TC02110

Appeal number: TC/2010/8375

NATIONAL INSURANCE CONTRIBUTIONS - section 121C Social Security Administration Act 1992 – personal liability notice – liability of director for company's contributions – fraud or neglect on the part of a director – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN PETER SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
CHARLES BAKER

Sitting in public at Bedford Square, London on 30 April 2012

Len Jacobs, an officer of HM Revenue and Customs, for the Respondents

The Appellant failed to attend the hearing and was not represented, but the Tribunal proceeded with the hearing, being satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed.

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DECISION

1. This is the appeal of Mr John Peter Smith against the decision of the HMRC to issue a personal liability notice in respect of unpaid national insurance contributions ("NICs") of Wadkin Limited ("Wadkin").

2. Mr Smith did not attend the hearing and was not represented. On 27 April 2011 the Tribunal wrote to the parties seeking their dates to avoid for the hearing of this appeal. Mr Smith replied by e-mail on 7 June 2011 (giving a post office box in Fiji as his address) stating it was unlikely that he would be able to afford to return to the UK until before next year. On 21 June 2011 the Tribunal issued directions permitting Mr Smith to give evidence by videolink, but that otherwise the hearing of the appeal would take place in his absence. Further directions given on 21 June 2011 provided for Mr Smith to provide written representations along with supporting documents. Notice of the hearing was sent to Mr Smith on 17 January 2012 both by post to his Fiji address and by e-mail - more than three months before the hearing date. At the hearing, a videolink was prepared – but Mr Smith had not provided the Tribunal with connection details for the videolink. As Mr Smith had also not provided the Tribunal with his telephone number in Fiji, we were unable to have the clerk telephone him. However, we were told by Mr Jacobs that HMRC had been in contact with Mr Smith and Mr Smith had provided him with written submissions which were included in the bundle. He believed that Mr Smith did not intend to appear at the hearing. In the circumstances, we were satisfied that Mr Smith had been notified of the hearing and that it was in the interests of justice to proceed in his absence.

3. Before us were bundles of documents which included witness statements by Mr Andrew Pawley, an officer of HMRC, and the written representations (and accompanying documents) from Mr Smith that he had sent to HMRC. There being no objection from Mr Smith to Mr Pawley's witness statements, we accepted them in evidence. Mr Pawley was the HMRC officer responsible for making the decision to issue the personal liability notice.

Appeal

4. This is an appeal against a personal liability notice that was issued to Mr Smith on 15 September 2010 under section 121C(2) of the Social Security Administration Act 1992 ("the Act"), following a decision under section 8(1)(h) of the Social Security Contributions (Transfer of Functions etc.) Act 1999. The personal liability notice states that the amount of unpaid NICs due from Wadkin was £229,194.14 plus interest of £2,269,14, and that pursuant to section 121C(3)(a) of the Act, Mr Smith is required to pay this amount to HMRC.

5. Section 121D of the Act provides that an individual who is served with a personal liability notice may appeal to this Tribunal against HMRC's decision as to the issue and content of the notice. Mr Smith issued a notice of appeal dated 14 October 2010. The grounds for appeal given in the notice fall under the following three broad headings:

(1) that Mr Smith did not accept that he was the sole culpable officer;

(2) that Wadkin's inability to pay the NICs was not attributable to any fraud or neglect on the part of Mr Smith; and

(3) that the decision to issue a personal liability notice was unreasonable.

6. Section 121D(4) of the Act provides that on an appeal under section 121D, the burden of proof as to any matter raised by a ground of appeal shall be on HMRC. For HMRC to succeed in this appeal, they must prove, on the balance of probabilities, that Wadkin's failure to pay NICs was attributable to the fraud or neglect of Mr Smith.

