



Neutral Citation: [2022] UKFTT 00208 (TC)

Case Number: TC08531

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2019/04164

NATIONAL INSURANCE CONTRIBUTIONS – Section 121C Social Security Administration Act 1992 – personal liability of a company officer for unpaid contributions – whether the company’s failure to pay contributions was attributable to the neglect of the Appellant who was the sole director of the company at the relevant times – yes – appeal dismissed

Heard on: 31 January 2022
Judgment date: 01 July 2022

Decided by:

TRIBUNAL JUDGE BAILEY

Between

DAVID HOWICK

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 31 January and 1 February 2022 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 following the Direction of Judge Hyde on 29 November 2021.

DECISION

INTRODUCTION

1. This appeal by Mr Howick (the “Appellant”) is against a Review Decision upholding a Personal Liability Notice making the Appellant personally liable for Class 1 National Insurance Contributions (“NICs”) that were due from a company named S P Surface Finishers Limited for the period 6 April 2015 to 5 August 2016.

2. The Personal Liability Notice was issued under Section 121C Social Security Administration Act 1992 (SSAA 1992), and the Appellant’s appeal is brought under the provisions of Section 121D SSAA 1992. The amount of NICs in dispute is £63,337.40, and statutory interest continues to accrue on this amount.

OUTCOME OF THIS APPEAL

3. As this is a long decision, it is appropriate to set out the outcome here:

- I am satisfied that HMRC have demonstrated the failures were attributable to the Appellant’s neglect. **Therefore, the Appellant’s appeal is dismissed.**
- If the Appellant wishes to consider a further appeal he should pay particular attention to the final paragraph of this Decision. This final paragraph explains to do, and the time limit, for seeking permission to appeal.

EVIDENCE BEFORE THE TRIBUNAL

4. Before the Tribunal was a document bundle prepared by the Respondents on the basis of the document lists filed by the parties. The Appellant filed a witness statement and, on behalf of the Respondents, Officer Bode Ayoola filed a witness statement and a supplementary witness statement. As this hearing took place on the papers, neither witness was able to give oral evidence or be cross examined on the matters set out in the statements.

FACTS

5. On the basis of the documents before me, I find as follows:

Background

6. In 1980, when he was in his late thirties, the Appellant was treated for testicular cancer.

7. By late 1998, the Appellant was employed as a senior printer. On unknown dates between late 1998 and 2008, the Appellant suffered three heart traumas, resulting in the diagnosis of a weakened heart sac. This ill health caused the end of the Appellant’s employment as a senior printer but (still in this period and still on unknown dates) he became director of another printing company. However, this venture proved unsuccessful, and the Appellant became bankrupt in 2008.

8. In March 2012, the Appellant was involved in a road traffic accident that resulted in damage to his spine and lower left leg. The Appellant subsequently underwent a bone graft operation in August 2021 but has had lower back pain as a result of the accident for which further treatment was given in 2018 and 2019.

9. In February 2013, the Appellant’s father died. The Appellant’s elderly mother has been dependent upon him since that date.

10. The Appellant’s second marriage was dissolved in January 2015.

Overview of the Appellant's involvement with various companies from 2015

11. From 2015 onwards, the Appellant became involved with a number of companies. It is not clear how all of these companies are related (if they are) or how the Appellant came to be involved in any of these businesses.

12. The first of the Appellant's appointments took place in April 2015.

13. A company named Charles James Associates plc had been incorporated on 14 July 2009, and the nature of its business was business support services. The directors in early 2015 were a Mr John Bailey and a Mr Peter Neagle.

14. On 13 April 2015, Charles James Associates plc bought 82 shares in a company called S P Surface Finishers Limited. The nature of S P Surface Finishers Limited's business was sheet metal and laser cutting.

15. The 82 shares bought by Charles James Associates plc were purchased from a Mr Joel Bacchus, who had been the previous sole director. Mr Bacchus resigned as a director of S P Surface Finishers Limited on 13 April 2015 but he retained 20 shares in the company.

