



TC05183

Appeal number: TC/2016/00346

*INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS (NICs)
– security for payment of PAYE and NICs – Income Tax (Pay As You Earn)
Regulations 2003, Part 4A – Social Security (Contributions) Regulations
2001, Sch 4, Part 3B – criminal sanction – ITEPA, s 684(4A) - whether
supervisory or appellate jurisdiction – reasonableness of decision that
requirement of security is necessary for the protection of the revenue/Class 1
contributions – relevance of hardship on giving notice – variation of notice*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

D-MEDIA COMMUNICATIONS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ROGER BERNER

**Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 9 June
2016**

The Appellant did not appear and was not represented

**Siobhán Brown, HMRC Officer, Solicitor's Office and Legal Services, Appeals
and Reviews Team for the Respondents**

DECISION

1. This is the appeal of D-Media Communications Limited (“D-Media”) against
5 the decision of HMRC to issue to it a Notice of Requirement to require security to be
given for PAYE and national insurance contributions (NICs) in accordance with Part
4A of the Income Tax (Pay As You Earn) Regulations 2003 (“PAYE Regulations”) and
Part 3B of Schedule 4 to the Social Security (Contributions) Regulations 2001
 (“NICs Regulations”).

10 2. The Appellant did not appear and was not represented. An email from Mr
Kevin Dougall, a director of D-Media, dated 7 June 2016 informed HMRC that D-
Media was expected to cease trading on 20 June 2016, and accordingly would not be
represented at the hearing. Following an enquiry by HMRC, Mr Dougall had further
15 confirmed, both to HMRC and to the Tribunal, that D-Media would not be
represented, but that it was not withdrawing its appeal.

3. In those circumstances, I was satisfied that D-Media had received notice of the
hearing, and that it was in the interests of justice to proceed with the hearing in its
absence.

Notice of Requirement

20 4. The Notice of Requirement was issued by HMRC to D-Media on 3 September
2015. It required an amount of security to be given in relation to PAYE of
£79,127.55, and in relation to NICs, £68,007.33. The total amount of security
required was therefore £147,134.88. The period for which the security was required
to be given was 24 months and the date stated for the giving of the security was 13
25 October 2015.

5. Security was not only required from D-Media. It was also required, on a joint
and several basis, from directors of D-Media, namely Mr Brian de Sousa, Mr Dougall,
Mr Denis Erkan and Mr Alastair Keith. In the events that have happened, the only
outstanding Notices are those directed to D-Media and Mr Dougall. The Tribunal has
30 only received an appeal from D-Media, and it is with that appeal that this decision is
concerned.

6. The Notice of Requirement set out the basis on which the required security had
been calculated. There had been taken the estimated amount of PAYE and NICs due
to be paid by D-Media, the employer, for a four-month period. Those amounts were
35 £19,376.80 (PAYE) and £16,397.37 (NICs). To that there had been added the then
current arrears of PAYE and NICs due from D-Media; those figures were £59,750.75
(PAYE) and £51,615.96 (NICs). The security was required to be given in one of three
ways: (a) by making a payment to a specific HMRC bank account; (b) by means of a
guarantee in the form of a performance bond from an approved financial institution;
40 and (c) by opening a joint account with HMRC.

The law

7. There is no material difference between the provisions giving HMRC power to require security in the case of PAYE on the one hand and NICs, in the form of Class 1 contributions, on the other. The provisions in the PAYE Regulations and the NICs Regulations effectively mirror one another, with only necessary changes to reflect the different regimes covered by the provisions. I shall therefore refer primarily to the PAYE Regulations. For ease of reference, however, both sets of provisions are set out in the Appendix to this decision.

8. Regulation 97N of the PAYE Regulations provides that in circumstances where an officer of HMRC “considers it necessary for the protection of the revenue” the officer may require certain persons to give security or further security for the payment of amounts of PAYE tax in respect of which an employer is or may be accountable to HMRC under various of the PAYE Regulations. The persons from whom security may be required are the employer (with certain exceptions not relevant in this case) (see Reg 97O) and, in the case of a company such as D-Media a director, a company secretary, any similar officer and any person purporting to act in such a capacity (Reg 97P).

9. Regulation 97Q of the PAYE Regulations sets out certain matters which must be specified in the Notice. Those are important, because if a Notice does not comply, a person is not to be treated as having been required to provide security (Reg 97Q(5)). The same applies to the specification of a date in the Notice: that cannot be earlier than the 30th day after the day on which the Notice is given (Reg 97R(1)).

10. The time for giving security is postponed if, before the date specified in the Notice for the security to be given, the employer makes a request for a time to pay agreement under paragraph 10(1) of Schedule 56 to the Finance Act 2009. If HMRC refuse the request, however, the security falls to be given on or before the 30th day after notification of that refusal. If an appeal is made under Reg 97V, the security is then due to be given on the 30th day after the day on which the Tribunal makes a final determination of the appeal, subject to any other determination the Tribunal may make (Reg 97(7)(a)).

