appeared to be based on the cylinder capacity of the motor vehicle in cubic centimetres.

118. The assessments for the Mercedes motor vehicle, registration number 92 KR, covered the tax years 2000/01 to 2004/05 inclusive. The cash equivalent of the car benefit was £17,836 for 2000/01 and 2001/02; £21,744 for 2002/03 and 2003/04; and £6,384 for 2004/05. The cash equivalent was based on a list price for the Mercedes of £67,950 and that the vehicle was available for use by Mr Rhodes throughout the years in assessment. The cash equivalent of the fuel benefit was £3,200 for 2000/01 and 2001/02, which appeared to be based on the cylinder capacity of the motor vehicle in cubic centimetres. There was no fuel benefit for 2002/03, 2003/04 and 2004/05. HMRC accepted that the Mercedes was a low mileage motor vehicle in relation to 2002/03, and that R&W Concessions purchased no fuel in 2003/04 and 2004/05.

119. The Tribunal notes that HMRC in its skeleton pointed out that the legislation in 2002/03 introduced the list price of the vehicle as the basis for computing the car benefit, which appeared to contradict Officer Webber's use of the list price in earlier years¹³ for the calculation of car benefit. Mr Rhodes, however, did not challenge the

¹² See above paragraphs 57-63 for the background.

¹³ See page 178 of the First Bundle of Documents.

method for computing the benefits. The dispute on the substantive matter concerned whether the statutory requirements for charging car and fuel benefits were met.

120. The applicable legislation is found in section 157 of ICTA 1988, and sections 114 – 118 of ITEPA 2003 which cover the years of assessment from 2000/01 to 2004/05. Essentially the two legislative provisions are the same on the key requirements for the benefit charge, although section 118 ITEPA 2003 clarifies availability for private use. For the purpose of this Appeal the Tribunal refers to sections 114 to 118 ITEPA 2003 which formed the foundation of Mr Rhodes' representations.

121. Section 114 ITEPA 2003 states that car and fuel benefits are chargeable:

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

a) is made available (without any transfer of the property in it) to an employee

b) is so made available by reason of his employment, and

c) is available for the employee's private use”.

122. Section 118 ITEPA 2003 clarifies availability for private use:

“(1) For the purposes of this Chapter a car or a van made available in a tax year to an employeeis to be treated as available for the employee's private use unless in that year–

a) the terms on which it is made available prohibit such use, and

b) it is not so used

(2) In this Chapter private use in relation to car or van made available to an employee means any use other than for the employer's business travel”.

123. Mr Brooks for Mr Rhodes submitted that for section 114 ITEPA 2003 to apply it is necessary for the employee to be able to use the vehicle. According to Mr Rhodes, he was unable to use the vehicles in 2002/03 to 2004/05 because of his illness. In addition, the Mercedes would not have been available for his use from January 2001 because of its mechanical defects.

124. Mr Foxwell for HMRC disagreed with Mr Brooks' construction, arguing that in order for section 114 to be engaged it is only necessary for the car to be available for the employee's use. Further if the car is so available, it would be treated as available for private use unless such use is prohibited by the employer (section 118 ITEPA 2003). According to Mr Foxwell, the fact that Mr Rhodes may not have actually used the vehicles was irrelevant for the purposes of section 114.

125. The Tribunal considers that Mr Foxwell has misunderstood Mr Brooks' submission. Mr Brooks is not relying on the fact of Mr Rhodes' assertion that he did

not use the vehicles for his submission¹⁴. Mr Brooks is saying that the Mercedes could not be used from 2001 because of mechanical defects, and that both cars could not be used in 2002/03 to 2004/05 during Mr Rhodes' illness. Thus Mr Brooks submits that there are effectively two limbs of section 114: the car is made available to the employee, and is available for the employee's use. The facts of the mechanical defect and Mr Rhodes' illness prevented the availability of the cars for his use.

126. On a strict reading of the Appellant's skeleton, Mr Brooks appears to be conceding on behalf of Mr Rhodes that the Porsche was available for use by Mr Rhodes in the tax years 2000/01 and 2001/02.

127. Before considering the merits of the parties' legal arguments, the Tribunal makes the following findings of fact:

(1) On 23 July 2009 R&W Concessions purchased the Porsche motor vehicle for £90,340, which included the part exchange value of a Porsche Boxter (£43,940).

(2) Mrs Velma Rhodes originally used the Porsche as her company car. Mrs Rhodes ceased to have any involvement with the company following her separation from Mr Rhodes in September 1999.

(3) Mr Rhodes accepted that Mrs Rhodes did not use the Porsche from early 2000, when according to Mr Rhodes the Porsche was garaged at the warehouse belonging to R&W Concessions.

