[2012] UKFTT 652 (TC)

TC02324

Appeal number : TC/2011/09222

Personal Liability Notice. Neglect or fraud by a Company Director.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HUMAYUN ZUBAIR **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES QC
IAN ABRAMS

Sitting in public at 45 Bedford Square, London WC1 on 08 October 2012.

Mr. Considine, counsel, for the Appellant (for the purpose of applying for an adjournment only)

Mr. Walsh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. On 16 May 2011 the respondent served a Personal Liability Notice upon the appellant making him personally liable to pay the sum of £244,195.06 in respect of National Insurance Contributions that should have been paid to the respondent by The Airside Corporation Ltd in respect of the tax years ended 5 April 2008, 2009, 2010 and 2011.

2. The Personal Liability Notice was served on the basis that the respondent was satisfied that the appellant, as the sole director of that company, had caused the default in payment to arise as a result of his neglect in and about his duties as the company's sole director. Accordingly, claimed the respondent, section 121C Social Security Administration Act 1992 was applicable.

3. The appellant requested a Review of the decision and the Review went against him. He then lodged an appeal with this Tribunal on 7 November 2011. The Grounds of Appeal are within the Notice of Appeal and appear at page H26 in the appeal bundle prepared by the respondent.

4. The Grounds of Appeal proceed on two distinct bases :

(1) That the company had a separate bank account into which money was paid so that it could discharge its tax liabilities. It is said that those monies, which had been accumulated, were later used to meet other outgoings of the business so as to keep it afloat. No further detail is given. In the Notice of Appeal the appellant refers to "*unforeseeable difficulties*" and "*an exceptional event*" causing it to write off £80,000 in bad debts.

(2) The second basis is that the company was, in effect, robbing Peter to pay Paul and hoped that its commercial fortunes would turn around so that it is unreasonable to impose liability for the entire amount of NIC's due given the "*aforesaid important matters*", which are substantially unparticularised and wholly unsupported by any documentation.

5. In readiness for the appeal the respondent provided a Revised Statement of Case, a Statement of Authorities, a witness statement of Andrew Pawley dated 24 August 2012 and a Revised Bundle of Documents.

6. The Tribunal had received nothing by way of documents or witness statements from or on the half of the appellant until just before the hearing was due to begin, a witness statement from the appellant, dated 8 October 2012, was presented and used in support of an application to adjourn this appeal.

Adjournment Request

7. Mr Considine of counsel appeared on behalf of the appellant but made it clear that his instructions were limited to him making the application for an adjournment and that if the adjournment application was unsuccessful, he would take no further part in the appeal hearing.

8. Mr Considine put the application for an adjournment on two separate bases. The first was that the appellant wished to obtain certain (unparticularised) documents which he believed might be relevant to the overall outcome of the appeal. The second was that in the appellant's witness statement he alleged that, this very day, he was due to attend a job interview and so thought that he should prioritise that commitment rather than attending the appeal.

9. We refused the adjournment. The appeal was lodged as long ago as 7 November 2011. That means that the appellant has had 11 months within which to prepare his case. He has had 11 months within which to seek documents from other people, to prepare witness statements and generally to put his case in order. We were not shown a single letter or document suggesting what, if any, documents the appellant has sought to obtain from third parties and/or any response from any such third party to any such request. We do not know what attempts, if any, the appellant has made to obtain any material which he now claims would be relevant or when he claims to have made any such attempts. If, as has been claimed, he has been seeking documents from others, unsuccessfully, there can be little doubt that there will be correspondence (possibly by e-mail) demonstrating the efforts made by the appellant and the response or lack of response thereto.

10. In the appellant's witness statement he refers to a late opportunity to attend a job interview on 8 October 2012. He claims that on Thursday last he sent an e-mail to the Clerk to the Tribunal requesting an adjournment and, assuming that an adjournment would be granted, accepted an invitation to an interview which was made known to him later on Thursday last. We find it surprising, to say the least, that a copy of the letter or e-mail inviting the appellant to an interview with a prospective employer, has not been produced. Indeed, the prospective employer has not even been identified.

11. Notwithstanding that the appellant's statement contains a "statement of truth" we are not prepared to accept that the appellant's assertion that he is today attending a job interview as reliable and/or truthful.

12. We are entirely satisfied that the adjournment application has been made in a bid to cause delay to the appeal process in which, after 11 months, the appellant has not seen fit to adduce one shred of documentary or witness evidence in support of his appeal. The one exception to that comment might be the statement dated 8 October 2012 (today) but even though that statement contains 14 paragraphs, it contains virtually no hard fact of the type that we might reasonably expect to see if the appellant was pursuing his appeal in a meaningful and concerted manner.

