[2013] UKFTT 273 (TC)

TC02681

Appeal number: TC/2011/6573

NICs – contributions record – whether all relevant contributions properly recorded – taxpayer a director: whether, when contributions due had not been paid, taxpayer had been negligent or connived – reg 6A Social Security (Contributions) Regulations 1979; effect of aggregation provisions (Reg 12).

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN TRACEY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
JOHN COLES

Sitting in public in Reading on 27 November 2012, additional submissions on 31 December 2012

Phillip Thompson FCA for the Appellant

Mrs A Johnson for the Respondents

DECISION

1. This appeal relates to Mr. Tracey's national insurance contribution record. The record is of importance to him as it affects the amount of his pension.

2. HMRC (a term we use to cover all the previous entities which administered NI) gave a decision on 9 January 2010 specifying what they contended were the amounts of his contributions for each of the years 1978 to 2008. After 9 January 2010 there was correspondence between the parties, a review, a notice of appeal and further correspondence. By the time of the hearing figures for some periods were agreed or no longer disputed. HMRC also considered new evidence produced at the hearing by Mr Tracey, and wrote to him on 8 January 2013 indicating that they now accepted that he should be credited with certain contributions for 1990/91.

The table below summarises the position. Disputed years are highlighted.

Year	Whether specifically Disputed in Notice of appeal	Comment/ nature of dispute
1978-79		Position Agreed
1979-80	Disputed	Now Agreed
1980-81	Disputed	Now agreed :contribution £545.20
1981-82	**Disputed**	**Other earnings?**
1982-83	Disputed	Agreed
1983-84	Disputed	Agreed
1984-85	**Disputed**	**LEL/other earnings**
1985-86	**Disputed**	**Other earnings?**
1986-87	**Disputed**	**Other earnings?**
1987-88	**Disputed**	**Payment etc/LEL/Other earnings?**
1988-89	**Disputed**	**LEL**

1989-90	**Disputed**	**Payment etc**
1990-91	**Disputed**	**LEL** *HMRC agreed to a change after the hearing*
1991-92	**Disputed**	**LEL**
1992-93 to 2007 -08		Class 2 contributions. No dispute

3. “Other earnings” relates to the contention on behalf of Mr Tracey that he had earnings not taken into account by HMRC.

4. "LEL" stands for Lower Earnings Limit. This is the limit below which national insurance contributions are not required to be made. In this appeal two issues arise in relation to the LEL. First, if a person is an earner in relation to two or more different employers (meaning persons from whom he receives earnings), when can or must his earnings be aggregated for the purposes of comparison with the LEL. Second, if aggregation for two "employments" (ie positions from which he receives earnings) is engaged, over what period should the aggregate earnings be compared with the LEL for such period.

5. "Payment etc" refers to the issues which arise where HMRC contend that payment of contributions was not made by an employer when it should have been. In such cases regulation 39 Social Security (Contributions) Regulations 1979 may deem a payment to have been made unless the earner consented to, connived in, or was negligent as to, the nonpayment. We set out the provisions of that regulation in our discussion under the heading "Payment" below.

6. Under this heading two initial questions arose: (i) was payment in fact not made? and (ii) if not, had Mr. Tracey consented to or connived at the non-payment or was it attributable to his negligence?

7. Two further issues arose under that heading . In the years concerned HMRC say that their in solvency division concluded that the payment had not been made and that Mr. Tracey had been negligent in relation to that failure. They say that a decision was made to that effect and that it was notified to Mr. Tracey. Two questions arise from this in this case: (1) whether HMRC did in fact so notify Mr. Tracey, and (2) whether, if they did, such notification precluded an appeal in 2012 in relation to the conclusion that they had reached in those years.

8. A preliminary issue also arose. Although Mr. Tracey's notice of appeal is dated 10 August 2011 and was received by the tribunal on 19 August 2011 it appears that there may have been an earlier form which did not reach the tribunal until after 18 February 2011. The original HMRC decision was on 9 January 2010. HMRC were asked for a review which was undertaken. Its results were sent, in a letter of 14 April 2010, to Mr. Tracey's accountant, Mr. Thompson. Mr. Thomson was overworked and

retired in the following year. It is clear that the notice of appeal was given more than 30 days after the decision and was therefore out of time. The issue is whether the tribunal should permit at the out-of-time appeal. HMRC did not advert to this issue in their statement of case. It seemed to us that, given that the issues related to what had happened 30 or more years ago a few extra months of delay made little difference. Further, given the factual complexity of the issues and the correspondence between the parties, we considered that extending time for making the appeal was justified because the potential prejudice to Mr. Tracey outweighs the potential prejudice to HMRC. We therefore thought it was just and fair to extend time and to hear the appeal.

9. The issue relating to the aggregation of earnings was raised by Mr Thompson during the course of the hearing. It had not been raised previously. In addition Mr Thompson provided further evidence during the hearing in relation to the period for which Mr Tracey was a director of a particular company. We directed that HMRC should be given a chance to respond to these issues. They did so on 31 December 2012 and that response (and the letter to Mr Tracey of 8 January 2013) is taken into account in this decision.

