



**TC06936**

**Appeal number: TC/2017/08239**

***INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS  
(NICs) - security for payment - jurisdiction - reasonableness of the decision  
to require security - held decision reasonable - variation of notice***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAVID WILLIAM SMITH**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**

**Sitting in public at Cardiff on 7 January 2019**

**The Appellant in person**

**Miss Laura Morgan, Officer of HMRC, for the Respondents**

## DECISION

1. In this appeal, the appellant (or “**Mr Smith**”) appeals against the decision of HMRC (or the “**respondents**”) to issue to him 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**”).

### **Notice of requirement**

2. The notice of requirement was issued by HMRC to the appellant on 20 June 2017. It required an amount of security to be given in relation to PAYE of £16,206.13 and in relation to NICs of £15,142.56. The total amount of security required was therefore £31,348.69. 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 30 July 2017.

3. 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 the appellant for a four month period. 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; (c) by opening a joint bank account with HMRC.

### **The Law and the Tribunal’s jurisdiction**

4. In the First-tier Tribunal case of *D-Media Communications Ltd v HMRC* [2016] UKFTT 0430, Judge Roger Berner gave a characteristically shrewd and comprehensive synopsis of not just the law relating to the provision of security, but also this tribunal’s jurisdiction on an appeal in respect of a notice of requirement. That decision is not binding upon me, but I find myself in agreement with everything that Judge Berner has said in that case, and I set out the relevant extract below (the appendix to his decision comprises the appendix to this one):

#### **“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 –

- (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:

“(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.”

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,

“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.”

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. 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.

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 .

### **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 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 evidence and findings of fact**

5. The facts were largely agreed and relatively uncontroversial. As well as a bundle of documents, oral evidence was given by the appellant and, on behalf of HMRC, by Mrs Collett Humphreys ("**Mrs Humphreys**") who was responsible for authorising the decision that the appellant should provide a security deposit and for issuing the notice of requirement. From this evidence I find the following facts:

(1) The appellant was registered for PAYE from 25<sup>th</sup> of February 2017. He had set up as a sole proprietor following the liquidation of Just Bi-Folds Joinery Ltd ("Bifolds") on 29 June 2017. Given the similarities between the new business and Bifolds (and indeed previous businesses with which the appellant had been associated), the appellant's sole trading business was considered by Mrs Humphreys to be a continuation of the trade formally carried on by Bifolds.

(2) The factors that Mrs Humphreys took into account when considering the appellant's new business for security action were that it was; (a) trading from the same address; (b) Mr Smith was the common link; and (c) it carried on the same trade, namely joinery installation.

(3) The amount required by the notice of requirement was based on returns rendered by Bifolds.

(4) Mrs Humphreys considered that Mr Smith had been a shadow director of Bifolds. Mr Smith did not agree that this was the case. His role at Bifolds was largely pricing up work and, to a much smaller extent, going on site to check that fitting had been carried out satisfactorily.

(5) The work undertaken by Bifolds involved the manufacture and fitting of patio doors to, for example, restaurants, and manufacturing patio doors for sale to builders. When Mr Smith started out on his own, he was largely involved in fitting out bars, making external doors, and manufacturing and fitting out wall panelling for all sorts of retail outlets.

(7) Bifolds had approximately six people manufacturing. When Mr Smith started on his own, he, too, employed approximately six people manufacturing only three of whom had come from Bifolds. The other three came from various other businesses.

(8) It became increasingly difficult for Mr Smith to monitor and supervise the subcontractors who were involved in doing the fitting out, and he suffered

financially because of this. Over the last year or so he has virtually ceased to provide fitting services and has concentrated on manufacturing. He has reduced the number of employees involved in manufacturing from six down to two. His PAYE and NIC liability has reduced accordingly.

(9) I was provided with a schedule of PAYE and NIC liabilities by Mrs Humphreys. From this it can be seen that at the date of the hearing, the appellant has PAYE debts for 2016/2017 and 2017/2018 of £2,420.80, and NIC debts for those two years of £3,968.57; a total outstanding debt, therefore, of £6,389.37.

(10) However, because his PAYE and NIC liability is decreasing as a result of the reduction in the number of his employee's, four months security for PAYE and NICs would now be £2,562.25.