Background Facts

7. On the basis of the evidence before us, we find the background facts to be as follows.

8. Wadkin Ultracare Limited ("Ultracare") was incorporated on 12 March 2001 under number 04177852, and was a subsidiary of Wadkin Group Limited, a company under the control of Mr Smith. Mr Smith was appointed a director on 17 May 2001. It would appear that Ultracare commenced trading at about this time, as that was also the date on which the representatives of the company registration agents resigned. In August 2007 the directors sought professional advice from accountants in relation to the solvency of the company. It was concluded that the company was insolvent and should be placed into some form of formal insolvency proceedings, and a company voluntary arrangement was considered.. However it appears that the consents necessary for a CVA were not forthcoming, and Ultracare went into administration on 20 September 2007. In November 2007 the administrators sold its business and assets to TMCD Limited (a company controlled by Mr Smith). At the date Ultracare went into administration, it owed £1,015,000 to HMRC in respect of PAYE and NICs. Ultracare went into creditors' voluntary liquidation on 11 September 2008.

9. TMCD Limited ("TMCD") was incorporated on 8 August 2007 under number 06337154, and commenced trading at the beginning of November 2007 when it acquired its business and assets from the administrators of Ultracare. Mr Smith was appointed a director on 7 November 2007. From 21 December 2007 until 24 October 2008, TMCD's name was "Wadkin Limited". In September 2008 the directors sought professional advice from accountants in relation to the solvency of the company. It was concluded that the company was insolvent and should be placed into administration. TMCD went into administration on 23 October 2008. Immediately prior to the appointment of the administrators, Mr Smith indicated that he would be interested in acquiring its business and assets. The administrators negotiated a sale of the business to Wadkin for £70,000, of which £40,000 was paid on completion and £30,000 deferred until 23 January 2009. A professional valuation of the business was undertaken, and the valuers recommended that the offer by Wadkin be accepted. The sale was completed on 23 October 2008. The TMCD administrators took a debenture over the chattels sold to Wadkin as security for payment of the deferred consideration. At the date TMCD went into administration, it owed £229,101.59 to HMRC in respect

of PAYE and NICs. TMCD went into creditors' voluntary liquidation on 26 March 2009.

10. Wadkin was incorporated on 15 September 2008 under number 06697317 and commenced trading on 23 October 2008 on completion of the acquisition of TMCD's business from its administrators. At all material times there were two directors, Mr Smith and Mr Derek Sayer. Mr Sayer was appointed as a non-executive director on behalf of a trust which was one of the major shareholders in the company, but he did not have any executive role and was not (for example) a signatory on any of the bank mandates. Since 16 December 2008 Wadkin has not had a company secretary.

11. When Wadkin was incorporated, because Mr Smith did not have any financial qualifications and given the financial problems of TMCD, he was advised to appoint a qualified accountant to manage Wadkin's finance department. Anthony Simmons was recruited as financial controller through an employment agency that specialised in financial appointments.

12. A bank account was opened with Alliance and Leicester Commercial Bank and a factoring facility was established with Skipton Business Finance. The only persons who were signatories on the Alliance and Leicester bank mandate were Mr Smith and Mr Simmons, and both their signatures were required on cheques. In addition Wadkin had an internet banking facility to allow for electronic payments (such as payments of wages through BACS). Mr Smith was the only authorised user of the internet banking facility. Because Mr Smith was regularly away from the office travelling on business, Mr Smith regularly signed blank cheques so that payments could be made on time. In addition he gave details of his internet banking login and password to members of the finance department. Mr Smith states that "stupid as it may be but I am sure a lot of businesses practice the same policy". Mr Smith stated that he was confident that all payments made were cross-checked within Wadkin's finance department (in particular with one employee whom he had known for ten years and had no reason to question her loyalty or honesty).