10. We heard oral evidence from Mr Tracey and Mr Thompson and had a bundle of copies of HMRC's records and correspondence between the parties. We find the facts set out below on the basis of that evidence.

Background

11. Mr. Tracey was, during the relevant years, engaged in the sewer and drain business. He carried on this activity through joint ventures with a Mr. Moore for most of the period and for some of it also with a Mr. Chater. In these ventures Mr. Tracey was the operations man -generally out and about - and Mr. Moore on the sales side – generally at the office. The ventures were carried out through a number of companies generally with fairly similar names. Many began with MT (for Moore Tracey) or MTC (for Moore Tracey and Chater). Throughout most of that period Mr Thompson was Mr. Tracey's accountant and the auditor of the companies; he stepped down as auditor in 190 because of a conflict between the directors.

12. It seems that the name of each company reflected the area of the joint-venture businesses with which it was involved. Thus MTC Water Jetting was set up to do water jetting, MTC Drain and Sewer surveys limited to do surveys. Some of the ventures were more successful than the others.

13. In about 1987 the company engaged a new book keeper, Jill Martin. Jill Martin and Mr. Moore became lovers and Mr. Tracey began to feel that he was being excluded from the business of the companies. There was, Mr. Tracey said, a bust up in 1989/90. A number of companies went into insolvent liquidation, and at sometime between 1990 and 1992 Mr. Tracey was made the subject of a director's disqualification order.

14. We were shown a Companies House form 363a signed by Mr. Tracey as company secretary on 15 February 1991 which indicated that he had resigned as a director of Sewerline limited on 5 January 1990. This was the new information referred to in paragraph 9 above.

15. The joint-venture businesses employed some 30 people. There was a full-time bookkeeper in the form of Jill Martin. Jill Martin appears to have been a competent bookkeeper. She introduced management accounts to the business and when she left Mr. Thompson was, as an exception to his normal rule, happy to provide a reference. Mr. Tracey became uncertain of her loyalties only when the relationship with Mr. Moore came to the fore.

Discussion

(1) The LEL

(a) Aggregation

16. Section 4 of the Social Security Act 1975 provided that:

> "4. (1) For the purposes of this Act, there shall for every tax year be -
>
> (a) a lower earnings limit [the "LEL"] for Class 1 contributions, being the level of weekly earnings at which employed earners become liable for such contributions in respect of the earnings from their employments; ...
>
> (2) Subject to section 6 below, where in any week earnings are paid to or for the benefit of an earner in respect of any one employment of his, being employed earners employment and
>
> (a) he is over school leaving age; and
>
> (b) the amount paid is equal to or exceeds the current lower earnings limit (or the prescribed equivalent in the case of earners paid otherwise than weekly),
>
> there shall be payable, in accordance with this section (and except as provided by this Act, without regard to any other payment of earnings to or for the benefit of the earner in respect of any other employment), a primary and a secondary Class 1 contribution.
>
> (3) The primary contribution shall be payable by the earner and the secondary contribution shall be payable by the secondary Class 1 contributor."

17. It will be seen that the words in the tailpiece of subsection (2) raise the question of what happens when a person has more than one employment. In particular if a person were to receive equal amounts from two employers which together exceeded the LEL but were each less than the LEL, would he be exempt from contributions? And if he received earnings from two employers at a higher level would he be subject to national insurance on a greater amount than if he had received the aggregate sum

from one employer? Mrs Johnson pointed us to regulation 11 and 12 of the Social Security (Contributions) Regulations 1979 (SI1979/591) (which are replicated in the regulations 14 and 15 of the 2001 regulations of the same name) which provided as follows:

> "11. For the purpose of earnings related contributions, where an earner is concurrently employed in more than one employed earner's employment under the same employer, the earnings paid to or for the benefit of the earner in respect of those employments shall not be aggregated if such aggregation is not reasonably practicable because the earnings in the respective employments are separately calculated."

18. This provision relates to different employments "under the same employer"; it does not relate to different employments under different employers. Regulation 12 deals with that case in similar terms:

> "12 (1) [Subject to regulation 7 which limits the effect of this provision where payments made in one year are treated as made in another year], for the purpose of determining whether earnings related contributions are payable in respect of earnings paid to, or for the benefit of an earner in a given earnings period, and if so, the amount of the contributions, where in that period earnings in respect of different employed earner's employments are paid to or for the benefit of the earner-
>
> (a) by different secondary contributors who in respect of those employments carry on business in association with each other;
>
> (b) by different employers, one of whom is by virtue of schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978 treated as the secondary contributor in respect of each of those employments; or
>
> (c) by different persons, in respect of work performed for those persons by the earner in those employments and in respect of those earnings, some other person is, by virtue of that Schedule treated as the secondary contributor,
>
> the earnings paid in respect of each of the employments referred to in this paragraph shall, unless in a case falling with under subparagraph (a) it is not reasonably practicable to do so, be aggregated and treated as a single payment of earnings in respect of one such employment.
>
> (2) Where, under paragraph (1), earnings are aggregated, liability for the secondary contributions payable in respect of those earnings shall, in a case falling within paragraph (1)(a), be apportioned between the secondary contributors in such proportions as they shall agree amongst themselves, or, in default of agreement, in the proportions which the earnings paid by each bear to the total amount of the aggregated earnings.".