(4) R&W Concessions arranged for the Porsche to be sold on a commission basis. In February 2003 Merlin Cambria, the main Porsche dealership in Cardiff, collected the Porsche in order to value it. Merlin agreed to undertake repairs to the vehicle and market it at a projected bottom book price of approximately £45,000, which was evidenced by a Vehicle Sale or Return agreement dated 22 May 2003. The Porsche was sold later in 2003 with Mr Rhodes receiving the purchase price of £32,000.

(5) Mr Rhodes accepted that the Porsche had a current vehicle excise licence throughout the period from 1999 to 2003, and that it had a valid MOT certificate after the three year threshold.

(6) Mr Rhodes adduced no evidence to show that the Porsche was off the road. No statutory off road notification (SORN) had been made in relation to the vehicle. Mr Rhodes was unable to obtain the MOT certificates or copies of them to show the mileage for the vehicle.

(7) Mr Rhodes said that the keys for the Porsche were held by Rachel Smith, his personal assistant. Mr Rhodes, however, accepted that Ms Smith would not deny him access to the keys if he asked for them.

(8) On 6 October 1997 R&W Concessions purchased the Mercedes second hand for £67,950. The Mercedes was approximately six months old when bought and had a recorded mileage of 8,191 miles.

¹⁴ See paragraph 79 of the Appellant's skeleton.

(9) Mr Rhodes accepted that he used the Mercedes during the period from 1997 to 2001.

5 (10) According to Mr Rhodes, in January 2001 the Mercedes sustained a serious mechanical fault when it froze in temperatures of approximately minus 15 degrees Celsius. The serious fault with the Mercedes related to the fact that it would overheat if it was driven for more than a short distance. Mr Rhodes said that the repairs would cost in the region of £20,000. Mr Rhodes produced no documentary evidence to substantiate the costs of the repair. The invoice dated 15 December 2009 from Brooks Car and Commercial¹⁵ exhibited at page 39 to Mr Rhodes witness statement did not refer to a serious mechanical fault.

10 (11) In July 2004 Mr Rhodes purchased the Mercedes which was transported to his home in Autumn 2004.

15 (12) The mileage of the Mercedes as at 15 December 2009 was 35,176. During the period 1997 to 2009 the total mileage undertaken by the Mercedes was 26,985.

(13) Mr Rhodes accepted that the Mercedes had a vehicle excise licence and a valid MOT certificate throughout the period of R&W Concessions' ownership. The company did not file a SORN with DVLA.

20 (14) Mr Rhodes adduced no evidence which indicated that R&W Concessions prohibited him from using the Mercedes and Porsche for private use.

25 (15) Mr Rhodes explained that HMRC's investigations took a significant toll on his health. In 1998 he experienced panic attacks and began to suffer from extreme anxiety and stress. Mr Rhodes was forced to take several months off work during 2001. Unfortunately his health condition continued to deteriorate and was forced to give up work during September 2002. Mr Rhodes did not return to R&W Concessions' premises after September 2002, and effectively was housebound until 2004.

30 (16) Mr Rhodes supplied letters from his previous and current General Practitioner, Dr Morris, and Dr Edwards, and from Dr Roger Thomas, Consultant Psychiatrist which confirmed the poor state of Mr Rhodes' health in 2002 to 2004, and that Mr Rhodes rarely left his home during that period. In respect of Mr Rhodes' fitness to drive Dr Edwards stated that

35 'There are no entries in the records as to whether Mr Rhodes was driving at this time, although I would note that he would have found driving difficult due to the anxiety symptoms and the nature of the Diazepam medication he had been prescribed'.

40 128. The Tribunal concludes in relation to the Mercedes motor vehicle that R&W Concessions made the car available to Mr Rhodes by reason of his employment as a director, and that it was available for his private use. Mr Rhodes accepted that R&W Concessions purchased the car for his use, and that R&W Concessions did not prohibit private use of the Mercedes by Mr Rhodes. The Tribunal is also satisfied that

¹⁵ Exhibited at page 39 to Mr Rhodes' witness statement.

Mr Rhodes used the Mercedes for his private use. Mr Rhodes did not suggest that the trip to Prague was solely for business purposes.