16. Also on 13 April 2015, the Appellant was appointed as a director of S P Surface Finishers Limited. According to the records at Companies House, from 13 April 2015 onwards, the Appellant was the sole director of S P Surface Finishers Limited. (The Appellant has argued that Mr Bacchus played a greater role in the management of S P Surface Finishers Limited than his lack of any formal appointment would suggest, and I consider that below.)

17. Until 13 April 2015, Mr Bacchus had also been the sole director of a company called Anflow Limited. Anflow Limited had been incorporated on 3 December 1985, and the nature of its business was the renting and leasing of machinery and equipment.

18. On 13 April 2015, Mr Bacchus resigned as a director of Anflow Limited and the Appellant was appointed as a director. From 13 April 2015 onwards, the Appellant was the sole director of Anflow Limited.

19. So, from 13 April 2015, the Appellant was the sole director of both S P Surface Finishers Limited and Anflow Limited.

20. On 1 June 2015, the Appellant was appointed as a director of a company called Stanley L Hunt (Printers) Limited. Stanley L Hunt (Printers) Limited had been incorporated on 23 June 1949, and the nature of its business was printing. The other directors all resigned on 1 June 2015, and so, from 1 June 2015, the Appellant was the sole director of Stanley L Hunt (Printers) Limited. There does not appear to be any connection – other than the Appellant's involvement – between Stanley L Hunt (Printers) Limited and the other companies mentioned above.

21. On 13 July 2015, the Appellant was appointed as director of yet another company, this time a company called Saint Precision Engineering Limited. Saint Precision Engineering Limited had been incorporated on 2 August 2009. The nature of its business was engineering activities. The Appellant's appointment coincided with a resignation of another director, a Mr Matthew Sobel. Another director, a Mr Peter Neagle (who I find was the same Peter Neagle who was a director of Charles James Associates plc) remained for three days but, on 16 July 2015, Mr Peter Neagle resigned as a director of Saint Precision Engineering Limited. The Appellant was the sole director of Saint Precision Engineering Limited from 16 July 2015 onwards.

22. So, in the space of three months, the Appellant had been appointed to four directorships, and from 16 July 2015, he was the sole company officer responsible for the management and control of all four of these companies.

23. On 17 September 2015, the Appellant's appointments increased again when he was appointed as company secretary of Charles James Associates plc, replacing John Bailey.
24. Towards the end of the year the Appellant gained his sixth appointment. On 1 December 2015, the Appellant was appointed as a director of Precision Aircraft Limited. The previous directors of Precision Aircraft Limited were a Mr Jason Bailey and as a Mr Peter Williment, both of whom resigned on 1 December 2015. So, from 1 December 2015, the Appellant was the sole director of Precision Aircraft Limited.
25. On 21 December 2015, the Appellant resigned as director of Stanley L Hunt (Printers) Limited. This resignation came one day after the appointment of another director, a Mr Simon Du Plessis. Proceedings to wind up Stanley L Hunt (Printers) Limited began on 2 March 2016, and a voluntary liquidator was appointed on 17 March 2016. The company was ultimately liquidated.
26. On 15 April 2016, Saint Precision Engineering Limited went into administration, owing significant amounts to HMRC.
27. On 24 June 2016, the Appellant was appointed as director of a company called IO Electronics Limited. IO Electronics Limited had been incorporated on 28 February 2002, and its business was the manufacture of electronic and electric wires and cables. On 20 July 2016 (on the resignation of the other director, a Mr John Linnell), the Appellant became the sole director of IO Electronics Limited.
28. On 16 September 2016, the Appellant was appointed as a director of Charles James Associates plc. The other director, Mr Neagle, remained appointed until 17 March 2017.
29. On 21 October 2016, S P Surface Finishers Limited resolved to wind up on the basis that it could no longer meet its liabilities. A liquidator was appointed.
30. On 24 November 2016, IO Electronics went into administration, owing significant amounts to HMRC.
31. On 20 June 2017, Anflow Limited was dissolved, following a compulsory liquidation.
32. On 16 January 2018, Charles James Associates plc was wound up by court order.
33. In their Statement of Case HMRC have referred to a further five companies that the Appellant became an officer of in either late 2015 or during 2016. However, as no details of these companies appear in the documents bundle, I make no findings in respect of these appointments.