19. It will be seen from this that aggregation of earnings is required where the employers "carry on business in association with each other". We saw no definition of

"in association". It seems to us that, in part at least, this may be an anti avoidance provision, preventing a single employer avoiding NIC liability by splitting an earner's work between various associated employers.

20. Further the use of "shall" in the tailpiece of subsection (1) indicates that if the conditions are satisfied the provision is mandatory: no discretion is afforded to the employer.

21. Mrs Johnson submitted that there was no evidence that the companies had in fact aggregated earnings. Our review of the figures supported her contention. But the issue is whether they should have done so: for if it is the case that, where the aggregate of earnings from more than one employer exceed the LEL, contributions would have become payable when they would not have done so absent aggregation, it may be that Mr Tracey should have had credited to his record the NIC so payable (subject, in the case of non-payment by the companies concerned to question of negligence etc).

22. In their additional submissions HMRC say: (1) that the onus is on the employer to show that aggregation is not reasonably practicable because it is the employer who is making the judgement; (2) that the duty to aggregate is an ongoing duty to be continually reassessed through the tax year; (3) the employer must be aware of the effect on the employee; (4) it is for the employer to decide whether to aggregate but HMRC may review that decision; (5) "When considering aggregation employers will need to balance employee's interests against their own costs"; (6) when manual payroll systems were used aggregation would depend on contact between different payroll departments; aggregation may be more difficult with tailored IT systems.

23. It seems to us that the "reasonably practicable" test is an objective one. It is not dependent upon an election – or even on consideration of the issue by an employer. We see little room in the test for consideration of the effect on the employee unless that manifests itself in other pressures on the business. We accept that the reasons which would persuade an employer that aggregation was or was not so practicable may be relevant to an objective appraisal of that question, but do not consider that an employer's decision would be determinative. Still less the failure to make any determination.

24. On the evidence of Mr Thompson and Mr Tracey recounted in Background above, it seems to us that these companies were likely to have been carrying on business in association. There was a common thread through their businesses, they employed a similar cohort of people, they were owned and run by persons in the same small group, and at least from 1987 they shared a common administrator, Jill Martin. We note that Mr Tracey lived in Aldershot and latterly in Farnham, and from the P14s in the bundle before us we note that in 1988, 1989, 1990 and 1992 Sewerline Ltd, in 1988 MC Water Jettings, in 1989 and 1990, 1992 MTC Well Systems, and in 1991 and 1992 Gwenpier were all shown as sharing the same address, Mount Pleasant Road Aldershot. We think it unlikely that at that time (and with that number of employees) they would have employed computer payroll systems which would have made aggregation difficult. We conclude that it would not have been impractical for

the companies to have aggregated earnings for NIC purposes. Thus aggregation was mandatory.

(b) Earnings Periods

25. The Social Security (Contributions) Regulations 1979 also dealt with earnings periods which were more than one week long. Those provisions included special provisions for persons who were directors. Regulation 6A provided:

> "6A. (1) Where a person is, … , or ceases to be a director of a company during any year the amount ... of earnings related contributions payable in respect of earner ... shall ... be assessed on the amount of such earnings paid (whether or not paid weekly) in the earnings periods specified in the following paragraphs of this regulation. ...
>
> (3) Where a person is a director of a company at the beginning of the year the earnings period in respect of such earnings shall be that year, whether or not he remains such a director throughout the year.
>
> (4) Where the earnings paid in respect of two or more employed earner's employments fall to be aggregated and the earnings period in respect of those earnings would be different lengths then --
>
> (a) if those periods are determined only by the preceding paragraphs of this regulation, or
>
> (b) if the length of one or more of those periods is determined by the preceding paragraphs of this regulation and the length of one or more of the others is determined by any other provision of these regulations,
>
> the earnings period in respect of all those earnings shall be the period determined by those paragraphs or, where there is more than one such period for longer, or as the case may be, longest period so determined."

26. Thus for any year during any part of which Mr Tracey was a director of a company from which he had earnings which were required to be aggregated with his earnings from any other company, the earnings period in relation to the aggregate earnings would be that tax year.

(2) Payment etc

27. Regulation 39 of the Social Security (Contributions) Regulations 1979 provided that:

> "39 (1) Where a primary Class 1 contribution which is payable on the primary contributor's behalf by a secondary contributor is paid after the due date or was not paid, ... and the delay or failure in making the payment thereof is shown to the satisfaction of the Secretary of State not to have been with the consent or connivance of, or a attributable to any negligence on the part of, the primary contributor, the primary contribution shall be treated - ...

(b) ... for the purpose of any entitlement to contributory benefits -- as paid on the due date."

(A similar provision is now to be found in regulations 60 on the Social Security (Contributions) Regulations 2001.)

28. Thus even if a relevant payment was not made it is to be treated for pension benefit purposes as made if the failure to pay was not with the consent or connivance of the earner or attributable his negligence.

