



TC06096

Appeal number: TC/2016/00434

***NATIONAL INSURANCE CONTRIBUTIONS – Class 1 - Personal Liability
Notice to director – whether NIC unpaid – whether appellant an officer at relevant
time – whether a “culpable officer” because negligent – appeal dismissed.***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL DENMARK

Appellant

- and -

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

**TRIBUNAL: JUDGE RICHARD THOMAS
 SONIA GABLE**

Sitting in public at Civil Justice Centre, Colchester on 24 July 2017

The Appellant did not appear and was not represented

**Mr Simon Bracegirdle, HMRC Solicitor’s Office Legal Services, for the
Respondents**

DECISION

5 1. This was an appeal by Mr Michael Denmark (“the appellant”) against notices issued to him under s 121C Social Security Administration Act 1992 (“SSAA”). The effect of the notices was to make the appellant liable for all of the unpaid Class 1 National Insurance Contributions (“NICs”) primarily payable by Worldwide Support Services Ltd (“WSSL”), totalling £632,307.64, for the tax years 2012-13 and 2013-14.

10 2. Shortly before the hearing was due to start, we were told that the appellant did not intend coming to the hearing because he was unable to afford representation. It was obvious from this message that the appellant was aware of the hearing. He was not asking for a postponement.

15 3. As we had seen that the appellant had made his objections to the notice plain in his notice of appeal we considered it was in the interests of justice to proceed with the hearing.

4. At the end of the hearing we announced our decision which was to uphold the notices and dismiss the appeal. HMRC asked for a full findings and reasons decision, and this is it.

20 **Evidence**

5. We had evidence from Mr Andrew Pawley, the officer of HMRC who carried out the investigation in the form of a witness statement. Although the statement did not say so in terms that he exhibited them, he referred in his statement to the contents of the bundles containing the correspondence with the appellant and others and other materials such as bank statements obtained by him. We admitted all the documents as evidence.

6. We found Mr Pawley to be an experienced investigator whose approach in this case was thorough and careful. We have no hesitation in accepting his evidence as truthful and from it we find the facts set out in the next section.

30 **Facts**

7. WWSL was incorporated on 12 July 2012.

8. Its sole shareholder was the appellant and he was its only director until its voluntary liquidation in December 2013.

9. WSSL’s activity was said to be to act as a payroll services company.

35 10. From the start of its activities in November 2012 to the date of its voluntary winding-up WSSL made no payments of PAYE or of Class 1 National Insurance Contributions (either employers’ or employees’).

11. It made no end of year returns for 2012-13 on Forms P35. For 2013-14 it made monthly returns under the Real Time Information (“RTI”) system of notifying and paying PAYE and Class 1 NICs, but made no payments, although the RTI records showed £776,593.66 being due in respect of PAYE and Class 1 NICs.

5 12. Mr Pawley opened an investigation on 30 May 2014 with a view to establishing whether a Personal Liability Notice (“PLN”) under s 121C SSAA should be issued to any person.

13. Mr Pawley’s initial researches showed that the appellant had been a director of two other companies which were in liquidation, TRC Associates Ltd and Global
10 Solutions Worldwide Ltd.

14. On 30 May 2014 Mr Pawley wrote to the appellant and to the liquidator of WSSL and issued an “information request” to ADS Accountants of Dartford, Kent, a firm who had acted for WSSL in dealings with HMRC before the liquidation.

15 15. On 4 July 2014 Mr Pawley received an undated letter from the appellant, answering the questions Mr Pawley had asked him. The responses Mr Pawley considered to be relevant to his enquiry were as follows:

Q. Please provide details of your specific roles and responsibilities in the company [ie WSSL]

A. I was the director responsible for sales and general working of the company.

20 Q. What exactly did [WSSL] do and who were its main customers?

A. Provided payroll and labour sourcing, and the main customers were – [a list of 10 businesses]

Q. Who dealt with financial matters and maintained the books and records of [WSSL]?

25 A. M Denmark.

Q. Who was authorised to sign cheques and make payments (including electronically) from the [WSSL] bank account?

A. M Denmark.

30 Q. What did you understand to be the statutory duty and responsibility of the company, and you as a director, in respect of PAYE and NIC? For example were you aware of the statutory obligation to make payment to HMRC each month?