11. Regulation 97V(1) makes provision for appeals against the Notice or against any requirement in it. So far as material to this appeal, Reg 97V(4) provides:

“On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may –

- 35
- (a) confirm the requirements in the notice,
 - (b) vary the requirements in the notice, or
 - (c) set aside the notice.”

12. The giving of a Notice is a serious matter, as it has serious consequences for a person subject to it if there is a failure to comply. The failure to provide security by the due date is an offence of strict liability under s 684(4A) of the Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”), which provides:

5 “(4A) A person who fails to comply with a requirement imposed under PAYE regulations to give security, or further security, for the payment of any amount commits an offence if the failure continues for such period as is specified; and a person guilty of an offence under this subsection is liable on summary conviction to a fine not exceeding level 5 on the standard scale.”

10 In the case of a Notice that has been appealed to the Tribunal, the period specified for this purpose is either the 3-day period referred to in Reg 97(7)(a) or the day the tribunal or court finally determining the appeal determines to be the day on which security is to be given.

13. Level 5 on the standard scale is a reference to the scale set out in s 37(2) of the Criminal Justice Act 1982, level 5 being liable to a fine or maximum fine of £5,000. However, for relevant offences that £5,000 limit has been removed by s 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Under that provision,

15 “Where, on the commencement day, a relevant offence would, apart from this subsection, be punishable on summary conviction by a fine or maximum fine of £5,000 or more (however expressed), the offence is punishable on summary conviction on or after that day by a fine of any amount.”

20 14. The commencement date of s 85(1) the 2012 Act was 12 March 2015. Part 4A of the PAYE Regulations was inserted by the Income Tax (Pay As You Earn) (Amendment) Regulations 2012 with effect from 6 April 2012. Likewise, Part 3B of Schedule 4 to the NICs Regulations was inserted by the Social Security (Contributions) (Amendment No 3) Regulations 2012 with effect from the same date.
25 The offence of failing to provide security for the specified period is accordingly, both in respect of PAYE and NICs, a relevant offence (s 85(3)). Unless s 85(1) was disapplied in respect of that particular offence, the offence would not be subject to a maximum fine of £5,000, but to an unlimited fine.

30 15. There appears to have been no such disapplication. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015, which had effect from 11 March 2015, disapplied s 85(1) in respect of a number of offences, including certain relating to customs duties, excise duties and VAT. But those Regulations did not disapply s 85(1) in respect of the offence provided for by s 684(4A) ITEPA.

35 **The Tribunal’s jurisdiction**

16. This is, I was told, the first appeal to come to the Tribunal in respect of a Notice of Requirement to provide security in respect of PAYE or NICs. The nature of the Tribunal’s jurisdiction accordingly falls to be considered. As D-Media did not appear and was not represented, I heard no proper argument on this subject, and what follows
40 therefore is the view I have adopted with the benefit only of limited submissions.

17. Some assistance may be drawn from the position on the exercise by HMRC of its powers to require security for VAT, in respect of which some parallels were drawn

in Ms Brown's submissions. Those provisions are found in paragraph 4 of Schedule 11 to the Value Added Tax Act 1994. Paragraph 4(2) provides that if they think it necessary for the protection of the revenue, HMRC may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from (a) the taxable person, or (b) any person by or to whom relevant goods or services are supplied.

18. It is clear that, in relation to security for VAT, the jurisdiction of the Tribunal is supervisory only (*John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941). Thus, on such an appeal, the task of the Tribunal is to consider whether HMRC had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. In doing so, the Tribunal is confined to considering facts and matters which existed at the time HMRC made their decision (*Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747). The Tribunal might also have to consider whether the Commissioners had erred on a point of law. The Tribunal cannot, however, exercise a fresh discretion; the protection of the revenue is not the responsibility of the Tribunal or the court. If the decision is found to have been flawed, the appeal will be allowed, and HMRC may make a further determination if they so choose.

19. As Ms Brown fairly acknowledged, whilst the need for protection of the revenue is common to VAT security cases and those with which this appeal is concerned, there is a significant difference in the way the legislation has been drafted in each case. There is nothing in the VAT security provisions corresponding to the powers expressly given to the Tribunal, in Reg 97V(5) of the PAYE Regulations, to vary the requirements in the notice.

20. Accordingly, although I accept that the Tribunal's jurisdiction in relation to security for PAYE and NICs is to some extent supervisory in nature, it is an appellate jurisdiction. The supervisory approach, that is having regard to the reasonableness of HMRC's decision is, in my view, limited to the matters referred to in Reg 97N, namely whether the giving of security is necessary for the protection of the revenue. It is not for the Tribunal itself to second guess that exercise of judgment, so long as it has been exercised reasonably within the terms expressed in *John Dee*.

21. All other aspects, on the other hand, are matters on which the Tribunal is entitled to form its own view, and on doing so to confirm, set aside or vary the Notice of Requirement. That includes whether the appellant is a person from whom security may be required, the value of the security to be given, the manner in which it is to be given, the date on which it is to be provided and the period of time for which the security is required. The value of the security and the manner in which it is to be provided are included amongst these matters; in contrast to the VAT security provisions which provide, at para 4(4), that the security is to be of such amount and given in such manner as HMRC shall determine, the PAYE Regulations merely require those matters to be specified in the Notice, and the power of the Tribunal to

vary the requirements in the Notice, in my view, renders these matters susceptible to substitution of the Tribunal's own view.