S P Surface Finishers Limited

34. Having taken that overview of the Appellant's appointments in 2015 and 2016, it is now necessary to look in more detail at the Appellant's involvement with S P Surface Finishers Limited, the company that is at the heart of this appeal. I start with the facts that are apparently not in dispute and then consider a dispute over Mr Bacchus's alleged continuing management of the company.

The facts not in dispute

35. As found above, on 13 April 2015, Mr Bacchus sold 82 of his 102 shares in S P Surface Finishers Limited to Charles James Associates plc. 20 shares were retained by Mr Bacchus.
36. As found above, the Appellant was appointed as a director of S P Surface Finishers Limited on 13 April 2015. I find, on the balance of probabilities, that this appointment was at the instigation of Charles James Associates plc following its purchase of the 80 shares from Mr Bacchus.

37. From June 2009, S P Surface Finishers Limited had used the services of Knight Company to assist with its payroll obligations. Each month Knight Company calculated the PAYE and NICs that was due and payable to HMRC by S P Surface Finishers Limited, and prepared a report that advised S P Surface Finishers Limited of the amount of PAYE and NICs that was payable and of the deadline for S P Surface Finishers Limited to make this payment. The letter for September 2015 (as an example) concluded:

Your remittance for the above should reach the HM Revenue and Customs by the 19th of the month. Therefore I would be grateful if you could forward your payment to HM Revenue and Customs as soon as possible.

38. At about April 2015 there were approximately ten employees on the payroll of S P Surface Finishers Limited. These employees include Mr Bacchus, a Mr Charles Phelan who had been company secretary until 2007 and a director until September 2013, and a Miss Alicia Phelan who acted as the company's financial controller. Mr Bacchus remained on the payroll until July 2016. Miss Phelan remained on the payroll until January 2016.

39. Until March 2015, S P Surface Finishers Limited deducted PAYE and NICs from the payments it made to its employees, and each month it paid those deductions over to HMRC. In 2013/14, all of these payments were made on time and in full, and otherwise met all statutory requirements. All payments of PAYE and NICs due in 2014/15 were also made on time and in full until April 2015; however, the payment that was due to be made to HMRC no later than 19 April 2015 was not made.

40. From April 2015 to July 2016, S P Surface Finishers Limited continued to submit on-time Real Time Information returns to HMRC. However, none of the PAYE and NICs that had been deducted from the employees' wages was paid over to HMRC. No PAYE or NICs payments were made in 2015/16 or 2016/17. NICs of £53,626.15 remains unpaid for 2015/16, and NICs of £10,491.01 remains unpaid for 2016/17.

41. During the period April 2015 to August 2016, S P Surface Finishers Limited paid £91,000 to Saint Precision Engineering Limited with those payments being described in the bank statements as "wages". This was a continuation of the practice that operated prior to April 2015.

42. Many of the payments in and out of the bank account of S P Surface Finishers Limited in the period April 2015 to July 2016 were to, or from, a company called Pulse Cashflow Finance 2 Limited, suggesting that the company had difficulties in managing its cashflow in this period and required factoring support.

43. The Appellant and HMRC were in discussions in March and April 2016 about the cashflow difficulties affecting Precision Aircraft Limited, but there is no evidence of any similar contact from the Appellant to HMRC regarding S P Surface Finishers Limited.

44. S P Surface Finishers Limited submitted VAT returns for the quarters 05/15, 8/15, 11/15 and 2/16. The VAT returns due for the quarters 05/16, 8/16 and 11/16 were not submitted, and so HMRC issued assessments for these quarters. The VAT return for 02/17 was a nil return. No VAT repayments was due to S P Surface Finishers Limited for any of these quarters. The final return submitted for S P Surface Finishers Limited showed a repayment due of £833.33.

45. HMRC have no record of any valid research and development claim being submitted by S P Surface Finishers Limited.

Did Mr Bacchus continue to play a role in the management of S P Surface Finishers Limited?