13. Mr Smith states that Mr Simmons was instructed to incorporate two companies, Wadkin (which was a "service" company with "out" engineers) and SMC Limited ("SMC") (which was a manufacturing company), this was because Mr Smith was unsure of the viability of the manufacturing operations because of the availability of cheap Chinese imports and the then economic situation. He therefore wanted to ensure that if the manufacturing operations proved in the end not to be viable, SMC's failure would not pull down Wadkin's profitable service business. Mr Simmons was therefore instructed to establish separate ledger and payrolls for the two companies. Mr Simmons advised Mr Smith that in order to do this, he needed bespoke accounting software written for the business, and not the "off the shelf" software used by TMCD, and that he knew an individual who could write this software at the same cost as the licence fee charged by the company that provided the accounting software for TMCD (who would charge Wadkin a new licence fee for the use of their software). The board of Wadkin approved Mr Simmons' recommendation. One consequence of this decision was that the former software supplier terminated its licence. Therefore until the new accounting software became available, Wadkin was unable to prepare

management accounts. Mr Simmons promised the board that he would produce management accounts by December, and in the meantime key information would be provided to the board.

14. In December 2008 Mr Simmons requested leave of absence as he had to deal with some issues that had come about as a result of his previous employment in Jamaica. When Mr Simmons returned, he was asked to make sure that management accounts would be available – but blame was placed with the software developer for failing to produce the accounting software system. This situation continued into February 2009 when Mr Simmons was given a deadline to produce management accounts by the end of the month. Mr Simmons then told Mr Smith that the court proceedings in Jamaica had not concluded, and he would need to return. Mr Simmons stated that he was days away from producing management accounts, and that these could be completed remotely whilst he was away. However Mr Simmons never produced any management accounts, and his employment was terminated by letter dated 3 April 2009.

15. Ms Sharon Raey was then engaged as financial accountant, but on a part-time basis as she had a young child. There is no evidence that Mr Simmons was replaced on the bank mandate, and from April 2009, it would appear (and we find) that Mr Smith was the sole signatory on the bank account (as well as continuing to be the sole authorised user of the internet banking facility).

16. Mr Smith says in his statement that he only learned in March 2009 (following the preparation of "flash" accounts by Ms Raey) that nil returns for PAYE and NICs had been submitted by SMC for the periods up until December 2008, on the basis that SMC had made no supplies and had not made any payments to employees. Although the personnel records apparently reflected the split in the employees between SMC and Wadkin, Mr Simmons had recorded in the financial ledgers that all payments had been made by Wadkin. Although purchases of materials were being made in the name of SMC, all payments were settled by Wadkin. Therefore no personnel were paid by SMC and no VATable transactions were concluded by SMC, allowing Mr Simmons to file nil PAYE and VAT returns for SMC. Wadkin had made no returns for either PAYE/NICs or VAT, even though it had paid employees, paid suppliers and invoiced customers.

17. In his statement to the tribunal, Mr Smith says that he instructed Ms Raey produce a set of accounts for the board and to contact HMRC to discuss the implications and report back to the board. Management accounts for the period to March 2009 were produced to the Wadkin's board at its meeting on 2 June 2009. The board minutes run to nine pages, including the following minute:

> "HMRC - Sharon [Ms Raey] opened discussions in this respect. Tony Simmons had submitted a nil return for the period up until the end of December 2008. Sharon calculates that for the period 1 November 2008 through 5 April 2009 the outstanding debt is £217,000 – this figure includes the October 2008 payroll liability. Sharon is set to pay £28,000 on the due date and is liaising with HMRC. There is currently £85,000 in VAT undeclared.

> Derek Sayers wonders what the response from HMRC will be pointing out that Wadkin has used the Revenue to fund its losses twice before. Peter Smith commented that this was not done intentionally and no one could have anticipated the market. Derek highlighted that Wadkin has to take the initiative with the Revenue which it was acknowledged is what Sharon has done.
>
> During the meeting Sharon was contacted by the Inland Revenue who requested a cash flow and some other paperwork. They have requested a telephone call on 9th June, and have asked that Sharon gives a progress report and a payment schedule."

18. The minutes also refer to several other overdue debts – including an employment agency, a landlord, Coalville Council, Lombard and Standard Life for employee pension payments. It is stated in the minutes that the trading forecast indicated sufficient cash for day-to-day obligations, but insufficient to satisfy the large outstanding creditors. It is clear that the company was insolvent, being unable to meet all of its liabilities as they fell due. The minutes of subsequent board meetings included in the evidence before use show that, notwithstanding Wadkin's financial position, the directors allowed it to continue to trade for a further six months, somehow meeting its immediate day-to-day obligations, and hoping that HMRC would agree to an instalment arrangement for its outstanding tax liabilities (which were steadily increasing, as it had made only one part payment towards these (see paragraph 20 below).