The facts

5 22. D-Media trades in media representation and supply of digital screens for advertising. It has been registered as an employer since 15 March 2013.

10 23. In January 2015, there were arrears of PAYE and NICs of £61,000. On 15 January 2015 a "time to pay" arrangement was made between D-Media and HMRC's debt management unit to pay those arrears. No payments were made under that arrangement, which accordingly failed on 26 March 2015. A second time to pay arrangement was agreed with the debt management unit on 2 June 2015 in respect of the then arrears of PAYE and NICs of £95,000. No payments were made and this arrangement failed on 20 July 2015. A further time to pay request made by D-Media on 24 August 2015 was refused by HMRC as no payments had been made under the previous arrangements.

15 24. At the time of the decision to give the Notice of Requirement, the HMRC officer noted, in addition, that D-Media had PAYE and NICs debts dating back to June 2014, that Real Time Information (RTI) returns had been rendered without payment in full, that 14 RTI returns remained unpaid, that the last remittance had been paid in January 2015 and set off against the September 2014 debt and that the total
20 debt for 2014/15 and 2015/16 amounted to £111,366.71.

25 25. Following a review requested by D-Media, HMRC wrote to D-Media on 4 December 2015. Referring to a six-month cash flow forecast which Mr Dougall had sent to HMRC on 5 September 2015, HMRC said:

25 "Despite the inclusion within the *cash flow forecast* of regular monthly payments of PAYE/NICs both of current and shortfall from August 2015, none has been paid and PAYE/NIC debt has continued to accrue at approx. £6k per month during the current year. Unfortunately it appears that the company's cash-flow has not met that predicted and to
30 continue to trade on this basis will put further risk to revenue. I must therefore uphold HMRC's decision to require security."

26. It is from the review decision that D-Media appealed to the Tribunal. Although the appeal was made a little outside the time period for appealing, HMRC did not resist permission being given for the late appeal to be admitted.

D-Media's appeal

35 27. The grounds of appeal put forward by D-Media in its notice of appeal are:

(1) HMRC has failed to thoroughly and properly investigate and/or consider why PAYE/NIC payments had accrued.

(2) HMRC has failed to thoroughly and properly investigate how the company planned to remedy the situation.

(3) HMRC has failed to thoroughly and properly investigate and consider the company's ability to meet all future PAYE/NIC payments.

(4) Had HMRC investigated and considered all of the above it should fairly and justly conclude that security is neither appropriate nor required.

5 (5) The level of security demanded is also excessive is, which is denied, security is properly due.

28. As to the reason why the arrears had accrued, D-Media placed the blame on a former finance director. According to an email from Mr Dougall to HMRC of 5
10 September 2015, after the Notice of Requirement was given, but which was taken into account in the review decision, that director, a Mr M'Crystal, had been responsible for managing the financial and operational sides of the business. He had, according to Mr Dougall, failed to progress an entitlement to a substantial R&D tax rebate, done nothing to put in place an invoice finance solution put forward by the company's bank, and had used working capital to acquire equipment rather than secure asset
15 finance. It was also said that errors had been made in classifying sub-contractor payments, which had led to excess PAYE and NICs being incurred.

29. It is clear that, once these reasons were put forward, they were considered by HMRC in the course of the statutory review. Their conclusion in that review cannot be described as unreasonable. There was at that time a continuing failure to remedy
20 past arrears, but more importantly a failure to prevent a continuing accrual of PAYE and NICs debt at about £6,000 per month. Those debts had continued to accrue despite a payment of £7,888.00 that is recorded in the RTI summary for the month 6 September 2015 to 5 October 2015. The question is whether security is necessary for the protection of the revenue. Where there is evidence that past failings are being
25 addressed, and payments are being made on time, that may indicate a reduction in risk which it would be proper to take into account. But that is not this case.

30. Mr Dougall also referred to the efforts that had been made, since Mr M'Crystal's departure from the company in April 2015, to address D-Media's financial position. He referred to a personal loan he had made and a guarantee he had
30 given for asset finance loans, of which £145,000 was expected in the week commencing 14 September 2015. In addition, loans were said to have been secured for working capital, invoice financing had been put into place and additional investment was being sought. It was said that, according to the cash flow forecast, monthly PAYE/NICs payments would be kept up to date going forward and that the
35 arrears would be cleared by January 2016. In a further email of 2 November 2015 Mr Dougall referred to a recapitalisation of the company and a 12-week period to clear the arrears and make monthly payments on time. However, by the time of the review decision in December 2015, PAYE and NICs debts had continued to accrue, and the amount outstanding had increased. The cash flow forecasts had not been reflected in
40 the reality.