46. I have found that Mr Bacchus resigned as a director of S P Surface Finishers Limited on 13 April 2015, the day that the Appellant became director. From 13 April 2015 onwards, Mr Bacchus was not an officer of the company. HMRC's case is that Mr Bacchus told them he has suffered a stroke that required him to sell the business and he had no involvement after 13 April 2015.

47. However, the Appellant has stated, in his witness statement, that Mr Bacchus was on site every day until he had his stroke in order to protect the investment of his remaining 20 shares, and that Mr Bacchus was on the company premises more often than the Appellant himself was. This assertion about Mr Bacchus's presence is consistent with the Appellant's HMRC questionnaire response that the "general manager" only left after a "major stroke" which took place at an unspecified date. This appears to be a suggestion from the Appellant that, despite Mr Bacchus holding no official role, Mr Bacchus was, in fact, still running the company until the date of his stroke.

48. It does not appear to be in dispute that Mr Bacchus did have a stroke at some point, but the parties do not seem to be in agreement about whether this was before or after 13 April 2015.

49. If, as Mr Bacchus told HMRC, the stroke was the impetus for him to sell his shares in S P Surface Finishers Limited, then that stroke must have occurred before 13 April 2015. No other reason has been suggested for why Mr Bacchus (who was 59 in 2015, three years younger than the Appellant and, prior to his stroke, in apparently good health) would want to sell four fifths of his shares in S P Surface Finishers Limited.

50. The Appellant has suggested that Mr Bacchus would not have had the capacity to negotiate a sale share if the damage from his stroke were that great. However, neither party has provided any documents relating to the sale share in April 2015. It is impossible to know to what extent Mr Bacchus was represented by an agent, a family member or a friend. I do not consider this factor to be determinative, and I make no findings in this regard.

51. I also note that the Appellant has demonstrated confusion about the dates for other major events (stating to HMRC that his heart attacks, his car crash, and his father's death all occurred in the period April 2015 to July 2016 but stating in his witness statement that these events occurred in 1998 to 2008, 2012 and 2013.)

52. I find, on the balance of probabilities, that, as Mr Bacchus told HMRC, this sale was prompted by Mr Bacchus suffering a stroke prior to April 2015 that required 12 months of rehabilitation and resulted in the eventual sale of his home. Taking all of these matters into account, I find, on the balance of probabilities, that Mr Bacchus's stroke occurred before 13 April 2015.

53. I have considered whether it is possible Mr Bacchus might have been able to attend the premises of S P Surface Finishers Limited after 13 April 2015 and following a stroke that required twelve months of rehabilitation. I have concluded that it is not likely that a person who had suffered a major stroke requiring months of rehabilitation would be physically able to attend a place of work every day.

54. That does not mean that I consider Mr Bacchus had no continuing connection to S P Surface Finishers Limited after 13 April 2015 but the evidence available points to, and I find, Mr Bacchus's role being only as a passive recipient of payments. The insolvency practitioner informed HMRC (and I find) that Mr Bacchus remained on the payroll of S P Surface Finishers Limited and that he was an employee until July 2016. The payroll report in the bundle showed that Mr Bacchus was receiving a wage as late as September 2015. In addition, between

September to December 2015, and in February and July 2016, S P Surface Finishers Limited paid Mr Bacchus, the former director, the sum of £2,222 each time. These payments were described in the bank statements as being “share payments” and I find, on the balance of probabilities, that these payments were deferred consideration for the share purchase. The Appellant suggested that the sum of £599.43 that was paid each month to the director’s loan account was also intended for Mr Bacchus. This is supported by the insolvency practitioner who informed HMRC that these payments to Mr Bacchus were to repay a loan. However, remaining on the payroll and receiving other payments, even via a director’s loan account, does not mean that Mr Bacchus played any part in the management of S P Surface Finishers Limited or that he attended the company premises.

55. The Appellant has not offered any suggestion of why, if Mr Bacchus remained in control of S P Surface Finishers Limited for some or all of the period from April 2015 to July 2016, there should be any change to the company practice with regard to the payment of PAYE and NICs.