(11) Prior to authorising the notice of requirement, Mrs Humphreys reviewed the compliance history of a number of companies with links to Mr Smith. There were eight of these including Bifolds. Each of these companies either went into liquidation or ceased to trade leaving considerable debts owed to HMRC. The combined debt owing by these companies for VAT, PAYE and NICs was over £700,000.

(12) Following service of the notice of requirement, and the appellant's appeal against the decision on 17 July 2017, Mrs Humphreys then reviewed her decision in light of further information provided by the appellant, including details of the more stringent controls that he had put in place to manage his business (in particular its financial position) more precisely. However, at the time that Mrs Humphreys reviewed her decision (later in July 2017) the PAYE for PAYE months 2 and 3 had not been paid. And having taken into account the fact that any business linked to Mr Smith was a habitual defaulter there was little to suggest that the new business would be managed differently despite these controls. This had been borne out with the non-compliance demonstrated at that early stage and so Mrs Humphreys upheld her decision.

(13) The appellant requested an independent review on 31 August 2017. The review upheld Mrs Humphreys original decision. Following that review decision, Mr Smith appealed to this tribunal on 3 November 2017.

(14) Mr Smith had offered to put a charge on his properties to secure his PAYE and NIC liabilities, but that offer was declined by HMRC.

(15) Mr Smith has also tried to sell a property to settle the obligation to provide security but Japanese knotweed has been found in a neighbours garden which has rendered his property valueless (in his view) and no lender will lend on it.

(16) In or around July 2018 Mr Smith secured a contract to provide a full fit out (plus some additional work to foundations et cetera) for a restaurant bar. He was provided with a purchase order in the name of Potting Shed Trading Ltd ("**Potting Shed**"). He anticipated that the total fees which this project would generate for himself could be in the region of £380,000.

(17) Whilst he has been partially paid for some of the work done to date, there is approximately £200,000 outstanding for which he is currently seeking recovery through his solicitors.

(18) In conjunction with his bookkeeper/accountant, Mr Smith has budgeted for a return (excluding the Potting Shed job) for the financial year ending in April 2019 of between £250,000 and £300,000, and hopes that it will be possible to generate a profit margin of more than 40% on this work. This is virtually exclusively manufacturing. The only fitting that is now undertaken at his behest involves superficial installation of his manufactured items.

(19) The appellant owns two properties, both of which are mortgaged.

(20) Mrs Humphreys did not know about the Japanese knotweed issues, nor about the trouble regarding the Potting Shed contract at the time that she authorised the notice of requirement to be served on the appellant, nor, subsequently, when she reviewed her decision. This information was not available, either, to the independent HMRC reviewer.

(21) The third option set out in the notice of requirement as to how the appellant could give security, namely opening a joint bank account with HMRC, is no longer available.

## **Submissions**

6. The respondents position is that:

(1) Security can be required if it is necessary to protect the revenue. The appellant represents a risk to the revenue because of his previous trading record and his history of non-compliance. The notice of requirement is both reasonable and proportionate.

(2) The tribunal's jurisdiction is supervisory and I can only overturn the decision to issue the notice of requirement if I think it was an unreasonable one. It was not. Mrs Humphreys arrived at a reasonable conclusion based on the information available to her.

(3) The amount of the security has been calculated in accordance with HMRC's published guidelines. The basis of the calculation is a PAYE/NIC bill of about £6,000 per month based on Bifold's records. If the figures have been based on those of the appellant when he started his sole trading business, the PAYE/NICs for the first few months of trade would have been in the region of £11,000 per month. So the appellant has done better than he ought strictly to have done.

(4) At the date of the appeal hearing, the appellant was still non-compliant. On the date of the hearing, £6,389.37 was owed to HMRC.



(5) The appellant has been disqualified as a director until 2020. He has also been asked to provide security for VAT.

7. The appellant's grounds of appeal are:

(1) He is sympathetic of the need for HMRC to protect its position given his track record, but he thinks that the amount of security required is excessive. He was thinking in terms £20,000. In any case however, he could not pay it. He cannot raise any more money against his properties. He is hoping that he will be paid for a few jobs in the next few weeks which will enable him to pay off some of the debt. If the Potting Shed issue is resolved in his favour, then he will be able to clear all his outstanding debts to HMRC. He wants to settle his tax debts. He accepts he cannot run away from them. He does not wish to be made personally bankrupt.