31. Having considered the evidence, there is nothing in D-Media's assertions that HMRC failed to investigate, or have regard to, the reasons put forward by the company for the arrears of PAYE and NICs, how the company had planned to remedy the situation and the company's ability to meet future liabilities. Having done so,

HMRC took the view, consistently with the reasonable view it had taken having considered the available information at the time of deciding to give the Notice of Requirement, that security was required to protect the revenue. It is quite clear that not only was HMRC's view that protection was required one that could reasonably have been taken; it was the only reasonable view.

32. D-Media has also raised the question of the appropriate level of security. That does give rise to a number of questions on which it would have been helpful to have heard legal argument. Without the benefit of such argument, I am in the position simply of expressing my own view.

33. HMRC's position, which appears from their review letter of 4 December 2015, and as I understand it, is that as a matter of policy the figure taken for security is based upon the current and previous years' PAYE/NICs debt, plus four months' PAYE/NICs, based upon an average of the RTI returns for the most recent 12-month period. Taken on its own, I can see the logic of that calculation. It looks, as Reg 97N suggests it should, at the giving of security both in respect of amounts for which the employer is already liable and amounts for which it may become accountable. But there are two other factors that I consider ought to be taken into account before the appropriate amount of security is determined upon.

34. The first is a general point, namely that regard must be had to the fact that the consequence of a failure to provide the security is that the recipient of the notice will have committed a criminal offence of strict liability. This is another area where a contrast can be made with the analogous VAT provisions. In that case the criminal offence consists of continuing to make or receive taxable supplies without having given the security. In other words, it is necessary to do something other than merely fail to provide the security. In a sense, the trader can avoid committing a criminal offence by not continuing to carry on business. The recipient of a Notice which requires security for PAYE and/or NICs may be criminally liable merely for failure to provide the security. If that person simply does not have the funds, the inevitable consequence of the issue of a Notice will be that a criminal offence will have been committed.

35. That leads onto the second point. There is nothing in Reg 97N or in Reg 97Q which sets out what matters are to be considered in setting the amount or value of the security. There is no reference, at the stage of the security being required, to questions of hardship. A reference to hardship does appear in Part 4A, but only in Reg 97S in relation to applications by persons who have given security applying for a reduction in the value of security held by HMRC. In such a case, if there has been a change of circumstances since the day the security was given because of hardship, an application may be made for a reduction in the security.

36. If hardship is a reason for a reduction in security that has already been given, it is difficult to see why it should not be a factor in the initial decision to require security. Not to have regard to hardship in providing the required security could give rise to perverse results. A person who is impecunious may be required to give security, and will have no opportunity to reduce the amount of that security because

his impecuniosity will not be a change of circumstances. A person who is financially able to provide the security but who later falls on hard times will, by contrast, be able to obtain a reduction. The first of those persons will inevitably be criminally liable for failure to provide the security; the second will be able to avoid that unhappy outcome.

37. For these reasons, I do not consider that adherence to a policy which dictates the amount of the security to be required without having regard to ability to pay is consistent with the scheme of the legislation. If the level of security required is unlikely to be provided, the giving of a Notice in such circumstances is unlikely to provide the protection of the revenue that the regulations are designed to secure. If the only likely result is that the recipient of the Notice will inevitably fail to provide the security and thus will inevitably be liable to a criminal penalty as a matter of strict liability, that in my view cannot have been the purpose of Parliament in making these regulations.

15 **Determination**

38. I turn therefore to consider how I should exercise my jurisdiction in this case.

39. At the outset I pay no regard to the assertion made by Mr Dougall, shortly before the hearing of this appeal, that D-Media was expected to cease trading on 20 June 2016. Even if that were the case, it would not affect the arrears of PAYE and NICs that have built up, and would not necessarily result in D-Media ceasing to be an employer and ceasing to incur further PAYE/NICs liabilities in the course of the closure of the company's business.

40. I have explained that I am satisfied that the decision which HMRC took that the giving of security was necessary in this case for the protection of the revenue was not unreasonable. The same applies to the review decision. In each case I am satisfied that HMRC took all relevant factors into account, and did not have regard to anything irrelevant. There was no error of law in those decisions.

41. I do not, however, consider that it would be right on that basis simply to confirm the requirements in the Notice. The material before me suggests strongly that D-Media was not able to provide security in the amount required by HMRC. That, for example, was the position explained by Mr Dougall in an email to HMRC on 18 January 2016, and it is in my view supported by the financial information I have seen, although that is not extensive and I did not have the benefit of examining that evidence with D-Media.

42. It appears from the correspondence, though without further evidence I can make no findings of fact in these respects, that following the receipt of the Notice, Mr Dougall in particular had been engaged in attempts both to make payments of current liabilities to PAYE and NICs, and to reduce the arrears. In that latter regard, Mr Dougall referred in correspondence to various means by which he considered that the arrears might be reduced by way of offset against VAT repayments that the company had claimed, or R&D tax credits. In addition, reference is made to a number of

cheque payments and at least one electronic payment, but it does not appear, with the exception of a payment of £7,888 in September or October 2015, that any such payments appear in HMRC's records as reducing the debt due from the company. In any event, what is clear is that, despite the efforts which Mr Dougall has described in his correspondence, there has been a continuing default by D-Media of its PAYE and NICs obligations.