56. I find, on the balance of probabilities, that Mr Bacchus did not attend the premises of S P Surface Finishers Limited after 13 April 2015, either at all or to any significant degree, and that Mr Bacchus was not involved in the control or direction of the company after 13 April 2015.

HMRC enquiry into the failure of S P Surface Finishers Limited to pay NICs

57. On 4 April 2018, HMRC wrote to the Appellant and his then agent to advise them that they had opened an enquiry into the Appellant’s potential personal liability for the NICs that were owed by S P Surface Finishers Limited. A director’s questionnaire was sent to the Appellant. On the same date HMRC wrote to the insolvency practitioner appointed in respect of S P Surface Finishers Limited asking to see various company books and accounts.

58. On 30 April 2018, the Appellant sent an email to HMRC with his replies to their questionnaire. In this email the Appellant stated that:

- he was a director of S P Surface Finishers Limited
- he had no financial or payroll responsibilities but that there were no other people involved in the management of the company or its finances
- he was responsible for hiring and firing staff but did not, in fact, hire or fire anyone
- the authorised signatory to the company bank account was “the previous owner” Mr Bacchus
- he did not know who was authorised to make online payments from the company’s bank account but that this might have been Mr Bacchus
- there was no system of checks in respect of payments made from the company bank account
- creditors were paid when the payment fell due, sometimes sooner and sometimes later, and that he had the final say on giving instructions for these payments to be made
- he had regular SAGE management reports but struggled to get a clear picture of the financial position due to Mr Bacchus having “made a mess of the system”
- he was aware that the company was in financial difficulties when he was appointed, and these difficulties arose due to loss of sales, the overheads of finance agreements and Mr Bacchus’s departure from the business

- the book keeper ran payroll and that payroll reports were circulated weekly and filed
- the person with actual responsibility to make payments to HMRC was:
 - between myself and the book keeper / office manager but cashflow (our lack of it) determined what was paid
- the checks he had made to ensure that PAYE and NICs was actually paid to HMRC each month were against management accounts and cross checked against HMRC reminders
- he did not know what PAYE or NICs had been paid as he had no files to refer to, and that lack of records also meant that he did not know when he personally first became aware of the company's failure to pay PAYE and NICs
- the action he had taken to remedy the PAYE/NICs deficiencies was to discuss the issue with the appointed insolvency practitioner, and
- there were no financial transactions were associated companies, there were no loans to him or any other company officer, and no company payments to him in the six months preceding the liquidation

59. In response to the question: What do you understand to be the statutory duty and responsibility of the company and you as a director, in respect of payment of PAYE and NIC deducted from employee wages to HMRC? the Appellant replied:

I was responsible for managing the company. There were huge VAT liabilities due to these being miscalculated against equipment finance. If the company had continued the agreement were unwound so the VAT due on these would (as I understand it) being credited. Hence the VAT liability would have been nearly nil. PAYE was a few months in arrears but I am aware that HMRC offer time to pay arrangements so this is obviously a common issue whereby cashflow prevents the PAYE/NI contributions to be paid on time.

60. On 9 May 2018, the insolvency practitioner provided HMRC with the records that were available at that time. There was further correspondence and a meeting between HMRC and the insolvency practitioner to discuss the records available. HMRC's note of this meeting (which I accept as being accurate) is that the insolvency practitioner did not consider the Appellant to have been particularly co-operative as he had failed to return questionnaires sent to him.

61. On 4 July 2018, HMRC wrote again to the Appellant seeking more information. HMRC also wrote to Mr Bacchus and two former employees: Mr C Phelan and Miss A Phelan, with the aim of establishing the person or persons who were in charge of S P Surface Finishers Limited from 13 April 2015. It does not appear that either Mr or Miss Phelan replied to HMRC

62. HMRC spoke to Mr Bacchus by telephone on 12 July 2018. Mr Bacchus informed HMRC that his stroke had compelled him to sell his shares and that he did not recall having any involvement with the company after 13 April 2015.