19. Ultimately, Skipton Business Finance froze Wadkin's invoice discounting facilities, and Wadkin ceased trading. The company went into creditors' voluntary liquidation on 12 January 2010. The statement of affairs shows that the amount owing to HMRC in respect of PAYE and NICs as at that date was £449,803.

20. In the period from when Wadkin commenced trading in October 2008, until it went into liquidation, although it deducted PAYE and NICs from payments of wages made to its employees, it only made one payment in respect of PAYE and NICs to HMRC, being £15,204.11 on 6 July 2009. In spite of the apparent precision of this payment, it did not correspond to any of the monthly liabilities. Indeed, it was only a little over one-half of a typical month's liability.

21. Following Wadkin's liquidation, Mr Pawley opened an enquiry into Wadkin's PAYE and NICs compliance. On the basis of Wadkin's payroll records, Mr Pawley determined that £114,949.15 was owed by Wadkin in respect of unpaid NICs for the tax year 2008/09 and £114,244.99 was owed in respect of 2009/10. On 15 September 2010 a personal liability notice was issued under Section 121C(2) Social Security Administration Act 1992 requiring Mr Smith to pay £229,194.14 in respect of unpaid Class 1 National Insurance Contributions due from Wadkin plus interest of £2,269,14. On 14 October 2010, Mr Smith appealed against the decision to issue the Notice.

22. We note that the personal liability notice is expressed on its face to be for NICs arising in the period from 6 April 2008 to 5 December 2009, which includes a period prior to Wadkin commencing to trade. However we were assured by Mr Pawley that the date reflected the date on which the 2008/09 tax year commenced, and the

underlying calculations (which were not in dispute) had been based on the payroll records of the company over the period during which it had traded.

The Law

23. Section 121C(1) and (2) of the Act, provide as follows

> (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.

24. "Officer" is defined in sub-section (9) as follow:

> "officer", in relation to a body corporate, means—
>
> (a) any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act as such; and
>
> (b) in a case where the affairs of the body corporate are managed by its members, any member of the body corporate exercising functions of management with respect to it or purporting to do so;

25. Under section 121D(4) of the Act, the burden of proof as to any matter raised by a ground of appeal is on HMRC.

26. For HMRC to succeed in this appeal, they must prove, on the balance of probabilities, that:

(1) Wadkin's failure to pay NICs was attributable to the fraud or neglect of Mr Smith; and

(2) Mr Smith was the sole culpable officer.

27. Neither "fraud" nor "neglect" are defined for the purposes of the Act. As to the meaning of neglect, we were referred by HMRC to the decision of Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781 at 786, where he says

> "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."

28. The tax tribunals have in many decisions drawn attention to the problems of applying a very old decision relating to the tort of negligence to modern tax statutes. In general the tribunals have taken the view that negligence (and neglect) in the context of tax statutes means to act in an imprudent or unreasonable manner. In other words this is an "objective" test, comparing the actions of the particular individual with the actions that would be taken by a reasonable and prudent individual in similar circumstances. Thus an individual would be negligent even if they acted innocently, but their actions fell short of those of a reasonable and prudent person

29. This approach was questioned in relation to the use of "neglect" in s121C in the recent decision of the First Tier Tribunal in *O'Rourke v HMRC* [2011] UKFTT 839, in which the Tribunal held (as a preliminary issue) that for HMRC had to prove *mens rea* on the part of the individual for the purposes of s121C. In other words "neglect" has in this context a subjective meaning – and HMRC must prove that the taxpayer acted with knowledge (or – adopting the criminal standard – recklessly). *O'Rourke* is a decision of the First Tier Tribunal and is therefore not binding upon us, and we understand that it is under appeal to the Upper Tribunal. However we have given that decision close consideration, and are persuaded that for the purposes of s121C, in order for HMRC to prove "neglect", they must show that Mr Smith acted with knowledge (or recklessly – not caring whether his behaviour was that of a reasonable and prudent officer).