29. HMRC say, in relation to the disputed periods, that Mr. Tracey was a director of the companies which were making payments of earnings to him. As a director they say he had the duty to make sure that those companies met all legal requirements and effectively that failure of the company to pay national insurance was negligence of its directors.

30. It seemed to us that given that there is no express definition of negligence in the relevant regulations the ordinary meaning of that word should apply. It means in our view the failure to take that care which a reasonable person would take in similar circumstances. The relevant circumstances are important. A director of a large company employing many thousands of people would not reasonably be expected to oversee the detail of the payment of liabilities. But he would reasonably be expected to be satisfied that there had been put in place a system which gave reasonable assurance that those liabilities would be paid. On the other hand the sole director of a one-man company whose only activity was that of a director would reasonably be expected to ensure that payments were made.

31. Mr. Tracey's position lay between these two extremes. He was a director of companies which together employed some 30 people. We accepted Mr. Thomson's evidence that Jill Martin was a competent bookkeeper. It seems to us that the care that directors could reasonably be expected to take in circumstances such as these is to establish a proper system, to employ competent people and to ensure that checks are made upon them. The evidence before us suggested that Mr. Tracey did do this.

32. Where it appears that national insurance contributions were not paid it seems to have been because of the insolvency of one of the companies in the relevant period. It does not seem to us that the fact of insolvent liquidation makes it more likely than not that a particular director was negligent in a manner which gave rise to the non payment of NICs. Mr Tracey said that MTC became insolvent because there had been a lack of business at that time in the economic cycle for its offering, and it bore the expense of costly equipment. We accept that there will be situations in which a company may be run in a way which is careless as to its obligations, but there is a difference between that and making a bad business judgment or suddenly suffering an unexpected loss. Thus whilst insolvency allows the possibility of negligence it does not require that conclusion.

33. Mrs Johnson says that HMRC would have carried out an investigation. She showed us passages from the relevant instructions which would have been current at the relevant time. Those instructions provided if no payment was made a standard

letter should be sent to the relevant directors explaining that the company had not paid the NI contributions attributable to the director's earnings and asking for his comments. If a director replied disputing negligence then the instructions required a meeting to be arranged with the director so that the extent and nature of the director's responsibilities could be investigated. If the conclusion from those meetings and investigations were that the director was negligent then a letter would be sent the director setting out that conclusion and the contributions removed from his record.

34. We accept this evidence of the procedure which HMRC adopted. But there was no evidence as to what evidence they received as a result their investigation, how the investigation was conducted or whether its evaluation of the evidence it received would match ours. We cannot assume that HMRC would have come to the same conclusion we would have reached on the same evidence. Whilst we accept that there is evidence that an investigation was carried out, the only conclusion we can draw is that it is likely that someone, for some reason, considered that Mr. Tracey was negligent. That is not enough for us to be able to conclude, in the face of the evidence of Mr. Thompson and Mr. Tracey, that Mr. Tracey was negligent. We cannot assume that the absence of evidence that HMRC was wrong proves that they were right. That is not to cast aspersions on Mrs Johnson or HMRC, but to recognise the need for evidence before the tribunal.

35. We concluded that Mr Tracey was not negligent in relation to the non payment of NIC contributions by Sewerline and MTC Water Jetting limited in the periods in which they became insolvent.

36. A question arises as to our jurisdiction in relation to the question of negligence, which was not dealt with in detail at the hearing. The question is this. We are hearing an appeal against the decision of HMRC that Mr Tracey's NICs were those set out in the schedule to the letter dated 9 January 2010. If HMRC decided at an earlier stage that by reason of Mr Tracey's negligence there was non payment of specific contributions and notified Mr Tracey of that decision, are we prevented, in considering the schedule from revisiting that conclusion.

37. Alternatively it might be said that Mr Tracey must seek leave to appeal that decision out of time. In that context Mr Thompson vigorously asserted that he had not seen any communication of such an earlier decision. He had no recollection of such a letter. He had been on the record as Mr Tracey's accountant. If Mr Tracey had received such a letter he would surely have shown it to him. We accept this evidence and found it likely that any such letter had not been sent to Mr Thompson and that it decreased the likelihood that such a letter had been sent to Mr Tracey.

38. We set out our decision on the proper course to take on this issue at the end of the decision, but for the present we continue on the basis that any earlier decision letter does not preclude us from visiting the question of negligence in this appeal.

The Disputed Years

1981/82

39. In his letter of 6 August 2010 Mr Thomson says that the earnings originally entered on the P14 were £6,724 rather than £6,479. There is therefore a £245 shortfall in the calculation of earnings and the credited NIC should be adjusted accordingly. The higher figure for earnings is borne out by the deduction card in the bundle before us, but that card also records credited contributions of £502, which is the amount credited in HMRC's contribution record. We conclude that it is not shown that Mr Tracey's earnings were greater than those which would give rise to those contributions in this period.

40. . In that letter Mr Thompson also says that he believes that MT Drain & Sewer Services Ltd also employed Mr. Tracey during part of that year. However he could produce no evidence to us of Mr Tracey's earnings and national insurance contributions from that source.