43. The regulations recognise that protection of the revenue may not be capable of being achieved by requiring security from the employer alone. It is an obvious point that if the employer is failing to meet its obligations already, it may simply be the case that it is unable to do so because of its financial position, although of course there may be other reasons. That is why security may be in addition be required of others, such as the directors, who may be in a financial position to do so, including with respect to arrears which have been built up. The amount of the security required should be calculated so as to give a realistic possibility that the security will be capable of being given, so that the revenue to that extent will be protected. If, as may be the case, there is insufficient information available for that analysis to be carried out at the stage of the decision to require security, it is something that should, in an appropriate case, be addressed by the Tribunal on appeal.

44. In this case, as a matter of policy, the aggregate amount of the security required from D-Media derived from an estimated amount of PAYE and NICs due for a four-month period and the whole of the then current arrears. From the information I have, I do not consider that D-Media was in a position to provide security for the amounts of the arrears. To require it to do so would simply have the effect that it would fail to comply and be criminally liable. That would do nothing to protect the revenue. Whether others were in a position to provide such security, or what other steps might be available to HMRC to recover the arrears, are matters that are outside the scope of this appeal.

45. On the other hand, whilst D-Media continued to be an employer, liabilities to PAYE and NICs would continue to arise month by month. In my view, it is appropriate for security to be required from an employer, even one whose financial position is such as to render it unlikely that security for existing arrears can be given, which continues to incur such liabilities. In this regard I consider that security based on a recent four-month period is a reasonable approach. I have considered the level of arrears accrued by the company in the period September 2015 to January 2016 (which are the latest available to me). I have ignored December 2015, as that included a larger than average amount of PAYE, and a negative figure for NICs. Taking account of the four remaining months, I determine that the amount of security to be required from D-Media should be set at £25,000.

Decision

46. I allow D-Media's appeal against the Notice of Requirement given to it to provide security to the extent only of the requirement in respect of the amount of the security to be given. In all other respects I dismiss the appeal.

47. I vary the requirement in the Notice as to the amount of the security required by substituting for the sum of £147,134.88 the revised sum of £25,000.

48. Subject to any appeal, the security is due on the 30th day after the date of release of this decision.

5 **Application for permission to appeal**

49. 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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**ROGER BERNER
TRIBUNAL JUDGE**

RELEASE DATE: 17 JUNE 2016

APPENDIX

Income Tax (Pay As You Earn) Regulations 2003, Part 4A

5

97M Interpretation

In this Part—

“a further notice” has the meaning given in regulation 97U(3); and

“PGS” has the meaning given in regulation 97S(1).

10 **97N Requirement for security**

(1) In circumstances where an officer of Revenue and Customs considers it necessary for the protection of the revenue, the officer may require a person described in regulation 97P(1) (persons from whom security can be required) to give security or further security for the payment of amounts in respect of which an employer described in regulation 97O (employers) is or may be accountable to HMRC under regulation 67G, as adjusted by regulation 67H(2) where appropriate, 68 or 80 (payments to HMRC and determination of unpaid amounts).

(2) Paragraph (1) does not apply to any amount which the employer is required to pay to HMRC that relates to income to which Part 8 (social security benefits) applies.

20 **97O Employers**

(1) The employer is any employer other than—

(a) the Crown,

(b) an employer to whom paragraph (2) applies,

(c) ... and

25 (d) a care and support employer within the meaning given by regulation 206(4) (employers).

(2) This paragraph applies to employers who at the relevant time could not be liable to a penalty under Schedule 56 to the Finance Act 2009 by virtue of paragraph 10 of that Schedule (suspension of penalty for failure to make payments on time during currency of agreement for deferred payment).

(3) In paragraph (2), the relevant time is a time at which, but for paragraph (1)(b), the officer would require security.

97P Persons from whom security can be required

(1) The persons are—

- (a) the employer,
 - (b) any of the following in relation to the employer—
 - (i) a director,
 - (ii) a company secretary,
 - 5 (iii) any other similar officer, or
 - (iv) any person purporting to act in such a capacity, and
 - (c) in a case where the employer is a limited liability partnership, a member of the limited liability partnership.
- (2) An officer of Revenue and Customs may require—
- 10 (a) a person to give security or further security of a specified value in respect of the employer, or
 - (b) more than one person to give security or further security of a specified value in respect of the employer, and where the officer does so those persons shall be jointly and severally liable to give that security or further security.
- 15 **97Q Notice of requirement**
- (1) An officer of Revenue and Customs must give notice of a requirement for security to each person from whom security is required and the notice must specify—
- (a) the value of security to be given,
 - (b) the manner in which security is to be given,
 - 20 (c) the date on or before which security is to be given, and
 - (d) the period of time for which security is required.
- (2) The notice must include, or be accompanied by, an explanation of—
- (a) the employer's right to make a request under paragraph 10(1) of Schedule 56 to the Finance Act 2009, and
 - 25 (b) the effect of regulation 97R(2) and (3) (date on which security is due).
- (3) In a case which falls within regulation 97P(2)(b), the notice must include, or be accompanied by, the names of each other person from whom security is required.
- (4) The notice may contain such other information as the officer considers necessary.