129. The Tribunal concludes in relation to the Porsche motor vehicle that R&W Concessions made the car available to Mr Rhodes by reason of his employment as a director, and that it was available for his private use. The facts found demonstrated that Mrs Rhodes' interest in the Porsche ceased following her separation from Mr Rhodes in September 1999. Mr Rhodes accepted that the Porsche was a trophy vehicle which would only be used by the directors of the company. Mr Rhodes was effectively the only working director after their separation¹⁶. The Porsche had a current vehicle excise licence and MOT certificate during the period of the assessment. Mr Rhodes accepted that Ms Smith would not refuse to give him the keys to the Porsche. There was no evidence that R&W Concessions had prohibited Mr Rhodes from using the Porsche for private purposes. Finally Mr Rhodes received the purchase monies for the Porsche and had accepted that he was liable to a tax change on the transfer of the vehicle to him at undervalue.

130. The Tribunal's conclusion on the Mercedes is subject to whether its purported mechanical defect and Mr Rhodes' state of health meant that the Mercedes was no longer available for his use. Similarly the conclusion on the Porsche may be affected by Mr Rhodes' state of health. The Tribunal will first consider whether the mechanical defect and state of health are supported by the facts, and if they are, their relevance to the interpretation of section 114 ITEPA 2003.

131. The Tribunal is not satisfied on the facts found that the Mercedes was unroadworthy. The Tribunal placed weight on the evidence that the Mercedes had a current excise licence and a valid MOT certificate during the period covered by the disputed assessment, which indicated that the vehicle was capable of being used on the public highway. Mr Rhodes had the burden of proving the truth of his assertion that the Mercedes was not roadworthy. Mr Rhodes gave evidence of the purported serious mechanical defect with the Mercedes. Mr Rhodes, however, chose not to provide documentary evidence to support his assertion. In the Tribunal's view, a mechanical report by an expert on the vehicle whenever carried out would have had some evidential weight. The Tribunal was not persuaded that the low mileage recorded for the Mercedes could only be explained by the existence of a serious mechanical defect with the vehicle.

132. The Tribunal finds that Mr Rhodes adduced persuasive evidence that he was medically unfit to drive the Porsche and Mercedes motor vehicles from September 2002 to around March 2004. In this respect the evidence of Dr Morris and Dr Edwards was instructive on the nature of his illness and its effect on Mr Rhodes' capability to drive during this period.

¹⁶ Mrs Rhodes did not actually resign as a director of R&W Concessions until 1 March 2007, however, it is accepted by Mr Beckett that her involvement in the company ceased following her divorce which was finalised on 28 November 2000 (see paragraph 38 of Mr Beckett's witness' statement dated 21 August 2012).

133. The issue, therefore, is whether Mr Rhodes' state of health was a relevant consideration in determining whether the requirements of section 114 ITEPA were met during the period from September 2002 to around March 2004.

5 134. HMRC argued that the vehicles did not become unavailable to Mr Rhodes simply because of his inability to drive them as a result of his illness. Mr Brooks contended that HMRC had focussed exclusively on the first element of section 114 of making the vehicles available and ignored the effect of availability for Mr Rhodes' private use. In Mr Brooks view, availability for private use implied that it was necessary for Mr Rhodes to be able to use the vehicles.

10 135. The Tribunal disagrees with Mr Brooks' construction of section 114. The Tribunal considers the operative words of section 114 are making the car available. The addition of private use does not create an extra requirement of being able to use the car; instead it simply extends the availability to private use which is necessary to create the taxable benefit.

15 136. The Tribunal, however, considers the state of Mr Rhodes' health may be a relevant consideration if the evidence showed that it affected the availability of the said vehicles for his private use. For example, the terms of the vehicles' insurance might exclude employees with certain health problems from using them. In this respect Mr Rhodes did not adduce evidence of a connection between his illness and
20 the act of making the vehicles available to him for his private use. Given the absence of an evidential connection, the plain fact that Mr Rhodes was unable to drive the Porsche and Mercedes motor vehicles from September 2002 to around March 2004 had no effect on his liability to pay tax on the car and fuel benefits associated with those vehicles.

25 **137. For the reasons give above the Tribunal decides to uphold the assessments against Mr Rhodes in respect of the car and fuel benefits for the Porsche and Mercedes motor vehicles.**

Transfer at Undervalue

30 138. Under section 206 of ITEPA 2003 an employment related benefit arises when an asset is transferred from employer to an employee. The cost of the benefit is the market value of the asset at the time of the transfer.

35 139. HMRC assessed Mr Rhodes for taxable benefits of £11,000 and £10,000 respectively in respect of the transfer of assets in the form of a Mercedes and a Volvo motor vehicle from R&W Concessions to Mr Rhodes in the accounting period ended 28 February 2005. According to HMRC, the taxable benefit against Mr Rhodes arose because the said vehicles were transferred to him at undervalue.