41. We conclude that the contributions recorded should not be adjusted for this year.

1984 - 85

42. HMRC say that Mr. Tracey received £1,395 from MT Drain and Sewer Surveys limited (which apparently had or used the same Inland Revenue reference as MT Drains and Sewers Ltd, namely M1032). They say the annual LEL for the year was £1767.76. Since the appellant's earnings failed to meet or exceed the LEL the NICs paid were removed from the NI record. HMRC say that there is no record of the contributions being refunded, and that that would suggest that the contributions had not been paid in the first instance. No documents are available in the department records to explain what happened.

43. We conclude that there was a payment of earnings by that company to Mr Tracey of £1,395. We make no finding as to whether payment was made of any NIC: if these were Mr Tracey's only earnings, none is creditable.

44. Mr. Thompson says that (1) Mr. Tracey was also employed by MTC Water Jetting limited in this year and his income from that source was likely to have been some £2160; (2) Mr. Tracey also had earnings from MT**C** Drain and Sewer **Surveys** Ltd of an unknown amount in the year; and (3) taking the additional earnings from these sources together with the earnings from MT Drain and Sewer Limited put Mr. Tracey's aggregate income above the LEL: because the companies were "carrying on business in association" the income should be aggregated.

45. However Mr. Thomson conceded that he did not have evidence of other income from the other sources to put before us.

46. Without evidence of other earnings the aggregation argument has no legs. We conclude that no change should be made to HMRC's record for this year.

1985 - 86

47. HMRC say that no end of year return and was recorded as received in respect of Mr. Tracey's earnings.

48. In his letter of 6 August 2010 Mr. Thompson says that Mr. Tracey was employed by MTC Drain and Sewer Ltd (as in 1984-85) and that his earnings from that source were likely to have been £2160, and that he also had earnings from MTC Water Jetting Ltd.

49. This is supported by a copy of a Sch E assessment addressed to Mr Tracey for 1985/86 in which £2,160, with tax deducted of £36, is assessed on Mr Tracey in respect of such income from "MT Drains" (which Mr Thompson identified as MT Drain and Sewer Surveys Ltd).

50. There was also a P14 in the bundle headed "pro forma" for the 1985/86 year bearing MT Drains & Sewers Limited's name as employer. It shows earning of £1395. Mrs Johnson thought that this was created by HMRC correcting wrongly submitted figures but that in fact it related to 1984/85 because it was in the microfilm records for that year numbered clearly with other such records for MT Drains & Sewers for that year. The figure also appeared on the NIC record for 1984-85. We think that Mrs Johnson is right. We do not take this as evidence of earnings from MT Drain and Sewer for this year.

51. Mr. Thompson told us that he had no evidence to offer of this additional income. No form P14 was available for Mr. Tracey in respect of any such earnings. Mr Thompson's recollection of events so far in the past was insufficient for us to conclude on balance that there were such earnings.

52. We conclude that no change should be made to HMRC's record for this period.

1986 -87

53. HMRC say that no end of year return was recorded as having been received in relation to Mr Tracey's earnings.

54. Mr. Thomson believes that Mr. Tracey was employed by at least five of the associated companies (MT Drain and Sewer Services Ltd, MTC Water Jetting limited, MTC Hydro Jet Cut limited, MTC Drain and Sewer Services Ltd, and Sewerline limited) and that he is likely to have earned some £10,000 in aggregate from those companies.

55. However Mr. Thompson was unable to produce any evidence of such earnings before us other than his recollection.

56. We conclude that HMRC's record for this year should not be altered.

1987 – 88

57. The parties agree that Mr Tracey received £720 from Sewerline this year on which £36.32 of NICs accrued.

58. HMRC said that the original 1987/88 P14 return from MTC Water Jetting limited could not be accepted because it was completed incorrectly. A clerical assessment

was completed by the contributions office and the P 14 record adjusted. It showed earnings of £1,665.

59. But HMRC say that because MTC Water Jetting limited went into liquidation it seems that it did not pay the NICs for which it was liable. They so conclude because their records show that an investigation was carried out, and on 23 May 1991 Mr. Tracey was found to be a "negligent director" and the contributions were removed from his record. Mr Tracey told us that he thought that MTC Water Jetting went into liquidation in 1991 or 1992, not 1988. We accept HMRC's conclusion: Mr Thompson's uncertain recollection was not enough to tip the balance.

60. The LEL for the year was £2,028. Mr. Tracey's recorded earnings of £1,665 were below this. Therefore HMRC say that even if Mr. Tracey had not been categorised as a "negligent director" no NICs would have been attributable to his earnings and the record should therefore reflect that- as it does.

61. Mr. Thomson asks (1) did MTC Water Jetting pay the NIC: he thought that it had. The correction to the P14 indicated that HMRC had received the money, (2) if not, was Mr. Tracey negligent; (3) was Mr. Thompson notified; and (4) if he was not notified does that affect his right to appeal? It seems to us likely that the company did not pay for the reasons given in the antepenultimate paragraph (we accept Mrs Jonhson's argument that the clerical assessment would have been carried out before the insolvency investigation by reference only to the paperwork received); we have set out our conclusions on the remaining questions earlier in this decision.

