



[2021] UKFTT 0299 (TC)

**TC08241**

**Appeal number: TC/2019/06203**

*NICs - PLN - whether out of time – no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GARY WAGSTAFF**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT**

**The hearing took place on 28 July 2021 via the Tribunal video platform.**

**Having heard Sam Brodsky of Counsel, for the Appellant**

**Giselle McGowan, of Counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

### **Introduction**

1. This is an appeal against a Personal Liability Notice (“PLN”) dated 13 March 2019 in the sum of £301,941.10 issued to the appellant by the respondent (“HMRC”) pursuant to Section 121C of the Social Security Administration Act 1992 (“SSAA”) in respect of National Insurance Contributions (“NICs”) payable by Warehouse Holdings Limited (“WHL”).
2. All of the material facts are agreed and the appeal proceeds on a pure point of law.
3. The sole ground of appeal is that the PLN was issued out of time in relation to all but a small percentage of the liabilities therein. The appellant contends that any NICs in respect of periods prior to the tax month ending 5 March 2011 were statute barred by virtue of Section 9 of the Limitation Act 1980 (“LA 1980”) at the date that the PLN was issued, having fallen due more than six years prior to that date. Accordingly the appellant argues that WHL was not “liable” for these sums at that date within the meaning of Section 121C(1) SSAA.

### **Agreed Facts**

4. The appellant was a director of WHL between 26 August 2005 and 1 October 2015 and he was the sole director between 16 November 2009 and 30 July 2015.
5. WHL set up a PAYE scheme on or about 21 December 2009. This PAYE scheme was active throughout the period from on or about 21 December 2009 to August 2013. During this period WHL made deductions of PAYE income tax and NICs from its employees’ salaries.
6. WHL filed its end of year P35 Return for the tax year 2009/10 on 20 March 2012, almost two years after the deadline of 19 May 2010, declaring NICs due of £13,238.26. WHL failed to submit end of year P35 Returns for the tax years 2010/11 to 2012/13. Following the change to Real Time Information (“RTI”) in April 2013, WHL failed to submit monthly RTI returns for the tax year 2013/14.
7. In the period June 2012 to October 2013 WHL made four payments to HMRC in respect of PAYE income tax and NICs totalling £22,258.68. Of these payments, HMRC allocated £11,129.34 to NICs for the period 2012/13 with the remainder allocated to PAYE income tax for the same period. WHL has failed to pay any further sums in respect of NICs deducted from its employees for the periods 2009/10 to 2013/14 to HMRC.
8. WHL provided HMRC with computerised P11 Deduction Working Sheets recording deductions from its employees’ salaries for the tax years 2009/10 to 2013/14 from which HMRC has been able to ascertain that the NICs that WHL deducted from its employees’ salaries for these tax years were as follows:

<b>Period NICs deducted</b>	
2009/10	£13,238.26
2010/11	£82,230.25
2011/12	£87,775.22
2012/13	£77,347.37
2013/14	£23,248.16
<b>Total:</b>	<b>£283,839.26</b>

9. On 20 November 2015 WHL entered Creditors' Voluntary Liquidation ("CVL").
10. On 7 October 2016 HMRC submitted a proof of debt in WHL's liquidation for £1,124,910.57 including a claim for unpaid NICs for the tax years 2009/10 to 2013/14.
11. On 13 March 2019 HMRC issued the PLN on the basis that WHL's failure to pay the NICs due was a result of the neglect of the appellant, the sole director at the relevant time. The amount claimed in the PLN of £301,941.10 is made up of the NICs which WHL had failed to pay to HMRC and interest thereon as set out below:

<b>Date</b>	<b>NICs due</b>	<b>NICs Paid</b>	<b>Unpaid NICs</b>	<b>Interest</b>	<b>Total Unpaid Contributions</b>
2009/10	£13,238.26	£0	£13,238.26	£2,220.76	£15,459.02
2010/11	£82,230.25	£0	£82,230.25	£11,327.50	£93,557.75
2011/12	£87,775.22	£0	£87,775.22	£9,431.41	£97,206.63
2012/13	£77,347.37	£11,129.34	£66,218.03	£5,143.24	£71,361.27
2013/14	£23,248.16	£0	£23,248.16	£1,108.27	£24,356.43
<b>Totals</b>	<b>£283,839.26</b>	<b>£11,129.34</b>	<b>£272,709.92</b>	<b>£29,231.18</b>	<b>£301,941.10</b>

## **The Law**

### ***Personal Liability Notices***

12. Insofar as relevant, section 121C(1) of SSAA provides as follows:-

#### **Liability of directors etc. for company's contributions.**

(1) This section applies to contributions which a body corporate is liable to pay, where –

- (a) The body corporate has failed to pay the contributions at or within the time prescribed for the purpose; and
- (b) The failure appears to the Inland Revenue to be attributable to fraud or neglect on the part of one or more individuals who, at the time of the fraud or neglect, were officers of the body corporate (“culpable officers”).