40 140. HMRC's assessment was derived from the details of the R&W Concessions' invoice dated 21 July 2004 which recorded the sale of the Mercedes and Volvo motor vehicles to Mr Rhodes at a combined value of £10,000. HMRC stated that the Glasses Guide valued the Mercedes at £16,000 (low book price) and the Volvo at around

£15,000 which resulted in the undervalues and taxable benefits of £11,000 and £10,000 respectively.

141. Mr Rhodes asserted that the invoice was wrong. Mr Rhodes stated that the invoice should have referred only to the Mercedes motor vehicle which was sold to him for £10,000. Mr Rhodes considered that £10,000 was a fair price to pay for the Mercedes in its present state of un-roadworthiness.

142. Mr Rhodes stated that there had been confusion regarding the identity of the Volvo motor vehicle recorded in the accounts of R&W Concessions. The Volvo, registration number, R280 RWO, referred to in the accounts for the period ending 28 February 2005 had been sold in 2001 to then events manager for R&W Concessions, Roger Wilson, and should have been deleted from the accounts.

143. The second Volvo Y382 NAX had been acquired by R&W Concessions on contract hire from a company known as Key Fleets, in which case the second Volvo was not listed as an asset in the accounts of R&W Concessions. Mr Rhodes stated that in July 2003 a valuation was requested from Key Fleets for the R&W Concessions to purchase the Volvo. Key Fleets supplied a valuation of £14,950 with an early termination fee of £779.61 plus VAT. Mr Rhodes said that he paid the purchase price of £14,950 direct to Key Fleets. R&W Concessions paid the early termination fee of £779.61 plus VAT.

144. The significance of Mr Rhodes' evidence was that there was no transfer of an asset in the form of a Volvo motor vehicle from R&W Concessions to him. The first Volvo was sold to Mr Wilson in 2001. The second Volvo was not an asset belonging to R&W Concessions because it was on contract hire from Key Fleets. In any event Mr Rhodes purchased the second Volvo direct from Key Fleets at its market value.

145. The sale of the first Volvo to Mr Wilson was evidenced by an invoice of R&W Concessions dated 27 February 2001. The existence of the contract hire agreement for the second Volvo was corroborated by documentation from Key Fleets. Mr Beckett, the Appellants' accountant, confirmed that R&W Concessions did not pay the purchase price of £14,950 for the second Volvo.

146. HMRC did not make a substantive challenge to Mr Rhodes' evidence on the status of the two Volvo motor vehicles. HMRC was not explicit about which of the two Volvo motor vehicles gave rise to the taxable benefit.

147. The Tribunal finds that R&W Concessions did not transfer a Volvo motor vehicle to Mr Rhodes in the accounting period ending 28 February 2005. **The Tribunal, therefore, cancels the taxable benefit of £10,000 associated with the Volvo motor vehicle.**

148. The Tribunal is satisfied that Mr Rhodes paid R&W Concessions £10,000 for the Mercedes motor vehicle. The Tribunal, however, finds that Mr Rhodes did not substantiate his assertion that the payment of £10,000 represented the market value of the Mercedes when it was transferred to him. At paragraph 131 above the Tribunal was not satisfied that the Mercedes was un-roadworthy. The Tribunal accepts

HMRC's evidence that £16,000 represented the market value of the Mercedes at the time of the transfer. **The Tribunal, therefore, reduces the taxable benefit associated with the Mercedes from £11,000 to £6,000.**

R&W Concessions Liability to pay Class 1A National Insurance Contributions

5 149. R&W Concessions' liability to pay Class 1A National Insurance Contributions in 2004/05 and 2005/06 was dependent upon the Tribunal's findings in respect of Mr Rhodes' taxable benefits. As the Tribunal has found that Mr Rhodes was in receipt of taxable benefits during the said years **the Tribunal is satisfied that R&W Concessions was liable to pay Class 1A National Insurance Contributions in**
10 **2004/05 and 2005/06.** The amount of the assessment to be agreed.

Penalties

150. Under section 95 TMA 1970 HMRC imposed tax geared penalties on R&W Concessions and Mr Rhodes. The maximum penalty permissible under section 95 was 100 per cent of the tax assessed.

15 151. HMRC said that Mr Rhodes had been negligent in omitting the value of benefits from his tax returns. HMRC fixed the penalty at 35 per cent of the tax assessed after giving abatements of 10 per cent for disclosure, 30 per cent for co-operation and 20 per cent for seriousness.

20 152. HMRC said that R&W Concessions had been negligent in making a section 419 claim. HMRC fixed the penalty at 20 per cent of the tax assessed after giving abatements of 20 per cent for disclosure, 40 per cent for co-operation and 20 per cent for seriousness.

153. The Tribunal had previously decided that R&W Concessions and Mr Rhodes were negligent when considering the question of discovery assessments.