63. On 12 July 2018, the Appellant replied to HMRC. In his response the Appellant stated that:

The facts are that prior to my appointment, the previous owner dismissed the company book keeper who [accounted for PAYE and NICs]

- there had been numerous conversations with HMRC about time to pay arrangements
- the loss of clients and the leasing liability that had not been disclosed on purchase of the company led to the failure of S P Surface Finishers Limited

- there was a VAT refund due that could have offset the PAYE/NIC liability

64. In respect of these replies by the Appellant, I find that Knight Company were not dismissed prior to the Appellant's appointment, and that Knight Company continued to provide monthly reports on the PAYE and NICs payable; the September 2015 report is quoted above. I have already found that there were no conversations between the Appellant and HMRC in respect of time to pay arrangements for S P Surface Finishers Limited although there were such conversations regarding Precision Aircraft Limited. I have also found that the only VAT refund due to S P Surface Finishers Limited arose from the final VAT return submitted, and that was after the period April 2015 to August 2016.

65. Following the responses of the Appellant and Mr Bacchus, HMRC conducted analysis of their own systems and cross checked this against the information that had been provided to them. On 16 October 2018, HMRC wrote to the Appellant with their findings thus far, which was that the Appellant had been negligent. The Appellant was invited to make representations within 28 days.

66. On 13 December 2018, the Appellant's current agent informed HMRC that he had been instructed, and he requested an extension of time to comment. This was agreed. A further extension was then sought by the agent but no representations were made at this time.

67. On 4 February 2019, HMRC Officer Bode Ayoola issued a letter to the Appellant stating that the Respondents had concluded their enquiries into the failure of S P Surface Finishers Limited to pay NICs to HMRC. The Appellant was informed that the Respondents intended to issue him with a Personal Liability Notice for the tax years 2015/16 and 2016/17 on the basis that his neglect had led to the non-payment of the NICs and that no other person was acting as an officer of the company at the relevant time. A copy of this letter was sent to the agent.

68. On 6 March 2019, the Appellant's then agent appealed to HMRC on behalf of the Appellant. The basis on which the Appellant appealed to HMRC was that:

- The failures to pay the NICs were caused by his lack of experience, training or knowledge, and that he had no formal qualifications
- The company's inability to pay the NICs were caused by the usual unpredictability of commercial life, that VAT refunds had been delayed and two Research and Development claims were not recognised although the company's advisors considered them to be valid.
- A major cause of the Appellant's errors was his ill health and that:
 - During the period of my involvement with S. P. Surface Finishers Limited I suffered a heart attack, skin cancer and a car accident that left me permanently disabled. My father also died during this period.
- He had only recently been discharged from bankruptcy, and had no assets to pay the amount required.

69. On 11 March 2019, Officer Ayoola issued his view of the matter to the Appellant and offered the Appellant a review of his decision. Officer Ayoola also invited the Appellant to provide any evidence relating to his ill health and other personal circumstances over the period when NICs had not been paid. On 8 April 2019, the Appellant accepted the offer of a review.

70. On 14 May 2019, HMRC Officer Sleight issued a review decision to the Appellant, upholding the personal liability notice.

71. On 11 June the Tribunal received the Appellant's Notice of Appeal. The Appellant's grounds of appeal were similar to those submitted to HMRC. The Appellant expanded on the final ground to argue that his bankruptcy showed his lack of commercial acumen.

DISCUSSION AND DECISION

72. The relevant parts of Section 121C(1) SSAA 1992 provide:

(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 Secretary of State--

(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.

73. In an appeal against the imposition of a personal liability notice imposed under Section 121C SSAA 1992, the onus is on HMRC to demonstrate the matters set out in Subsection 121C(1). Therefore, HMRC must demonstrate, on the balance of probabilities that:

- there was a failure of S P Surface Finishers Limited to pay NICs in the period April 2015 to July 2016, and
- that failure was attributable to the neglect of the Appellant, and
- the Appellant was an officer of S P Surface Finishers Limited at the relevant time.

74. It follows from the facts I have found that I am satisfied that there was a failure by S P Surface Finishers Limited to pay the NICs due for the period April 2015 to July 2016. I am also satisfied that these amounts remain outstanding.