13. We should add that by its letter dated 5 October 2012 The Chancery Partnership, solicitors, wrote to the respondent informing it that that practice no longer acted for the appellant.

The Substantive Appeal

14. Notwithstanding the absence of the appellant who, we are entirely satisfied, is voluntarily absent from this appeal hearing, we considered that it was just to continue with the appeal hearing. A whole day of Tribunal time had been allocated to this appeal.

15. During the tax years ended 5 April 2007, 2008, 2009, 2010 and 2011 the appellant was the sole director of The Airside Corporation Ltd ("the company"). During the tax year ended 5 April 2007 the company paid tax and national insurance contributions of £1863.77p. For each fiscal year thereafter the company paid no PAYE, no NIC's and no V.A.T. to the respondent. The appellant has not contended otherwise.

16. As a result of the non-payment of V.A.T. an unannounced V.A.T. inspection visit was made to the company on 8 September 2009. Shortly after that visit took place the company's outstanding end of year returns (P35's) for the fiscal years ended 5 April 2008 and 2009 were submitted, substantially out of time, to the respondent. They served to demonstrate that the company had been deducting tax and national insurance contributions from its several employees (about 29 employees) throughout each of those years. The respondent was able to ascertain from its records that it had received no due payments from the company. The fact that nothing was paid over to the respondent is not in issue.

17. A form P14 issued by the company in respect of the appellant for the fiscal year ended 5 April 2009 indicates that during that year he was paid £5100 with no tax and/or national insurance contributions deducted. That is surprising given that bank statements show that the appellant received from the company's bank account a sum totalling £214,065 between 18 June 2007 – 25 May 2010. In the Notice of Appeal the appellant refers to these various sums as being "*expenses*" paid to him by the company. For rather obvious reasons he does not refer to those monies as salary, directors fees and/or dividends.

18. If the £214,065 which the appellant received during that period truly represented the reimbursement of expenses incurred by the appellant on behalf of the company in the course of his duties as a director, we apprehend that it would be a straightforward matter for the appellant to give evidence of the nature and extent of the expenses incurred and, in respect of a great many of them, to produce vouchers, invoices, receipts or credit card statements showing the expenditure. In many instances the transfers of money to the appellant were done through internet banking directly to the appellant's personal bank account. A schedule of those payments appears at pages I41 – I45 in the bundle and we immediately note that the transfers are for rounded figures,

for example, £1000, £500, £3000 and £1200 on many occasions. There is virtually no instance of an odd amount being refunded to the appellant as one might reasonably expect if those sums truly represented repayment of actual expenses incurred, given that such actual expenses are rarely incurred in such rounded figures. Indeed, if those expenses had been in respect of items carrying VAT, the company would have wanted to reclaim that VAT and it would necessarily have had an audit trail relevant to such tax reclaims.

19. The burden of proof in this appeal rests upon the respondent. It must prove that the company failed to pay the national insurance contributions over to the respondent and that such failure arose as a result of the neglect or fraudulent conduct of the appellant. It must also approve the amount due.

20. The respondent called Mr Pawley to give evidence. He gave his evidence in chief by reference to his witness statement dated 24 August 2012. Naturally, as the appellant was not present or represented, Mr Pawley was not cross examined. Nonetheless, we must consider Mr Pawley's evidence critically. We do that by cross referencing what he has said, to the documents made available in support of his testimony. He refers to the respondent's statutory power to issue a Personal Liability Notice and sets out in his evidence the various pre-requisites for the issue of such a notice, so as to demonstrate that he had the relevant criteria in mind. At section H in the bundle he has exhibited correspondence and banking analyses based upon the company's bank statements obtained by the respondent from the company liquidator. He has exhibited a schedule of payments made by the company to the appellant based upon those bank statements. He has exhibited the end of year returns that were submitted late in 2009 showing the company's employees and the amounts deducted from each of them by way of national insurance contributions. The bank statements also contain details of payments made of a type that would ordinarily indicate expenses being incurred by company personnel. For example, there are debits showing payments to airlines, the duty-free shop at Abu Dhabi airport and hotel charges. That does not sit easily with the appellant's allegation that the very large payments made to him, far from being by way of salary or other emoluments, were reimbursement to him in respect of expenses that he had paid personally on behalf of the company.

21. We accept the evidence given by Mr Pawley both on the issues of liability and quantum. Despite the appellant having had ample time within which to challenge it, if it is susceptible to any plausible challenge, none has been forthcoming. In saying that we do not overlook the appellant's statement dated 8 October 2012, which we have taken into account, but it does not deal with the matters raised in the Grounds of Appeal in any detail whatsoever, as we might reasonably have expected if those matters are at the forefront of the appeal.