A. I understood payment should have been made to HMRC.

Q. Who at the company was given responsibility for making payment of PAYE and NIC due to HMRC?

A. M Denmark.

5 Q. Why did the company fail to pay the PAYE and NIC due to HMRC each month?

A. Cash flow dictated when payment could be made. Unpaid NIC due to bad debt.

16. In response to the last point which the appellant explained as being due to difficulties he had from the fourth month of operation in getting LVH Haulage Ltd, one of the businesses, to pay WSSL's invoices, Mr Pawley pointed out that LVH had paid WSSL from the start, but only sufficient to pay the net wages.

17. On 19 August 2014 the liquidator informed Mr Pawley that he had obtained bank statements of the company but had no other records.

18. Having obtained those statements on 9 October 2014 Mr Pawley asked further questions of the liquidator and ADS Accountants and on 10 October he wrote to the appellant with his initial findings. In these findings he said that his analysis of the bank statements showed:

(1) WSSL started paying wages on 26 November 2012

(2) Each week monies would come in from various companies.

20 (3) Each week those monies would be paid to individuals identified as supplying their services to the same companies.

(4) In addition to the net wages paid, regular weekly payments were made to ADS Accountants.

25 (5) After the payments of net wages and to ADS Accountants there were no funds left in the bank account to cover PAYE or NIC.

(6) In the period 8 August 2012 to 7 August 2013 total bank receipts were £2,730,276.54 and total payments were £2,730,778.09.

19. On 7 November 2014 in response the appellant said, among other things:

30 "We raised invoices on our clients to include PAYE, NIC and our profit margins. The clients paid us monies on account.

As earlier the clients made payments on account and I may have been naïve in not chasing these payments.

I paid wages from the bank account.

35 I know from a conversation with my accountants and information received from records that £130,000 was owed from KSS and I am working with the liquidator to recoveries. This is also the case with Hadley & Armour."

20. Mr Pawley established that the Insolvency Service was investigating the conduct of the appellant. Mr Franks of that Service gave Mr Pawley spreadsheets compiled from his own examination of the company records provided by ADS Accountants. These spreadsheets showed:

- 5 (1) There were arrears of PAYE, Class 1 NICs and Construction Industry Scheme deductions totalling £1,359,870 for 2012/13 and 2013/14.
- (2) WSSL had paid £729,000 to ADS Accountants Clients Accounts.
- (3) WSSL's turnover was in excess of £4 million.

21. In February 2015 Mr Pawley received the client account statements from Mr Franks and visited the liquidator's office to see the records of WSSL.

22. From all these sources Mr Pawley established that:

- (1) Throughout the period of the company's operations WSSL paid net wages to employees but failed to pay any PAYE or NIC to HMRC.
- 15 (2) The appellant had been involved in dealings with HMRC's Debt Management Unit regarding underpayments of PAYE in another company of which the appellant was sole director.
- (3) The successor to WSSL of which the appellant was sole shareholder and director, WSS London Ltd, went into creditors' voluntary liquidation on 7 July 2014. That company owed £543,590 in unpaid PAYE & NIC and never paid
- 20 any amounts to HMRC.

23. On 28 September 2015 Mr Pawley issued the PLN to the appellant with a decision letter.

24. On 15 October 2015 the appellant appealed against the PLN. As well as giving grounds of appeal the appellant offered to pay £30,000 over five years, an offer which the HMRC refused to accept.

25. On 16 January 2016 the appellant notified his appeal to the Tribunal.

Law

26. Section 121C SSSA provides:

“121C Liability of directors etc for company's contributions.

30 (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
- 35 (b) the failure appears to the Commissioners for Her Majesty's Revenue and Customs 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”).

5 (2) The Commissioners 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 Commissioners—

10 (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 Commissioners for the purposes of that paragraph.

15 (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 Commissioners, no other culpable officer, the whole of the specified amount; and

20 (b) in any other case, such proportion of the specified amount as, in the opinion of the Commissioners, the officer’s culpability for the failure to pay that amount bears to that of all the culpable officers taken together.

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

(5) The interest specified in the personal liability notice under subsection (2)(b)(ii) above shall be at the prescribed rate and shall run from the date on which the notice is issued.

30 (6) An officer who is served with a personal liability notice shall be liable to pay to the Commissioners the sum and the interest specified in the notice under subsection (2)(b) above.