(5) A person shall not be treated as having been required to provide security unless HMRC comply with this regulation and regulation 97R(1).

97R Date on which security is due

5 (1) The date specified under regulation 97Q(1)(c) (notice of requirement) may not be earlier than the 30th day after the day on which the notice is given.

(2) If, before the date specified under regulation 97Q(1)(c), the employer makes a request under paragraph 10(1) of Schedule 56 to the Finance Act 2009, the requirement to give security on or before that date does not apply.

10 (3) In a case which falls within paragraph (2), if HMRC does not agree to the employer's request, security is to be given on or before the 30th day after the day on which HMRC notifies the employer of that decision.

97S Application for reduction in the value of security held

(1) A person who has given security (“PGS”) may apply to an officer of Revenue and Customs for a reduction in the value of security held by HMRC if—

15 (a) PGS' circumstances have changed since the day the security was given because—

(i) of hardship, or

(ii) PGS has ceased to be a person mentioned in regulation 97P(1) (person from whom security can be required), or

20 (b) since the day the security was given there has been a significant reduction in the number of employees of the employer to whom the security relates or that employer has ceased to be an employer.

(2) Where regulation 97P(2)(b) applies, a person who has not contributed to the value of the security given may not make an application under paragraph (1).

97T Outcome of application for reduction in the value of security held

(1) If an application under regulation 97S(1) (application for reduction in the value of security held) is successful, the officer must inform PGS of the reduced value of security that is still required or, where that value is nil, that the requirement for security has been cancelled.

30 (2) HMRC may make such arrangements as they think fit to ensure the necessary reduction in the value of security held.

97U Outcome of application for reduction in the value of security held: further provision

(1) This regulation applies—

- (a) in cases which fall within regulation 97P(2)(b), and
- (b) where PGS' application is made under regulation 97S(1)(a).

5 (2) As a consequence of arrangements made under regulation 97T(2) (outcome of application for reduction in the value of security held), an officer of Revenue and Customs may require any other person who was given notice under regulation 97Q (notice of requirement) in relation to the security (“the original security”), or any other person mentioned in regulation 97P(1), to provide security in substitution for the original security.

10 (3) Where an officer of Revenue and Customs acts in reliance on paragraph (2), the officer must give notice (“a further notice”).

(4) Regulation 97Q and regulation 97R (date on which security is due) apply in relation to a further notice.

(5) Subject to paragraph (6), regulation 97V(1) (appeals) applies in relation to a further notice.

15 (6) A person who is given a further notice and who was also given notice under regulation 97Q in relation to the original security may only appeal on the grounds the person is not a person mentioned in regulation 97P(1).

97V Appeals

20 (1) A person who is given notice under regulation 97Q may appeal against the notice or any requirement in it.

(2) PGS may appeal against—

(a) the rejection by an officer of Revenue and Customs of an application under regulation 97S(1), and

(b) a smaller reduction in the value of security held than PGS applied for.

25 (3) Notice of an appeal under this regulation must be given—

(a) before the end of the period of 30 days beginning with—

(i) in the case of an appeal under paragraph (1), the day after the day on which the notice was given, and

30 (ii) in the case of an appeal under paragraph (2), the day after the day on which PGS was notified of the outcome of the application, and

(b) to the officer of Revenue and Customs by whom the notice was given or the decision on the application was made, as the case may be.

(4) Notice of an appeal under this regulation must state the grounds of appeal.

(5) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may—

- (a) confirm the requirements in the notice,
- (b) vary the requirements in the notice, or
- 5 (c) set aside the notice.

(6) On an appeal under paragraph (2) that is notified to the tribunal, the tribunal may—

- (a) confirm the decision on the application, or
- (b) vary the decision on the application.

10 (7) On the final determination of an appeal under this regulation—

- (a) subject to any alternative determination by a tribunal or court, any security to be given is due on the 30th day after the day on which the determination is made, or
- (b) HMRC may make such arrangements as it sees fit to ensure the necessary
- 15 reduction in the value of security held.

(8) An appeal under this regulation is subject to the provisions of Part 5 of TMA (appeals and other proceedings) apart from—

- (a) section 46D,
- (b) section 47B,
- 20 (c) section 50(6) to (9), and
- (d) sections 54A to 57.

97W Appeals: further provision for cases which fall within regulation 97R(2)

In a case which falls within regulation 97R(2) (date on which security is due), if the request mentioned in that provision is made before an appeal under regulation 97V(1) (appeals), regulation 97V(3)(a)(i) applies as if the words “the day after the day on

25 which the notice was given” were “the day after the day on which HMRC notifies the employer of its decision”.