30. For the purposes of s121C, "officers" includes not only the statutory officers of the company (namely the directors and company secretary (if there is one), but also "managers" and "similar officers". Wadkin was not managed by its members, and therefore we do not need to consider whether any of its shareholders exercised management functions.

31. The provision has to be construed *ejusdem generis*, and therefore the meaning of "manager" or "similar officer" has to be taken in context. Thus for a person to be a "manager" or "similar officer", they must have responsibilities and duties akin to those of a director. As authority we were referred to the decision of the Court of Appeal in *Re B Johnson & Co Builders Ltd* [1955] Ch 634 in which we were told that it was said:

> A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person

> who is entrusted with power to transact the whole of the affairs of the company.

32. In fact this is a quotation from the decision of the High Court in another case altogether (*Gibson v Barton* (1875) LR 10 QB 329).

33. Notwithstanding this error in citation, we agree with HMRC's submission that a manager for the purposes of s121C is someone who has broad responsibilities for the management of the affairs of the company as a whole. The term "manager" appears as part of similar expressions in various other statutory contexts. In *Gibson v Barton* (1875) LR 10 QB 329, the court was concerned with s27 of the Companies Act 1862:

> … every Director and Manager of the Company who shall knowingly and wilfully authorize or permit such Default [in not forwarding an annual list of members] shall incur the like Penalty.

Blackburn J said (at 336):

> In what sense are the words “director” and “manager” used in that section? When the section says “director”, it is plain enough a director is a director, but the words are “and manager.” We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is intrusted with power to transact the whole of the affairs of the company.

34. In the case of *Registrar of Restrictive Trading Agreements v W H Smith & Son Ltd* [1969] 1 WLR 1460 (not cited to us) the statutory provision in question was s15(3) of the Restrictive Trade Practices Act 1956:

> 'Where notice under section fourteen of this Act has been given to a body corporate, an order may be made under this section for the attendance and examination of any director, manager, secretary or other officer of that body corporate …

35. In giving the leading judgment of the Court of Appeal Lord Denning MR cited with approval the passage from Blackburn J's judgment in *Gibson v Barton* (mentioned above) and a passage from Jenkins LJ's judgment in *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 661 and continued as follows:

> That is the meaning of the word “manager” in the Companies Acts and we should apply it here also. The word “manager” means a person who is managing the affairs of the company as a whole. The word “officer” has a similar connotation … the only relevant “officer” here is an officer who is a “manager”. In this context it means a person who is managing in a governing role the affairs of the company itself.

36. There are many other decisions of the courts with similar effect. Where the term "manager" is used in association with the terms "officer" or "director" (as in this case), it takes its meaning from the context, and refers to an individual who has responsibility for the management of the whole of the affairs of the company.

Analysis

37. Mr Smith's defence is that he acted in a reasonable and prudent manner. He says he was concerned to ensure that Wadkin's finances were properly managed, and used a reputable recruitment agency to engage a financial controller at the outset. However the financial controller proved to be incompetent. As soon as the incompetence came to light, the financial controller was dismissed. The fact that the company was unable to produce management accounts (because its bespoke software was not ready) exacerbated the situation. Mr Smith submits that he was unaware of the fact that Wadkin had not met its obligations to pay PAYE and NICs until March 2009. At that point efforts were made to turn around the finances of the company, and to negotiate an instalment agreement with HMRC. He argues that these are the actions of a reasonable and prudent director.