35 (7) Where, after the issue of one or more personal liability notices, the amount of contributions to which this section applies is reduced by a payment made by the body corporate—

(a) the amount that each officer who has been served with such a notice is liable to pay under this section shall be reduced accordingly;

40 (b) the Commissioners shall serve on each such officer a notice to that effect; and

(c) where the reduced liability of any such officer is less than the amount that he has already paid under this section, the difference shall be repaid to him together with interest on it at the prescribed rate.

5 (8) Any amount paid under a personal liability notice shall be deducted from the liability of the body corporate in respect of the specified amount.

10 (8A) The amount which an officer is liable to pay under this section is to be recovered in the same manner as a Class 1 contribution to which regulations under paragraph 6 of Schedule 1 to the Contributions and Benefits Act apply and for this purpose references in those regulations to Class 1 contributions are to be construed accordingly.

15 (9) In this section—
“contributions” includes any interest or penalty in respect of contributions;

“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;
20 and

(b) in a case where the affairs of the body corporate are managed by its members, any member of the body corporate exercising functions of management with respect to it or purporting to do so;

25 “the prescribed rate” means the rate from time to time prescribed by regulations under section 178 of the Finance Act 1989 for the purposes of the corresponding provision of Schedule 1 to the Contributions and Benefits Act, that is to say—

(a) in relation to subsection (5) above, paragraph 6(2)(a);
30 (b) in relation to subsection (7) above, paragraph 6(2)(b).”

27. WSSL’s liability to pay Class 1 NIC derives from the Social Security (Benefits and Contributions) Act 1992 (“SSCBA”), section 6 of which provides:

“6 Liability for Class 1 contributions

35 (1) Where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment—

(a) a primary Class 1 contribution shall be payable in accordance with this section and section 8 below if the amount paid exceeds the current primary threshold (or the prescribed
40 equivalent); and

(b) a secondary Class 1 contribution shall be payable in accordance with this section and section 9 below if the amount paid exceeds the current secondary threshold (or the prescribed equivalent).

5 ...

(4) The primary and secondary Class 1 contributions referred to in subsection (1) above are payable as follows—

(a) the primary contribution shall be the liability of the earner; and

10 (b) the secondary contribution shall be the liability of the secondary contributor;

but nothing in this subsection shall prejudice the provisions of paragraphs 3 to 3B of Schedule 1 to this Act.

15 (5) Except as provided by this Act, the primary and secondary Class 1 contributions in respect of earnings paid to or for the benefit of an earner in respect of any one employment of his shall be payable without regard to any other such payment of earnings in respect of any other employment of his.”

28. Paragraph 3 of Schedule 1 to SSCBA says:

20 “~~3~~—(1) Where earnings are paid to an employed earner and in respect of that payment liability arises for primary and secondary Class 1 contributions, the secondary contributor shall (except in prescribed circumstances), as well as being liable for any secondary contribution of his own, be liable in the first instance to pay also the earner's primary contribution or a prescribed part of the earner's primary contribution, on behalf of and to the exclusion of the earner; and for the purposes of this Act and the Administration Act contributions paid by the secondary contributor on behalf of the earner shall be taken to be

25 contributions paid by the earner.

30

...
(3) A secondary contributor shall be entitled, subject to and in accordance with regulations, to recover from an earner the amount of any primary Class 1 contribution paid or to be paid by him on behalf of the earner; ...but notwithstanding any other provision in any enactment regulations under this sub-paragraph shall provide for recovery to be made by deduction from the earner's earnings, and for it not to be made in any other way.”

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40 Thus it is the employer, the secondary contributor, which is liable to pay the employee’s Class 1 NICs and to deduct the amount from a payment of wages etc. in accordance with regulations.

29. Those regulations are the Social Security (Contributions) Regulations 2001 (SI 2001/1001) (“SSCR”) and in those regulation 67 says:

“67 Collection and recovery of earnings-related contributions, and Class 1B contributions

5 (1) ... earnings-related contributions and Class 1B contributions shall be paid, accounted for and recovered in like manner as income tax deducted from the general earnings from an office or employment by virtue of regulations under section 684 of ITEPA 2003 (PAYE Regulations).

10 ...”