75. I am satisfied that the Appellant was an officer of S P Surface Finishers Limited during the period April 2015 and July 2016, and also that he was the only person who was an officer of S P Surface Finishers Limited during this time.

76. The only point remaining for HMRC to demonstrate is whether the failure of S P Surface Finishers Limited was attributable to the neglect of the Appellant.

77. In support of their case HMRC argue that:

- As the only director of S P Surface Finishers Limited, the Appellant had a statutory obligation to pay over the NICs that was due to HMRC each month,
- Knight Company advised S P Surface Finishers Limited of the amount of NICs payable each month and the deadline for payment,
- The Appellant had responsibility for choosing when and who to pay,
- The NICs were deducted from the wages paid to the employees of S P Surface Finishers Limited,
- The Appellant had confirmed he checked management accounts and so would have been aware of the failure to pay NICs to HMRC,
- PAYE and NICs were paid in full each month prior to the Appellant taking over the running of S P Surface Finishers Limited but no PAYE or NICs was paid as soon as the Appellant took over,
- The Appellant chose for S P Surface Finishers Limited to make payments to other creditors, to employees and former directors and to another company (Saint Precision Engineering Limited) of which he was a director, and
- Lack of available funds is not a valid reason for failing to pay PAYE or NICs, but in any event S P Surface Finishers Limited did have funds available.

78. In response the Appellant argues that he was not negligent but instead:

- the failures of S P Surface Finishers Limited to pay the NICs were caused by his lack of experience, training or knowledge, and his lack of commercial acumen is evidenced by his recent discharge from bankruptcy, and
- The company's inability to pay the NICs were caused by the usual unpredictability of commercial life.

What constitutes neglect?

79. It is relevant for me to set out the test that I propose to apply when considering whether there was neglect on the part of the Appellant.

80. HMRC have referred to *HMRC v O'Rorke* [2013] UKUT 0499 (TCC). In this case the Upper Tribunal considered what test should be applied when considering whether there was neglect. The Upper Tribunal held that the relevant test was objective: a standard of conduct, not a subjective state of mind. This tribunal is bound by decisions of the Upper Tribunal.

81. As the Upper Tribunal stated, that objective standard of conduct was summarised long ago by Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch. 781 at 786:

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.

82. Therefore, in considering whether the failures were attributable to the Appellant's neglect, I apply an objective test: did the Appellant meet the standard to be expected of a reasonable and prudent man in those circumstances?

83. I have considered this at great length and I have concluded that HMRC have succeeded in demonstrating that the failures of S P Surface Finishers Limited were attributable to the Appellant's neglect. In the circumstances of this case, the Appellant did not meet the standard to be expected of a reasonable and prudent man.

84. I agree with HMRC that the Appellant was in a position to ensure that the NICs that were due from S P Surface Finishers Limited were paid over to HMRC. The Appellant had access to the monthly Knight Company reports that informed him of the amount of PAYE and NICs to pay and the deadline for payment. The Appellant was aware from management reports that no PAYE or NICs was being paid each month, and the Appellant chose who was paid and when. Although the Appellant says that he was not previously involved in the operation of PAYE and NICs, most people have a basic understanding of the way that PAYE and NICs are deducted from wages and paid over to HMRC. The Appellant had previously been an employee and would have had such deductions from his own wages. A reasonable and prudent man would have understood that PAYE and NICs must be paid to HMRC each month, and would have ensured that both were paid. The Appellant fell short of this standard.

85. Although the Appellant has referred to the absence of any training, the Knight Company reports made it very clear what was required of S P Surface Finishers Limited each month. If the Appellant considered he still required additional training, he could – as the reasonable and prudent man would have done – have sought advice from others or organised such training for himself. The Appellant was aware of his lack of training, and that he would be solely responsible for the company, when he accepted the appointment. I also bear in mind that the failures took place over the entirety of April 2015 to August 2016. The Appellant clearly had more experience at the end of this period than he did at the beginning but there is no evidence that the Appellant made any attempt to pay in any month or that he changed his practice as he gained experience.