38. We find Mr Smith's explanations implausible and do not believe them.

39. In the period from the commencement of Wadkin's trade until it ceased trading, it only made one instalment payment of NICs and PAYE. Mr Smith was at all material times a signatory on Wadkin's bank account and the terms of the bank mandate required his signature on all cheques. He was also the only authorised user of the company's internet banking facility. He would therefore have signed all cheques for wages (or authorised their payment through the internet facility). He would therefore also have been aware of the fact that no payments (bar one) had been made to HMRC in respect of NICs and PAYE in respect of those wage payments. Given that he had been a director of both TMCD and Ultracare (both of which had gone into administration owing substantial amounts by way of PAYE and NICs), Mr Smith would have known of the requirement that employers must account monthly for PAYE and NICs, and should have been particularly alert to ensuring that Wadkin made its monthly tax payments.

40. We also find it implausible that Mr Smith was unaware that SMC had not paid its staff, its suppliers or its other creditors. Under the bank mandate, all cheques would have to have been signed by Mr Smith, and Mr Smith was the only authorised user of the internet banking facility. He would therefore have been aware that he had not signed any cheques (or authorised internet payments) on behalf of SMC.

41. Mr Smith's counter-argument is that because he left signed blank cheques (and gave his internet password to the accounts staff), he would not necessarily have been aware that payments had not being made. If this was in fact the case, we find these actions to be of themselves reckless. It is standard banking practice to require the board of directors to approve the terms of the bank mandate and internet banking facility. By signing blank cheques, and disclosing his internet password, Mr Smith would be acting contrary to the instructions of the board. In any event, this behaviour is of itself reckless and contrary to all prudent and sensible financial controls, and puts the finances of the company at risk.

42. We also consider that the decision of Wadkin not to install an off-the-shelf accounting package was imprudent. Commissioning a bespoke accounting system is inevitably a time-consuming process, and given the history of this business (which

had been insolvent twice previously), close and careful financial management from the start was clearly required. TMCD had used a Sage accounting system. Sage Financial Controller is a popular and well-known accounting package familiar to many bookkeepers. It is well able to account for multiple companies and allow multiple users to work at the same time. Directors have individually and collectively a duty to acquire and maintain sufficient knowledge of the business to be able to discharge their duties (see the judgment of Woolf MR in *Re Westmid Packing Services* [1998] 2 All ER 124 at 130), this includes ensuring that the company has proper financial reporting systems in place). From the board minutes, it is not clear whether Wadkin's bespoke accounting system ever became fully operational. Thus it operated from commencing trading for a period of many months without adequate financial reporting systems. Allowing a company to operate without any adequate financial reporting systems for this length of time (particularly since it was known at the outset that the business's finances would be precarious) is reckless.

43. We find the comments made by Mr Sayer at the board meeting of 2 June 2009 to be most telling. Although Mr Smith dismisses Mr Sayer's comments, the truth is that Wadkin subsidised its precarious financial position by not meeting its obligations to HMRC. The bank statements included in the bundles show that Wadkin was receiving payments under its factoring facility, and was making payments of wages (after deductions) and to other creditors. The evidence is that Wadkin used the PAYE and NICs withheld from wages to fund its business, despite its duty to account for these deductions to HMRC monthly – giving the business the veneer of solvency, when in fact it was insolvent. In this context, we note that Mr Smith had been a director of two predecessor "phoenix" companies to Wadkin – both of which had become insolvent owing substantial amounts to HMRC in respect of PAYE and NICs. We also note that in the document bundle, there are references to Mr Smith seeking advice in order to undertake a further "phoenix" operation, with a view to him incorporating yet another company to buy Wadkin's assets free from liabilities to HMRC and other creditors. The fact that Wadkin is a successor to two "phoenix" companies (and Mr Smith was a major shareholder and director in both such companies), and that Mr Smith was contemplating yet a further "phoenix" transaction indicates that Mr Smith was financially well aware of the possibility that he could structure his business affairs to allow him to continue in business through successive companies, whilst leaving behind liabilities owing to HMRC. Furthermore, Mr Smith would have been well aware from his previous dealings with insolvency practitioners that he (as a director) was obliged to take account of the interests of creditors. We were not provided with company minutes before 2 June 2009. Nevertheless, from the references in the 2 June 2009 minutes to long-standing issues, it is clear that the company had been insolvent for quite some time. We do not believe that Mr Smith was ignorant of the company's position and his failure to take account of the interests of creditors showed a deliberate disregard of his obligations.