62. In addition for this year Mr Thompson says that Mr. Tracey received income from Globic Ltd, MTC Well Systems Ltd and MTC Hydro Jet Cut limited, increasing his total earnings by, Mr Thompson estimates, some £3500. However Mr Thompson provided no evidence of these earnings other than his own recollection and we did not find that sufficient for us to be able to conclude on the balance of probabilities that earnings had accrued from these sources.

63. However, for the reasons set out earlier in this decision (and also because it seems that Mr Tracey left Water Jetting on 9 December 1987 – and so would not have had direct involvement in payment matters for the year), we were satisfied that Mr Tracey neither was negligent as to, nor connived in, the non payment of NIC by MTC Water Jetting Limited. As a result we conclude that the deemed contributions which arose in relation to the earnings of £1665 should be reinstated on his record. Taken together with his earnings from Sewerline Limited his earnings in the period were £2485, which exceeded the LEL. It seems to us that these two companies were associated and that the aggregation was practicable. We therefore conclude that his recorded earnings for the year should be treated as £2485 and his NIC contributions treated as those attributable to this amount.

1988 - 89

64. HMRC say that an end of year return from Sewerline Limited showed earnings of £2340 and NICs of £118.04. The LEL for that year was £2132. Mr. Tracey's earnings were thus above the LEL in this year.

65. HMRC also accept that Mr. Tracey had earnings of £1500 from MTC Well Systems for this year, but said that no NI contribution accrue in respect of them because these earnings were below the LEL.

66. Mr. Thompson called to our attention copies of income tax assessments made by HMRC in respect of this year. The assessments showed that the Inland Revenue had taken into account estimated income from MTC Hydro Jet and MTC well Systems. Mr. Thompson also asserts that Mr Tracey also received earnings from Gwenpier Workspace limited and MTC Drain and Sewer Surveys. This income he says would have given rise to contributions which should have been reflected in Mr Tracey's contribution record.

67. The 88/89 assessment shows (1) income from Gwenpier of £1,500; no NIC record exists in respect of this; (2) *estimated* income form MTC Hydro Jet of £1,650; no NIC record exists in respect of this; (3) estimated income from Sewerline of £1,000 ; a P14 for Sewerline, as noted above records earnings of £2340; (4) *estimated* income from MTC Well Systems of £150; a P14 exists for £1,500.

68. We are not persuaded by the estimated figures in the assessments that income from Hydro Jet should be taken into account: the estimate reflects the inspector's lack of knowledge, and comparison with the actual P14 for Sewerline shows how wrong his estimate was. We also consider that it is likely that in a collection of companies working closely together the allocation of income between the principals could be done on an ad hoc basis.

69. But we are concerned by the non estimated figure of £1,500 from Gwenpier. However we saw none of the correspondence which was likely to have flowed after this assessment, and, given the similarity between the aggregate of the income shown in the P14s of £3,840 and the aggregate estimate in the assessment of £4,300, think it likely that the income attributed to Gwenpier was in the end paid to Mr Tracey by another entity in the group, namely MTC Well Systems.

70. We were thus unable to conclude that any earnings had been received from companies other than MTC Well Systems Ltd and Sewerline Limited. Accordingly we could not conclude that national insurance contributions were to be treated as having been paid, or had been paid, in respect of any other such earnings.

71. But it seems to us that MTT Well Systems Ltd, and Sewerline were likely to have been carrying on business in association. As a result, unless it was not "reasonably practical to do so" the earnings fall, by regulation 15, to be treated as being in respect of one employment. We concluded that it was reasonably practical to do so.

72. As a result the recorded earnings for this year of £3840 (=£2340 plus £1500) should be treated as arising from one employment.

73. It appeared that MTC Well Systems Ltd did not account for any NIC on the earnings it paid, but Mr. Tracey can take advantage of regulation 6A unless he connived in, or was negligent as to, that non-payment. In this year no question of insolvency arises. The failure to pay seems clearly to have been due to a failure to aggregate. That failure does not seem to us to have been attributable to Mr Tracey's negligence or connivance.

74. As a result the national insurance contributions to be recognised for the year should be treated as those in relevant to an income of £3840.

75. *1989 - 90*

76. HMRC say that Sewerline submitted an end of year return showing Mr. Tracey's earnings as £2385 and employee NICs of £818. As Mr. Tracey was a director his NICs were reassessed by HMRC shortly after the end of the year. The reassessment showed that NICs of £248.64 in total and £131.89 of employee contributions should have been paid and the NI record was amended by HMRC on 5 May 1993 to show the corrected figures.

77. But a later investigation by the Insolvency Section determined that Mr. Tracey was a "negligent director" and (implicitly) his earnings and contributions were removed from the record. It is implicit in the fact that this investigation was conducted that the contribution had not been paid by Sewerline, but the evidence before us suggests that Sewerline was still paying earnings and making NIC reports in 1991/92. On this evidence we do not find it proved that Sewerline had not made the relevant payments.