(2) He is paying VAT monthly which he had not anticipated.

(3) He has put number of controls in place, including; weekly meetings with his accountant and bookkeeper to forecast cash flow; implementing formal payment structures with customers; pricing site work with a retention; involving a factoring company to vet companies for any liabilities; daily meetings on various contracts with the site manager and factory manager; acting, in person, as site foreman and manager overseeing all of the jobs and file costings; working with blue chip companies.

(4) As a sole trader he is personally liable for all tax liabilities.

## **Discussion**

7. My jurisdiction in relation to the decision by Mrs Humphreys to authorise the original decision that the appellant should provide a security deposit and then authorise the issue of the notice of requirement, is clearly supervisory. I agree with HMRC's submissions in this regard and it is consistent with my view of the law – see [4] above.

8. The appellant has not challenged the reasonableness of the decision. Indeed he has accepted that given his compliance record, it is understandable that HMRC wish to protect itself.

9. His main contention is that the amount which is sought is excessive. He takes issue, too, with his involvement with Bifolds and does not consider that he was a shadow director there. But even if that is right and the Bifold's non-compliance is not due to him, then it still leaves over £500,000 owed to HMRC by businesses with which he was involved.

10. I must consider Mrs Humphreys position at the time that she made her decision. At that time she did not know of the appellant's misgivings regarding HMRC's view

of him as a shadow director of Bifolds. Indeed, notwithstanding that this was set out in the letter 12 October 2017 written by Officer Heppell who conducted the independent review, setting out the conclusions of that independent review, the appellant took no issue with it in his appeal to the tribunal of 3 November 2017. Given the appellant's involvement with businesses which had been serially non-compliant as regards payment of PAYE and NIC's over many years (since 2003), it is my view that Mrs Humphreys decision to request security from the appellant for PAYE and NIC was a reasonable one.

11. As regards the reasonableness of the amount of security, I think it was reasonable to base the PAYE and NIC's on the amounts owed by Biflex when it went out of business. Indeed, by so doing, the appellant may have done rather better than would have been the case had the figures been based on his first few months of trading as a sole trader. HMRC have a policy for calculating the amount of security (four months money) which they have applied this case. There is, in principle, nothing wrong with having such policy provided that it is used as a guideline. There seemed to be no circumstances known to Mrs Humphreys which might have caused her to diverged from such policy

12. There is a question as to whether hardship to the appellant is something which should have been considered by Mrs Humphreys. Judge Berner in *D-Media* thinks that it is relevant. At paragraphs 35 to 37 of his decision he says as follows:

“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.”

13. It is not clear from the evidence whether Mrs Humphreys considered hardship and the impact on the appellant's business when she came to her original decisions regarding the required for security. What is clear, however, is that she considered them when she reviewed her decision following the appellant's appeal. In that appeal the appellant states that "... As with all new businesses, the management of cash flow is paramount and the levels of bonds you suggest, would have a detrimental effect on my business. I am currently paying VAT on a monthly basis".

14. In her review conclusion letter of 28<sup>th</sup> July 2017, Mrs Humphreys states that "the aim of Security is to protect future revenue and not put taxpayers out of business. However, where a taxpayer's commercial practices present a risk to the collection of tax, it is reasonable for us to take steps to minimise that risk and ensure that tax legally due is paid".

15. It seems to me, therefore, that although Mrs Humphries might not have considered the impact on the appellant's business when she came to her original decision, she did consider it subsequently. I do not believe that her decision is flawed by any failure to consider it at the time of her original decision.

16. Having decided that Mrs Humphreys came to a reasonable decision, I now turn to the appellate jurisdiction conferred on me by PAYE Regulation 97V(5) and its NIC equivalent. I have three alternatives. I can confirm the requirements of the notice; I can vary those requirements or I can set aside the notice. Miss Morgan urged me that I should adopt the first alternative. That I should confirm the notice. Having considered the position I have decided not to do so and have instead decided to vary the requirements in the notice. I have done so for the following reasons:

(1) My appellate jurisdiction allows me to consider the position at the date of the hearing (unlike my supervisory jurisdiction which obliges me to consider the position which Mrs Humphreys found herself in when issuing the notice of requirement). I can therefore take into account all the evidence presented at the hearing.