30. The relevant regulations under s 684 ITEPA are the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) (the “PAYE Regulations”). For 2012-13 WSSL’s obligations were in regulations 68 and 69 which for that year read:

15 **“68—(1)** This regulation applies to determine how much an employer must pay or can recover for a tax period.

(2) If A exceeds B, the employer must pay the excess to the Commissioners for Her Majesty’s Revenue and Customs.

...

20 (4) In this Regulation—

A is—

(a) the total amount of tax which the employer was liable to deduct from relevant payments made by the employer in the tax period, ...

25 B is the total amount which the employer was liable to repay in the tax period.

69—(1) An employer must pay amounts due under regulation 68(2)—

30 (a) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or

(b) within 14 days after the end of the tax period, in any other case.

...”

35 31. For 2013-14 WSSL’s obligations were in regulations 67G and 69 which for that year read:

“67G Payments to and recoveries from HMRC for each tax period by Real Time Information employers

(1) For each tax period, a Real Time Information employer must pay to, or may recover from, HMRC the amount arrived at under the formula in paragraph (4).

5 (2) If the amount arrived at under the formula in paragraph (4) is a positive amount, the employer must pay the excess to HMRC.

...

(4) The formula in this paragraph is A–B, where—

A is the sum total of the relevant amounts for each of the employer's employees, and

10 B is amount A for the previous tax period in the tax year, if any.

(5) For the purposes of paragraph (4), a “relevant amount” is the amount shown under paragraph 17 of Schedule A1 (real time returns) for an employee in the most recent return made in the tax year by the employer under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B) which contains information about that employee.

15

...

(6) In paragraph (5) “the most recent return” means the return which, as at the end of the tax period, contains the most up to date information under paragraph 17 of Schedule A1 about the employee.

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...

69—(1) An employer must pay amounts due under regulation 67G(2) ... —

25

(a) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or

(b) within 14 days after the end of the tax period, in any other case.

30

...”

32. The provisions regarding appeals against decisions under s 121C SSAA are in Social Security Contributions (Transfer of Functions, Etc) Act 1999 (“SSCTFA”) and regulations made under that Act. Sections 8 and 11 SSCTFA say:

“8 Decisions by officers of HMRC

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(1) Subject to the provisions of this Part, it shall be for an officer of HMRC—

(h) to decide any question as to the issue and content of a notice under subsection (2) of section 121C of the Social Security Administration Act 1992 (liability of directors etc for company's contributions),

40

11 Appeals against decisions of HMRC

(1) This section applies to any decision of an officer of HMRC under section 8 of this Act ...

...

5 (4) This section has effect subject to section 121D of the Social Security Administration Act 1992 (appeals in relation to personal liability notices).”

33. Section 121D SSAA referred to in s 11(4) SSCTFA says:

“121D Appeals in relation to personal liability notices.

10 (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 Commissioners for Her Majesty's Revenue and Customs' decision as to the issue and content of the notice on the ground that—

15 (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;

20 (b) the failure to pay that amount was not attributable to any fraud or neglect on the part of the individual in question;

(c) the individual was not an officer of the body corporate at the time of the alleged fraud or neglect; or

25 (d) the opinion formed by the Commissioners under subsection (3)(a) or (b) of that section was unreasonable.

(3) The Commissioners shall give a copy of any notice of an appeal under this section, within 28 days of the giving of the notice, to each other individual who has been served with a personal liability notice.

30 (4) On an appeal under this section, the burden of proof as to any matter raised by a ground of appeal shall be on the Commissioners.

(5) Where an appeal under this section—

35 (a) is brought on the basis of evidence not considered by the Commissioners, or on the ground mentioned in subsection (2)(d) above; and

(b) is not allowed on some other basis or ground,

40 and is notified to the tribunal, the tribunal shall either dismiss the appeal or remit the case to the Commissioners, with any recommendations the tribunal sees fit to make, for them to

consider whether to vary their decision as to the issue and content of the personal liability notice.

(6) In this section—

...

5 “officer”, in relation to a body corporate, has the same meaning as in section 121C above;

“personal liability notice” has the meaning given by subsection (2) of that section;

...

10 “tribunal” means the First-tier Tribunal or, where determined under Tribunal Procedure Rules, the Upper Tribunal;

“vary” means vary under regulations made under section 10 of the Social Security Contributions (Transfer of Functions, etc) Act 1999.”