97X Offence

(1) For the purposes of section 684(4A) of ITEPA (PAYE regulations—security for

30 payment of PAYE: offence)—

(a) in relation to a requirement for security under a notice under regulation 97Q (notice of requirement) the period specified is the period which starts with the day the notice is given and ends with—

(i) the first day after the date specified under regulation 97Q(1)(c), or

5 (ii) in a case which falls within regulation 97R(2), the first day after the date determined under regulation 97R(3),

(b) in relation to a requirement for security under a further notice the period specified is the period which starts with the day the further notice is given and ends with—

10 (i) the first day after the date specified under regulation 97Q(1)(c) as it applies in relation to the further notice, or

(ii) in a case which falls within regulation 97R(2), the first day after the date determined under regulation 97R(3) as it applies in relation to the further notice, and

15 (c) in relation to a requirement for security to which regulation 97V(7)(a) applies the period specified is the period which starts with the day the determination is made and ends with the first day after—

(i) the day the tribunal or court determines to be the day that the security is to be given, or

20 (ii) the day determined in accordance with that regulation,

as the case may be.

Social Security (Contributions) Regulations 2001
Schedule 4, Part 3B

5 **Interpretation**

29M - In this Part—

“employer” has the meaning given in paragraph 29O(1);

“a further notice” has the meaning given in paragraph 29U(3);

“PGS” has the meaning given in paragraph 29S(1).

10 **Requirement for security**

29N - In circumstances where an officer of Revenue and Customs considers it necessary for the protection of Class 1 contributions, the officer may require a person described in paragraph 29P(1) to give security or further security for the payment of amounts which an employer is or may be liable to pay to HMRC under paragraph 10,
15 11, 11ZA or 11A.

Employers

29O-(1) An “employer” is any employer within the meaning given in paragraph 1(2) other than—

- (a) the Crown;
- 20 (b) a person to whom sub-paragraph (2) applies;
- (c) ... and
- (d) a care and support employer within the meaning given in regulation 90NA(3) of these Regulations.

(2) This sub-paragraph applies to persons who at the relevant time could not be
25 liable to a penalty under Schedule 56 to the Finance Act 2009 by virtue of paragraph 10 of that Schedule (suspension of penalty for failure to make payments on time during currency of agreement for deferred payment).

(3) In sub-paragraph (2), the relevant time is a time at which, but for sub-paragraph (1)(b), the officer would require security.

30 **Persons from whom security can be required**

29P—(1) The persons are—

- (a) the employer;

- (b) any of the following in relation to the employer—
 - (i) a director;
 - (ii) a company secretary;
 - (iii) any other similar officer; or
 - 5 (iv) any person purporting to act in such a capacity; and
- (c) in a case where the employer is a limited liability partnership, a member of the limited liability partnership.
- (2) An officer of Revenue and Customs may require—
 - 10 (a) a person to give security or further security of a specified value in respect of the employer; or
 - (b) more than one person to give security or further security of a specified value in respect of the employer, and where the officer does so those persons shall be jointly and severally liable to give that security or further security.

Notice of requirement

- 15 **29Q**—(1) An officer of Revenue and Customs must give notice of a requirement for security to each person from whom security is required and the notice must specify—
 - (a) the value of security to be given;
 - (b) the manner in which security is to be given;
 - 20 (c) the date on or before which security is to be given; and
 - (d) the period of time for which security is required.
- (2) The notice must include, or be accompanied by, an explanation of—
 - (a) the employer's right to make a request under paragraph 10(1) of Schedule 56 to the Finance Act 2009; and
 - 25 (b) the effect of paragraph 29R(2) and (3).
- (3) In a case which falls within paragraph 29P(2)(b), the notice must include, or be accompanied by, the names of each other person from whom security is required.
- (4) The notice may contain such other information as the officer considers necessary.

(5) A person shall not be treated as having been required to provide security unless HMRC comply with this paragraph and paragraph 29R(1).

5 (6) Notwithstanding anything in regulation 1(4)(b), where the notice, or a further notice, (“contributions notice”) is to be given with a notice or further notice mentioned in regulations 97Q(1) and 97U(3) of the PAYE Regulations (“PAYE notice”) the contributions notice shall be taken to be given at the same time that the PAYE notice is given.

Date on which security is due

10 **29R**—(1) The date specified under paragraph 29Q(1)(c) may not be earlier than the 30th day after the day on which the notice is given.

(2) If, before the date specified under paragraph 29Q(1)(c), the employer makes a request under paragraph 10(1) of Schedule 56 to the Finance Act 2009, the requirement to give security on or before that date does not apply.

15 (3) In a case which falls within sub-paragraph (2), if HMRC does not agree to the employer's request, security is to be given on or before the 30th day after the day on which HMRC notifies the employer of that decision.

Application for reduction in the value of security held

29S—(1) A person who has given security (“PGS”) may apply to an officer of Revenue and Customs for a reduction in the value of security held by HMRC if—

20 (a) PGS' circumstances have changed since the day the security was given because—

(i) of hardship; or

(ii) PGS has ceased to be a person mentioned in paragraph 29P(1); or

25 (b) since the day the security was given there has been a significant reduction in the number of employed earners of the employer to whom the security relates or that employer has ceased to be an employer.

(2) Where paragraph 29P(2)(b) applies, a person who has not contributed to the value of the security given may not make an application under sub-paragraph (1).

Outcome of application under paragraph 29S

30 **29T**—(1) If an application under paragraph 29S(1) is successful, the officer must inform PGS of the reduced value of security that is still required or, where that value is nil, that the requirement for security has been cancelled.