(2) That evidence shows that at that date, the amount which would be required as security on the basis of the formula which HMRC applies (four months money) is significantly less than the amounts set out in the notice of requirement. The evidence is that at the date of the hearing, the amount would be £537.24 for PAYE and £2,025.54 for NICs, a total of £2,562.25.

(3) In his letter to HMRC of 19 October 2017 the appellant stated that

"At last I have actually realised. The fitting is a lot of hard work with very very little profit. I know sometimes it can eat into the profit of the manufacture.

I have now made the decision to do manufacture only when I have completed my present commitments to clients. With manufacture the work is all in-house, controlled under regular supervision with my own skilled tradesmen on my own site on PAYE. There are only 3 joiners in my joinery in Cardiff.

My turnover will half, my VAT bill will half and I leave I will make more profit with less headaches!!!!"

(4) The appellant has been true to his word. In his evidence (which was not challenged by HMRC) he indicated that he is now doing little significant fitting and has reduced the number of employees involved in manufacture to two. And he may let one of these go in the foreseeable future.

(5) This is reflected in the huge reduction in his PAYE and NIC "footprint" and in the amount of his outstanding liability for PAYE and NICs. This has come down from £39,231.96 as at 6 December 2017 (see paragraph 28 of the respondents' Statement of Case) to £6,389.37 at the date of the hearing.

(6) There is little point in saddling the appellant and his business with an obligation to provide security which he simply cannot afford to pay. Failure to pay an unaffordable amount would not be in HMRC's interests and would also render the appellant liable to pay a fine of up to £5,000. Based on the evidence I believe that this would be the case if I confirmed the requirements in the notice. Furthermore, given the current position, HMRC's own formula would result in the security being set at £2,562.25 (absent any outstanding tax liability).

17. I have therefore decided to vary the requirements in the notice of requirement. It is my decision that the amount of security should be set at £8,951.62. This comprises the outstanding PAYE and NIC debts of £6,389.37 (£2,420.80 for PAYE and £3,968.57 for NICs) together with security of £2,562.25 (£537 for PAYE and £2,025.05 for NICs). I understand that the £6,389.37 will be taken against the outstanding tax liabilities leaving the balance as ongoing security. It is my view that this provides adequate security to HMRC. Given the appellant's evidence regarding his ability to pay any security, I have also decided that the notice should be varied so that the date on which the security should be paid is extended from 30 days to 42 days.

## **Decision**

18. I allow the appellant's appeal against the notice of requirement given to him to provide security to the extent only of the requirement in respect of the amount of the security to be given and the date on which the security is due to be paid.

19. I vary the requirement in the notice as to the amount of the security required by substituting the sum of £8,951.62 for the sum set out in the notice of £31,348.69.

20. Subject to any appeal, the security is due on or before the 42nd day after the date of release of this decision.

## **Appeal rights**

21. 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.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 18 JANUARY 2019**

## APPENDIX

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

#### 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) .

#### 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.

#### 97O Employers

(1) The employer is any employer other than—

(a) the Crown,

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

(c) ...and

(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,
  - (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—

- (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.

### **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,
- (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
  - (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**

- (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.
- (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—
- (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
  - (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.

(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) .

(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.

(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.

(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**

- (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.
- (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
    - (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
  - (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.
- (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 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 ,
- (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 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 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
- (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—

- (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

(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

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

as the case may be.

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

### **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).

### **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, 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;

(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 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.

### **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

(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—

(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**

**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;
- (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
- (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).

(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**

**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.

(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—

(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

(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**

**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).

(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.

(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.
- (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**

**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.
- (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.
- (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;
  - (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
- (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
- (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—

- (a) sections 46D, 47B, 50(6) to (9) and (11)(c) and 54A to 57 were omitted; and
- (b) in section 48(1) —
  - (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**

**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**

**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)—

(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);

(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

(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—

(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.