(2) The Inland Revenue may issue and serve on any culpable officer a notice (a “personal liability notice”)—

- (a) Specifying the amount of the contributions to which this section applies (“the specified amount”);
- (b) Requiring the officer to pay to the Inland Revenue —
  - (i) a specified sum in respect of that amount; and
  - (ii) specified interest on that sum; and
- (c) where that sum is given by paragraph (b) of subsection (3) below, specifying the proportion applied by the Inland Revenue for the purposes of that paragraph.

(3) The sum specified in the personal liability notice under subsection (2)(b)(i) above shall be—

- (a) in a case where there is, in the opinion of the [Inland Revenue], no other culpable officer, the whole of the specified amount; and
- (b) in any other case, such proportion of the specified amount as, in the opinion of the Inland Revenue, the officer's culpability for the failure to pay that amount bears to that of all the culpable officers taken together.

(4) In assessing an officer's culpability for the purposes of subsection (3)(b) above, the Inland Revenue may have regard both to the gravity of the officer's fraud or neglect and to the consequences of it.

...

(9) In this section—

“officer”, in relation to a body corporate, means —

- (a) any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act as such”.

13. Section 121D of SSAA 1992 (so far as relevant) provides:

“121D.— Appeals in relation to personal liability notices.

(1) No appeal shall lie in relation to a personal liability notice except as provided by this section.

(2) An individual who is served with a personal liability notice may appeal against the Inland Revenue’s decision as to the issue and content of the notice on the ground that—

(a) the whole or part of the amount specified under subsection (2)(a) of section 121C above (or the amount so specified as reduced under subsection (7) of that section) does not represent contributions to which that section applies”.

### ***Limitation***

14. Section 9(1) of LA 1980 provides:

“Time limit for actions for sums recoverable by statute.

(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

### ***Insolvency***

15. The Insolvency Act 1986 provides that the property of a company in a CVL shall be applied in satisfaction of its liabilities as at the date that the company enters CVL albeit a creditor can prove in the insolvency in respect of some future liabilities<sup>1</sup>.

### ***The case law***

16. Amongst other cases, we were referred by both parties to *In re General Rolling Stock Co*<sup>2</sup> (“R S”) and *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited*<sup>3</sup> (“Larnell”) and we refer to those below.

### **Discussion**

17. Section 121D of SSAA provides that the burden of proof as to any matter raised by a ground of appeal lies with the respondent. It also provides that the power of the Tribunal is limited to either dismissing the appeal or remitting the case to the respondent to consider whether to vary their decision as to the issue and content of the PLN.

18. It is not in dispute that for Section 121C of SSAA to apply, three conditions must be fulfilled, namely:-

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<sup>1</sup> Rule 14.1(3)(b) of the Insolvency (England and Wales) Rules 2016 (“the Insolvency Rules”)

<sup>2</sup> (1872) LR 7 Ch App 646

<sup>3</sup> [2005] EWCA Civ 1408

- (a) The company must be “liable to pay” the NICs and that the liability must exist when the PLN is issued against a director.
- (b) The company must have failed to pay the NICs within the required time.
- (c) The failure must appear to HMRC to be attributable to the fraud or neglect of an officer of the company.

19. It is also not in dispute that WHL failed to pay its NIC liabilities and that that was as a result of the neglect of the appellant. The issue is liability. The appellant concedes that he is liable for the NICs in respect of the tax month ending 5 March 2013 and later months.

20. In summary, HMRC argue that the entry into CVL on 20 November 2015 “stopped the clock running” in relation to any claim relating to NICs. Therefore WHL remained liable for the NICs as at the date the PLN was issued.

21. By contrast, again in summary, the appellant argues that the fact that limitation ceases to apply once a company enters CVL is peculiar to the liquidation and cannot impact on other issues such as PLNs. Essentially, the appellant’s argument is that entering CVL “freezes” the liability at that date.