(2) HMRC may make such arrangements as they think fit to ensure the necessary reduction in the value of security held.

Outcome of application under paragraph 29S: further provision

- 29U - (1) This paragraph applies—
- (a) in cases which fall within paragraph 29P(2)(b); and
 - (b) where PGS' application is made under paragraph 29S(1)(a).
- 5 (2) As a consequence of arrangements made under paragraph 29T(2), an officer of Revenue and Customs may require any other person who was given notice under paragraph 29Q in relation to the security (“the original security”), or any other person mentioned in paragraph 29P(1), to provide security in substitution for the original security.
- 10 (3) Where an officer of Revenue and Customs acts in reliance on sub-paragraph (2), the officer must give notice (“a further notice”).
- (4) Paragraph 29Q(1) to (5) and paragraph 29R apply in relation to a further notice.
- (5) Subject to sub-paragraph (6), paragraph 29V(1) applies in relation to a further notice.
- 15 (6) A person who is given a further notice and who was also given notice under paragraph 29Q in relation to the original security may only appeal on the grounds that the person is not a person mentioned in paragraph 29P(1).

Appeals

- 20 29V—(1) A person who is given notice under paragraph 29Q may appeal against the notice or any requirement in it.
- (2) PGS may appeal against—
- (a) the rejection by an officer of Revenue and Customs of an application under paragraph 29S(1); and
 - (b) a smaller reduction in the value of security held than PGS applied for.
- 25 (3) Notice of an appeal under this paragraph must be given—
- (a) before the end of the period of 30 days beginning with—
 - (i) in the case of an appeal under sub-paragraph (1), the day after the day on which the notice was given; and
 - (ii) in the case of an appeal under sub-paragraph (2), the day after the day on which PGS was notified of the outcome of the application; and
 - (b) to the officer of Revenue and Customs by whom the notice was given or the decision on the application was made, as the case may be.
- 30

(4) Notice of an appeal under this paragraph must state the grounds of appeal.

(5) On an appeal under sub-paragraph (1) that is notified to the tribunal, the tribunal may—

(a) confirm the requirements in the notice;

5 (b) vary the requirements in the notice; or

(c) set aside the notice.

(6) On an appeal under sub-paragraph (2) that is notified to the tribunal, the tribunal may—

(a) confirm the decision on the application; or

10 (b) vary the decision on the application.

(7) On the final determination of an appeal under this paragraph—

(a) subject to any alternative determination by a tribunal or court, any security to be given is due on the 30th day after the day on which the determination is made; or

15 (b) HMRC may make such arrangements as they think fit to ensure the necessary reduction in the value of the security held.

(8) Part 5 of the Taxes Management Act 1970 (appeals and other proceedings) applies in relation to an appeal under this paragraph as it applies in relation to an appeal under the Taxes Acts but as if—

20 (a) sections 46D, 47B, 50(6) to (9) and (11)(c) and 54A to 57 were omitted; and

(b) in section 48(1)—

25 (i) in paragraph (a) the reference to “the Taxes Acts” were a reference to “paragraph 29V of Schedule 4 to the Social Security (Contributions) Regulations 2001”; and

(ii) in paragraph (b) the reference to “any provision of the Taxes Acts” were a reference to “paragraph 29V of Schedule 4 to the Social Security (Contributions) Regulations 2001”.

Appeals: further provision for cases which fall within paragraph 29R

30 **29W** - In a case which falls within paragraph 29R(2), if the request mentioned in that provision is made before an appeal under paragraph 29V(1), paragraph 29V(3)(a)(i) applies as if the words “the day after the day on which the notice was given” were “the day after the day on which HMRC notifies the employer of its decision”.

Offence

5 **29X—(1)** Section 684(4A) of the Income Tax (Earnings and Pensions) Act 2003 (PAYE regulations – security for payment of PAYE: offence) applies in relation to a requirement imposed under these Regulations as it applies in relation to a requirement imposed under the PAYE Regulations.

(2) For the purposes of section 684(4A) as it applies by virtue of sub-paragraph (1)—

10 (a) in relation to a requirement for security under a notice under paragraph 29Q the period specified is the period which starts with the day the notice is given and ends with—

(i) the first day after the date specified under paragraph 29Q(1)(c); or

(ii) in a case which falls within paragraph 29R(2), the first day after the date determined under paragraph 29R(3);

15 (b) in relation to a requirement for security under a further notice the period specified is the period which starts with the day the further notice is given and ends with—

(i) the first day after the date specified under paragraph 29Q(1)(c) as it applies in relation to the further notice; or

20 (ii) in a case which falls within paragraph 29R(2), the first day after the date determined under paragraph 29R(3) as it applies in relation to the further notice; and

(c) in relation to a requirement for security to which paragraph 29V(7)(a) applies the period specified is the period which starts with the day the determination is made and ends with the first day after—

25 (i) the day the tribunal or court determines to be the day that the security is to be given; or

(ii) the day determined in accordance with that paragraph,

as the case may be.