44. Although the board was told by Mr Smith that Wadkin was seeking to negotiate a "time to pay" arrangement with HMRC, in fact there is no evidence that Wadkin made any attempt to contact HMRC before 2 June 2009. In the whole time that Wadkin traded, it only once made a part payment towards its monthly PAYE and NICs payments.

45. We were informed by HMRC that the Insolvency Service is currently pursuing disqualification proceedings against Mr Smith (and is in the process of seeking leave of the court to serve process on Mr Smith abroad). However as these proceedings have not concluded, we have not taken them into account in reaching our decision.

46. We note Mr Smith's submission that he discharged his responsibility to manage Wadkin's finances by engaging a financial controller. Although companies regularly delegate the operation of their payroll to accounting staff (or external payroll bureaux), the responsibility for managing the company so that it meets its obligations cannot be delegated, and remains with the directors. We were referred by HMRC to the case of *Secretary of State for Trade and Industry v Gray* [1995] BCLC 276. In its judgment, the court refers with approval to a statement made by Sir Richard Scott when disqualifying a director:

> Overall responsibility is not delegable, All that is delegable is the discharge of a particular function.

47. Thus the fact that Wadkin's board had delegated the day-to-day operation of certain finance functions to Mr Simmons (and, after his dismissal, to other accounting staff) does not lessen the responsibility of the directors. They are required to supervise the operation of the accounting functions, and ensure that they are properly undertaken. The fact that Mr Simmons may have turned out to have been incompetent is no excuse – the responsibility for ensuring that Wadkin was properly managed – including monitoring the company's cash flow and its ability to meet its obligations as they fell due (including instalments of PAYE and NICs) remains with the directors.

48. The only directors of Wadkin since it commenced trading were Mr Smith and Mr Sayer. Wadkin had a company secretary for an initial period, but it has not been suggested by any party that the company secretary had any involvement in the running of Wadkin.

49. Mr Smith was at all material times an officer of Wadkin. We find that he carried out his functions as a director in knowledge of the consequences, and in particular without regard to the obligation of the company to account each month for PAYE and NICs. We find that the failure of the company to account for NICs was due to his deliberate decisions, and that this amounts to neglect for the purposes of s121C. We therefore find that Mr Smith is a culpable officer for the purposes of s121C.

50. In a written statement made to HMRC, Mr Smith said that Mr Sayer was a "non-executive director with no responsibilities within the company, his appointment was made in agreement with a private trust that had invested in the company and therefore he was there purely in an advisory capacity". Although this Tribunal does not agree with Mr Smith's analysis of the responsibilities of a non-executive director, Mr Sayer appears to have had very limited (if any) involvement with the day-to-day operation of the company. In particular he was not a signatory on the bank account, and was not authorised to operate the internet banking facility. The minutes we have seen report that he was against the company retaining PAYE and NICs that it had

withheld from wages. The evidence before us is not sufficient to demonstrate that Mr Sayer was negligent for the purposes of s121C, and therefore we find that he is not a culpable officer.

51. We also find that Mr Simmons is not a culpable officer. He was not a director. We also find that he was not a "manager" or "similar officer" as he was not entrusted with the management of the whole of the affairs of the company, but was responsible only for the discharge of certain finance functions.

Conclusions

52. We have found that that:

(1) Wadkin's failure to pay NICs was attributable to the fraud or neglect of Mr Smith for the purposes of s121C; and

(2) Mr Smith was the sole culpable officer of Wadkin.

53. We therefore dismiss the appeal.

54. For completeness (as it was given by Mr Smith as a ground of appeal) we would add that we find that HMRC did not act unreasonably in deciding to issue the personal liability notice to Mr Smith. In particular, (although not relevant to our decision), we consider that HMRC acted within the terms of the assurances given by the minister to Parliament in the House of Lords debate on 30 March 1998

55. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 28 June 2012

Authorities referred to in argument but not mentioned in this decision

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