22. We are satisfied, so as to be sure, that the company did not make any payments to the respondent in respect of national insurance contributions in the fiscal years ended 5 April 2008, 2009, 2010 and 2011. We say we are sure notwithstanding that this is a case in which the ordinary civil standard of proof applies, that is, the balance of probabilities.

23. The appellant was the sole director of the company and the sole signatory to its bank account. He has alleged that the company had a separate bank account into which £60,000 had been paid so as to make provision for sums payable to the respondent. That is remarkable. It is remarkable because the appellant has not seen fit to exhibit any document demonstrating the existence of that alleged second bank account or showing that it ever contained any given sum of money. It is equally remarkable that a company should keep money in a bank account to pay various taxes due to the respondent instead of making actual payment at the due date. We are entirely satisfied that this is a fabricated flight of fancy on the part of the appellant designed to demonstrate that there was some intention on his part, as a director, to act responsibly.

24. A director of a company owes fiduciary duties to the company and must act in its best interests and so as not to create a conflict of interest between his personal interests and those of the company. The duty includes conducting the company's affairs in a proper and businesslike manner which necessarily includes ensuring that the company abides by its statutory duties. One of those statutory duties is to make various statutory payable tax payments in due time. One accepts that there will be occasions when, for one reason or another, a company may be late in making such a payment or simply be unable to make payment for properly explicable reasons. That is not this case.

25. We do not accept that any second bank account, whether containing £60,000 or any other amount, existed. We do not consider the appellant, insofar as that allegation has been made, to have been truthful.

26. Even if such a sum had existed in a second but unidentified bank account there is no explanation as to why such money was not used, on a month by month basis, to pay the sums properly payable to the respondent.

27. Apart from the sum of £1863.77p paid by the company in the fiscal year ended 5 April 2007, no further taxes were accounted for to the respondent. The fact that a payment was made in that modest sum discloses that the appellant must have known that such taxes had to be paid over to the respondent. Even if he had not actually known, one of his duties as a director would have been to inform himself of the duties that he had to discharge towards the company which, in turn, would involve him in informing himself of the duties that the company had to discharge in respect of monies deducted from its employees by way of tax and national insurance contributions. We find it beyond belief that the appellant did not appreciate that such things as V.A.T and PAYE had to be paid over to the respondent timeously.

28. In the Grounds of Appeal the appellant argues that he was not neglectful because he had put aside some money in this alleged separate bank account with which, one day, he hoped the company would catch up with its obligations to the respondent. We simply do not accept that story. Even if it was true, it would provide nothing more than reinforcement for the conclusion that the appellant, as the sole company director, had decided to desist from causing the company to make payments timeously to the respondent, preferring instead to make same if and when he chose that the company

should make them. In that regard we cannot fail to be influenced by the fact that during the same period of time the appellant caused the company to pay him £214,065 which, according to him, was not by way of salary, other emoluments and/or dividends (and thus taxable) but, instead, by way of regular rounded lump sums in respect of alleged repayment of unidentified and unparticularised expenses. In our judgement that simply does not represent the truth.

29. It is plain to see that the appellant was helping himself to the company's money as and when he saw fit whilst being aware of the fact that the company was not paying over to the respondent not only National Insurance contributions, but also PAYE deductions and VAT. In our judgement that was a cynical and quite deliberate ploy which the appellant sought to hide from the respondent by causing the company not to submit end of year returns for the fiscal years ended 5 April 2008 and 2009 until after the unannounced VAT inspection in September 2009. Perhaps, in an attempt to clothe its activities with some kind of respectability the company then instructed PWC to deal with the matter and that firm reported that it was unable to give any proper account of what had happened with the monies due for payment to the respondent.

30. In our judgement the facts demonstrate that the default on behalf of the company arose, at the very least, from the neglect of the appellant. The appellant was bound to take that degree of care in and about the management of the company's affairs as would be taken by a reasonably prudent company director. Such a director would ensure that the proper tax payments were made timeously. That did not happen because, in our judgement, the appellant was busy diverting the company's funds to his own untaxed use and benefit. It is our judgement that the respondent has been generous in categorising this as a case of neglect on the part of the appellant whereas the documents and evidence available to us demonstrate that a convincing case might easily have been put forward on the basis of fraud. We are in no doubt that the appellant knew full well what he was doing and that in taking substantial funds from the company he was doing so at a time when, as a result of decisions taken by him, it was failing to pay over monies deducted from its employees salaries which it was statutorily obliged to pay over to the respondent.

31. 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.

Decision.

Appeal dismissed.

GERAINT JONES QC
TRIBUNAL JUDGE

RELEASE DATE: 22 October 2012