78. Mrs Johnson says that when the Insolvency Section made their decision they would have sent Mr. Tracey a letter to tell him that he was deemed to be negligent and that if he could have then showed that he had not been negligent the removal of contributions would have been reversed and the record reinstated.

79. HMRC accept that, in addition, Mr. Tracey had earnings of £1500 from MTC Well Systems Limited. The P14 report from that company showed no NI deductions (presumably because that figure fell short of the annual LEL).

80. Mr. Thomson, in the schedule attached to his letter of 6 August 2010 suggests (by a reference in small type to "P45") that a P45 shows earnings of £6,290 from MTC Drain and Sewer Surveys limited, and that there were earnings of £1,500, and £500 from MTC Water Jetting and MTC Hydro Jet Cut respectively. In his letter of 10 August 2010, he suggests that Gwenpier Workspace Centre Ltd paid "£1500 +" to Mr. Tracey.

81. We were provided with no evidence (other than Mr. Thompson's measured assertion) that MTC Hydro Jet Cut had made payments to Mr. Tracey. We saw no evidence of payment by MTC Water Jetting, and suspect that Mr. Thompson may have meant to refer to the recognised payment of £1500 from MT Well Systems. Nor was there any other evidence in relation to Gwenpier. We conclude that it was not proved that these payments were made.

82. Mr Thompson had referred, as we have noted above, to a P45 in relation to £6,290 paid by MTC Drain and Sewer Surveys Limited. Unfortunately no such document was put before us. We conclude that it was not shown that further earnings derived from this source.

83. Our conclusions are these: (1) in relation to Sewerline, if it failed to pay NIC, Mr. Tracey was not negligent and did not connive at any such failure; (2) and his earnings and NICs from that source should thus be taken to be £2,385 and £131.89 respectively; (3) Sewerline and MTC Water Jetting were carrying on business in association and it was reasonably practicable for them to aggregate earnings; (4) thus Mr. Tracey's earnings from MTC Well Systems Ltd are to be treated as aggregated with those from Sewerline; and (5) as a result those earnings do not fall below the LEL. Consequently for this year Mr Tracey should be treated as having made contributions in respect of earnings of £(2385+1500 = 3885)..

84. *1990 - 91*

85. HMRC accept that Mr. Tracey had earnings from Sewerline, MTC Well Systems and Gwenpier in this year. But at the hearing they submitted that only the earnings from Gwenpier give rise to NIC credits. They said:

(1) Sewerline Ltd's end of year return showed earnings of £835, total NIC's of £129.71 and employee NICs of £50.56. HMRC say that as the earnings did not reach the LEL applicable to a director (of £2,392) the NICs were removed from the record.

(2) Earnings of £1500 from MTC Well Systems Ltd likewise did not reach the LEL; but

(3) earnings of £16,216 from Gwenpier did qualify for NIC credits.

86. Mr. Thompson's letter to HMRC of 21 January 2010 suggests that the earnings from Well Systems were £5009, not £1500. This is repeated in the schedule to his letter of 6 August 2010, but in a letter of 10 August 2010 it appears that he accepts that the figure should be £1500. £1500 is consistent with the P 14 held by HMRC.

87. We conclude that it is not shown any other earnings accrued to Mr. Tracey for this period by reference to which NIC credits would arise.

88. Mr. Thompson makes two further points:

(1) He says that Mr. Tracey was not a director of Sewerline in 1990/91 and therefore that the earnings period would not be the whole of that year. Accordingly £835 would have been would have given rise to creditable NIC;

Mr. Tracey's P 14 year however shows that he left on 10 May 1990.

But as we note at [13] above, a Companies House form 363a shows that he resigned as director in the previous year. We think it likely that, having been a director he resigned on 5 January and continued as company secretary until he

left on 10 May 1990 and so was not a director of Sewerline for any part of that year. As a result, absent aggregation, the earning period is not a full year.

After HMRC had considered the newly produced form 363a they wrote to Mr Tracey on 8 January 2013 accepting that he had not been a director of Sewerline in the year, and indicating that as a result his earnings did give rise to NIC and they would reinstate the contributions paid to his record.

(2) He says that the fact that MT Well Systems declared earnings of £1800 and no national insurance indicates that it was in fact adopting aggregation of earnings.

It seems to us that MT Well Systems' record of nil NIC deductions on £1500 of earnings is consistent with the company treating Mr. Tracey as a director and recognising therefore that the earnings period was a full year and that his earnings were less than the LEL for that year. It does not therefore point towards aggregation in practice.

If Mr. Tracey's earnings from Sewerline were aggregated with those from MT Well Systems they would be £2235. The LEL for 1990/91 was more than that, it was £2392. Accordingly unless aggregation also applied to include his Gwenpier earnings it would not affect his earnings NIC record. Mr. Thompson says that in that period Mr Tracey was a director of MTC Well Systems Ltd and of Gwenpier Workspace Limited.