86. The Appellant has argued that S P Surface Finishers Limited's failures to pay the PAYE and NICs due were due to the usual unpredictability of commercial life. I do not agree that this was the case. Although there were times when S P Surface Finishers Limited had cashflow issues, the company was able to make payments to other people, and I agree with HMRC that the bank statements demonstrate that the Appellant could have chosen to pay (at least some of) the NICs to HMRC. In addition, the factoring arrangement with Pulse Cashflow Finance 2 Limited gave S P Surface Finishers Limited a source of funds that it could draw upon when it had cashflow difficulties. The reasonable and prudent man would have used this factoring arrangement to ensure that S P Surface Finishers Limited's statutory responsibilities were met.

87. The Appellant has also argued that a major cause of his errors in his management of S P Surface Finishers Limited was his ill health, constant pain and the emotional distress of his father's death and his second divorce. I do not doubt that all of these are limiting. However, I have found that all of these events predated the Appellant's decision to become a director of S P Surface Finishers (and of all the other companies) in 2015 (and 2016). For example, the car crash in which the Appellant was badly injured took place in March 2012, over three years earlier. Therefore, in April 2015 when the Appellant made the decision to become a director, the Appellant was fully aware of his own personal circumstances and the level of pain which he had to endure each day.

88. The Appellant was also aware, having previously been a director of a printing company which collapsed in 2008, that being a director carries considerable responsibilities. The

Appellant stated that he accepted the director appointments in an effort to improve his life, but the Appellant has not explained in what way he considered it would be an improvement to his life for him to take on, by himself, the considerable responsibilities of running a company operating in a field (engineering) in which he had no previous experience. Therefore, this is not a case where a person has accepted a role but subsequent events have made it harder for that person to carry out their responsibilities, in a way that could not have been foreseen at the beginning. The Appellant has known from the outset what was expected of him, and he has also known from the outset whether his pain and emotional distress left him with the capacity to carry out those responsibilities. A reasonable and prudent man either would not have taken on responsibilities he could not manage, or (if he had misjudged his limitations) he would quickly take steps to obtain help once he realised he could not manage alone.

89. I have considered whether I would have reached a different conclusion if I had found that Mr Bacchus's stroke occurred after 13 April 2015, and that Mr Bacchus was attending the company premises until the time of his stroke. I have decided it would not make a difference. Mr Bacchus was not a director after 13 April 2015, and so he was not an officer of the company. The Appellant was the only company officer and the Appellant could not delegate the responsibilities of being director. Even if it was the case that Mr Bacchus had been asked by the Appellant to be in charge of the day to day management of the company (which, for the avoidance of doubt I do not consider occurred because it would not explain why the company suddenly stopped paying the PAYE and NICs as soon the Appellant was appointed), it would still remain the Appellant's responsibility to check that this was being done properly, and to check that all of his and the company's responsibilities were being met. Failure to check and supervise employees mean that the Appellant would still have failed to meet the standard of a reasonable and prudent man.

90. I have noted that the Appellant has stated that he does not have the funds to pay the amount due under the Personal Liability Notice. Unfortunately for the Appellant, lack of funds is not a reason to allow an appeal against a Personal Liability Notice.

91. I have also noted that the Appellant informed the Tribunal in 2021 that there was a concern that the testicular cancer he was treated for in 1980 could have returned. That is obviously a matter of very great concern for the Appellant, and it was the reason for the Tribunal agreeing to this appeal being heard on the papers. However, that serious issue also does not affect the issues that were determined in this appeal.

CONCLUSION

92. HMRC have demonstrated the failures of S P Surface Finishers Limited to pay NICs were attributable to the Appellant's neglect. Therefore, this appeal is dismissed.

93. As the Appellant was the only officer of S P Surface Finishers Limited during the period 13 April 2015 to 5 August 2016, it is appropriate for the sum specified in the Personal Liability Notice to be equal to all of the NICs that were due from S P Surface Finishers Limited in that period and that remain outstanding.

94. The Personal Liability Notice is confirmed in the figures issued.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

95. 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.

**JANE BAILEY
TRIBUNAL JUDGE**

Release date: 04 JULY 2022