25 154. The Appellants made no direct representations on the penalty loadings of 20 per cent and 35 per cent respectively. The Tribunal considers that a penalty loading of 20 per cent is an appropriate reflection of R&W Concessions' culpability in respect of its dealings with HMRC.

30 155. The Tribunal is not convinced with HMRC's justification for giving Mr Rhodes a higher penalty loading, particularly as HMRC relied on Mr Rhodes's conduct when fixing the 20 per cent rate for R&W Concessions. The Tribunal considers the circumstances surrounding R&W Concessions' section 419 claim more serious than Mr Rhodes' negligence in omitting certain benefits from his tax returns.

35 156. Under section 95 the Tribunal is entitled to take an overall view of the appropriate penalty, and not obliged to follow HMRC's approach of giving abatements for various categories of conduct. Having said that, the Tribunal finds no qualitative difference in the co-operation given by Mr Rhodes to HMRC in his personal and corporate capacities. Further HMRC appeared not to consider the effect

of the accidental destruction of the accounting records on Mr Rhodes' capabilities in respect of disclosure.

157. Having regard to all the circumstances outlined above **the Tribunal reduces the penalty loading from 35 per cent to 20 per cent in respect of Mr Rhodes, and confirms the 20 per cent loading in the case of R&W Concessions.** The amount of the penalties to be agreed between the parties.

Decision

158. The Tribunal decides in respect of R & W Concessions' appeal as follows.

10 (1) The discovery assessment of 19 January 2010 in respect of the section 419(4) claim was validly made.

(2) The discovery assessment dated 19 January 2010 in the sum of £62,835.79 stands good.

15 (3) The section 8 decision relating to the years from 2000/01 to 2003/04 was out of time, in which case R&W Concessions was not liable to pay the disputed Class 1A National Insurance Contributions for 2000/01 to 2003/04 inclusive.

(4) R&W Concessions was liable to pay Class 1A National Insurance Contributions on the taxable benefits received by Mr Rhodes in 2004/05 and 2005/06. The amount to be agreed.

20 (5) R&W Concessions to pay a penalty fixed at 20 per cent of the assessed tax due. The amount to be agreed.

159. The Tribunal decides in respect of Mr Rhodes' appeal as follows:

(1) The legal requirements for the issue of discovery assessments for the years 2000/01 to 2005/06 against Mr Rhodes were met except the assessment concerning the loan benefit for 2004/05.

25 (2) The time limit for making the assessments for 2000/01 and 2001/02 was extended to 20 years on the ground of Mr Rhodes' negligent conduct.

(3) The assessment of the loan benefit to the cash value of £17,221 for 2005/06 against Mr Rhodes stands good. The assessment in respect of the loan benefit for 2004/05 is discharged.

30 (4) The assessments in respect of car and fuel benefits for the Porsche motor vehicle, registration number T82 RHR for the tax years 2000/01, 2001/2 and 2002/03 stand good. The cash equivalent of the car benefit was £23,782 for each of the years in question. The cash equivalent of the fuel benefit was £3,200 for 2000/01 and 2001/02, and £4,200 for 2002/03.

35 (5) The assessments in respect of the car and fuel benefits for the Mercedes motor vehicle, registration number 92 KR for the tax years 2000/01 to 2004/05 inclusive stand good. The cash equivalent of the car benefit was £17,836 for 2000/01 and 2001/02; £21,744 for 2002/03 and 2003/04; and £6,384 for

2004/05. The cash equivalent of the fuel benefit was £3,200 for 2000/01 and 2001/02. There was no fuel benefit charge for 2002/03, 2003/04 and 2004/05.

(6) The taxable benefit of £10,000 associated with the purported transfer of the Volvo motor vehicle is cancelled.

5 (7) The taxable benefit associated with the transfer of the Mercedes is reduced from £11,000 to £6,000.

(8) A taxable benefit of £7,000 associated with the transfer of the Porsche motor vehicle was agreed to by Mr Rhodes.

10 (9) Mr Rhodes to pay a penalty fixed at 20 per cent of the assessed tax due. The amount to be agreed.

160. The Tribunal, therefore, **allows in part the Appeals of R&W Concessions and Mr Rhodes.** The Tribunal directs HMRC by no later than 56 days from release of the decision to provide the Appellants with revised assessments with detailed computations based upon the decisions made above. If the parties are unable to agree the revised quantum within 56 days from the date HMRC serve the revised assessments upon the Appellants, either party may apply to the Tribunal for leave to determine the quantum based upon the above decisions.

20 161. 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.

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**MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE**

RELEASE DATE: 12 August 2013

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