89. It seems to us that (1) MTC Well Systems, Gwenpier and Sewerline were associated companies, and earning from them fell to be aggregated; (2) Mr Tracey was a director of one of those associated companies, MTC Well Systems, from which he received earnings; (3) therefore the relevant earnings period in respect of those aggregated earnings was a year (regulation 6A(4)); (4) that means that for 1990 - 1991 Mr. Tracey's recorded earnings should be increased by £835 + £1500 = £2,335and his national insurance contributions increased by such amount as is appropriate to an increase in that amount of his total earnings for the period by reference to an earnings period of 12 months. If the correct amount of NIC was not paid by those companies Mr Tracey may, for the reasons set out in para [73] take advantage of regulation 39.

90. As noted, HMRC acceded to the inclusion of NIC on the earnings of £825 from Sewerline, but the calculation of the relevant NIC will be different on the basis of our conclusions in the preceding paragraph.

1991-92

91. HMRC's records show:

(1) Earnings from MTC Well Systems of £1,060, which being below the LEL were not liable to NIC

(2) Earnings from Gwenpier Workspace of £3,033 with £242.24 of NIC.

92. Mr Thompson offered no further evidence in relation to earnings for the year.

93. In our view, for reasons already set out the earnings from these companies should be aggregated .

94. Mr Tracey had been a director of MTC Well Systems in 1990/91. It was likely that he was also a director in 1991/92: no evidence was produced to the contrary. Thus the earnings period for that year for these aggregated employments was 12 months.

95. As a result Mr Tracey's NIC should be based on total earnings of £4,093, and the LEL for a 12 month period.

96. To the extent that the companies involved did not pay the share of the NIC required by regulation 12, Mr Tracey is in our view entitled to rely on regualtion39.

Jurisdiction

97. Section 8 Social Security contributions (Transfer of Functions) Act provides that it shall be for an officer of HMRC to decide whether contributions of a particular class have been paid. Section 11 provides for a right of appeal against any such decision to the First Tier tribunal, and section 12 provides that an appeal must be made within 30 days after notice of the decision is issued (although the effect of section 13 may be to permit an appeal out of time where there is a reasonable excuse for the delay).

98. It is clear that the decision of 9 January 2010 fell within section 8 and that the appeal against it falls under those provisions.

99. Regulation 5 of the Social Security Contributions (Decisions and Appeals) regulations 1999 gives an officer of the board power to make a decision superceding in earlier decision. The letter of 9 January 2010 might be taken as one superceding any earlier a decision of HMRC in relation to periods in which HMRC classified Mr. Tracey as negligent.

100. On that basis the Transfer of Functions Act permits us to determine the question of whether contributions are to be treated as having been paid in those years in which HMRC say that Mr. Tracey was negligent.

101. This issue was not debated before us and we were not shown any transitional provisions in relation to decisions made before the 1999 Act came into force.

102. Unless further submissions are received in relation to this issue from either party within 28 days of the release of this decision, the appeals are determined as specified in the following paragraphs. Any party wishing to make such submissions should copy them to the other.

Conclusions

103.We should express our gratitude to HMRC for the clarity of their statement of case and the organisation of the evidence. We found the detail difficult to absorb and complex and our task was made easier with that help.

104.Many of our conclusions resulted from the absence of evidence to prove particular assertions to our satisfaction. The need for evidence is sauce for the goose and for the gander, and good evidence can become very difficult to find with the passage of time. HMRC could not produce persuasive evidence of negligence when the taxpayer's evidence suggested to us that there was no negligence; and the taxpayer failed to produce evidence of payments by other employers. Both suffered from the affects of time.

105.We set out our conclusion by repeating the table used in paragraph 2 above with our decision in relation to the disputed contributions and earnings set out in a final column.

Year	Whether Expressly Disputed in Notice of appeal	Comment/ nature of dispute	Result of appeal on NIC record
1978-79		Position Agreed	-
1979-80	Disputed	Now Agreed	-
1980-81	Disputed	Now agreed :contribution £545.20	-
1981-82	**Disputed**	Other earnings?	**No adjustment**
1982-83	Disputed	Agreed	-
1983-84	Disputed	Agreed	-
1984-85	**Disputed**	**LEL/other earnings**	**No adjustment**
1985-86	**Disputed**	**Other earnings?**	**No adjustment**
1986-87	**Disputed**	**Payment etc/LEL/Other earnings?**	**No adjustment**
1987-88	**Disputed**	**LEL/Payments etc/other earnings**	**Change to show NIC attributable to earnings of £2485**

1988-89	**Disputed**	**Other earnings/LEL**	**Change NIC record to NICs on earning of £3840**
1989-90	**Disputed**	**Payment etc/LEL /Other earnings**	**Change NIC record to NICs on earnings of £3885**
1990-91	**Disputed**	**LEL**	**Increase NICs by ref to increase in earnings of £2335**
1991-92	**Disputed**	**LEL**	**Adjust to aggregate for the full year.**
1992-93 to 2007 - 08		Class 2 contributions. No dispute	

Rights to appeal

106.If no further submissions are made in accordance with para 102 above, this document will contain full findings of fact and reasons for our decision. In that case any party dissatisfied with the 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 30th April 2013