15 34. The regulations made under s 10 SSCTFA referred to in s 121D are the Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) (“SSCDAR”) of which the relevant regulations are:

“7 Application of the Taxes Management Act 1970 in relation to reviews and appeals with modifications

20 (1) In this regulation reference to a section alone is reference to the section so numbered in the Management Act.

(2) For the purposes of these regulations, sections 49A to 49I of the Management Act shall apply to appeals with the following [irrelevant] modifications ...

25 **10 Determination of appeals by the tribunal**

If, on an appeal ... under Part II of the Transfer Act ..., it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.”

30 35. It is not entirely obvious that a s 121D SSAA appeal is an appeal under Part 2 of SSCTFA as it is a stand alone provision and what it stands alone from is s 11 SSCTFA which provides for appeals. But the reference in s 121D(6) to regulation 10 of SSCTFA can only have been intended to refer to the SSCDAR, so it is reasonably clear that the Tribunal’s powers are those given in regulation 10 SSCDAR.

35 36. The references to the Commissioners for Her Majesty’s Revenue and Customs and to the Commissioners, or in some places, but not all, to HMRC are made non-textually by s 50 Commissioners for Revenue and Customs Act 2005 and the modifications to the text of the legislation set out above to reflect this are made by us.

HMRC's submissions

37. HMRC agrees that the burden of proof is on it, as it has to show the appellant was either negligent or fraudulent. It is not pleading fraud.

38. They say that in relation to the conditions in s 121C SSAA:

- 5 (1) There was a failure by WWSL to pay Class 1 NICs.
- (2) The appellant was an officer of WWSL at the relevant time.
- (3) The appellant was a culpable officer in that the failure to pay was attributable to the neglect of the appellant.
- 10 (4) There is no other culpable officer, so the appellant is liable for 100% of the NICs outstanding.

39. In response to the appellant's submission that the liquidator is still recovering debts, HMRC say that if anything is recovered then s 121C(7) SSAA may allow the amount in the PLN to be reduced. But that has not yet happened and does not affect the notice under appeal.

15 The appellant's submissions

40. In his grounds of appeal the appellant says that he does not owe this money as it was due to be collected by the liquidator, and that he is still recovering the debts of the company. He adds that the debt [to HMRC] is a company debt.

Discussion

20 41. We have found as a fact that the appellant was an officer of the company, being its sole director, throughout the relevant period.

42. We have found as a fact that WWSL failed to pay Class 1 NICs for the relevant period and that the NICs are still outstanding.

25 43. In view of this the only issue in relation to which there is any discussion required from us is whether HMRC have shown that the appellant was negligent.

30 44. The overwhelming inference we draw from the evidence put forward by HMRC and by Mr Pawley in particular is that the company was set up deliberately to distance the NIC (and PAYE) obligations from its clients and was set up so that it could meet the obligations for net wages and payments to ADS Accountants but not to pay HMRC anything.

45. This is obvious from the analysis of the bank accounts and we do not believe the appellant when he says that he made efforts to collect more money from the clients to pay HMRC and that the failure was due to bad debts.

35 46. HMRC cited in support of their contention that the appellant was negligent the case of *Blyth v Birmingham Waterworks Co* [1856] 11 Exch. 781 ("*Blyth*"), approved as setting out the appropriate objective test in *HMRC v O'Rorke* [2013] UKUT 499 (TCC) by Hildyard J at [68]. In *Blyth* Alderson B described that test at p 786:

5 “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 reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

10 47. By his own admission the appellant did what a prudent and reasonable man would not have done and failed in his duty as a director to ensure that HMRC was paid that which it was required to pay, in large part on behalf of its employees and failed to ensure that the company was in a position to pay.

48. We therefore considered that HMRC have shown that the appellant was a culpable officer by reason of this negligent conduct.

15 **Decision**

49. In accordance with regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 (SI 1999/1027) the decision by HMRC that a notice under s 121C Social Security Administration Act 1992 should be given to Mr Michael Denmark is upheld and so the notice stands good in the amounts of 20 £195,473.95 for 2012-13 and £433,148.53 for 2013-14.

50. 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 25 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.

30 **RICHARD THOMAS**
TRIBUNAL JUDGE

RELEASE DATE: 6 September 2017

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