22. The appellant also argues that the normal time limit for recovery of NICs is six years so it cannot be right that a PLN can be issued after the expiry of that period. That would fly in the face of the policy considerations underpinning limitation.

23. Mr Brodsky cited paragraph 102 of *The High Commissioner for Pakistan in the UK v Prince Mukkaram and others*<sup>4</sup> as authority for the proposition, with which of course I agree, that the policy reasons for limitation are that a defendant should not have a claim hanging over him indefinitely, that with the elapse of time proof becomes more difficult and someone who does not act promptly to enforce rights should lose them.

24. However, it is not as straightforward as that. Limitation does not apply to everything. For example, as Mr Justice Lewison pointed out at paragraph 133 in *Painter v Hutchinson*<sup>5</sup>: “There appears to be no limitation period which operates as an absolute bar to the proof of bankruptcy debts even after the discharge of the bankrupt” because of the operation of Rules 11.2 and 11.3(2) of the Insolvency Rules.

25. Furthermore, Section 37(2)(a) LA 1980 provides that there are no limitations in proceedings by HMRC for recovery of tax or duty or interest thereon.

26. I accept that NICs are not a tax but a contribution and as such are not exempt from the six year time limit by virtue of that section. I also accept that if WHL had not entered CVL then HMRC would have had to issue a PLN before the expiry of the six years.

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<sup>4</sup> 2016 EWHC 1465 (Ch)

<sup>5</sup> [2007] EWHC 758 (Ch)

HMRC would have been time barred after the expiry of six years since WHL would no longer have been liable for the NICs. But that is not the issue here.

27. Mr Brodsky argues that, although expressed in his Skeleton Argument as being an issue of the policy considerations underpinning limitation, the issue is really one of statutory construction.

28. The condition precedent, in terms of Section 121C SSAA for the issue of the PLN is that WHL is liable for the NICs as at the date of issue of the PLN. Was it? The appellant argues that WHL's entry into CVL had only the effect that HMRC could prove for the NICs in the liquidation. It had no other consequence.

29. That is an interesting argument but I do not agree. In any event, HMRC could, and did, prove in the liquidation. It is accurate to state that the liabilities of the company are those existing at the date of the liquidation. That is made explicit by Lord Justices Moore-Bick and Floyd in *Larnell* when considering *R S*<sup>6</sup>. The liabilities might also include future liabilities admitted in terms of the Insolvency Rules as described in paragraph 24 above.

30. The effect of entering CVL is described by Lord Justice Lloyd in *Larnell* at paragraph 13: "In effect, so far as the operation of the winding-up is concerned, limitation periods cease to run at that date [the commencement of the winding-up]". Mr Brodsky argued that that supported his argument that the impact of the CVL was confined to the liquidation alone. I agree with Ms McGowan that that is too limited an interpretation.

31. Lord Justice Lloyd went on to quote Lord Hoffman in *Wight v Eckhardt Marine GmbH*<sup>7</sup> where he stated at paragraph 27: "The winding up leaves the debts of the creditors untouched...The debts, if they are owing, remain owing throughout."

32. Section 121C SSAA is expressed in unequivocal terms. The section applies to contributions which the body corporate is liable to pay. Certainly WHL was liable to pay in 2015 when it entered CVL but it was also liable to pay in 2019 when the PLN was issued.

33. There is no lack of clarity in that section. The draftsmen of the SSAA must be assumed to be aware of the workings of the insolvency legislation not least because recourse to a PLN would only usually arise where the body corporate does not have sufficient assets. There is no requirement to look at more general policy considerations.

34. Lastly, given the argument advanced for the appellant that "...the proper approach is to apply the rules of limitation in the ordinary way at the date of issue of the PLN", it is appropriate to look at Section 9 of LA 1980. It is also expressed in very clear terms and the limitation period of six years applies from "... the date on which the cause of action accrued". Up until the PLN was issued HMRC had no cause of action in relation

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<sup>6</sup> At paragraphs 57 and 13 respectively

<sup>7</sup> [2003] UKPC 37

to the appellant. The time bar on the PLN runs from the date of its issue. The appellant had no cause of action because before then he only faced a potential liability. He had no claim against him. He had no right to litigate until the PLN was issued.

**Decision**

35. The appeal is dismissed.

36. 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.

**ANNE SCOTT**

**TRIBUNAL JUDGE**

**RELEASE DATE: 19 AUGUST 2021**