



[2022] UKFTT 00119 (TC)

TC 08450

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04952

NATIONAL INSURANCE CONTRIBUTIONS – personal liability notice – whether neglect attributable to officer – yes – appeal dismissed

BETWEEN

MICHAEL EAMES

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
ELIZABETH BRIDGE**

The hearing took place on 8 November 2021 at Havant Justice Centre.

The Appellant appeared in person

Ms Vicary, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a personal liability notice (PLN) issued to the Appellant (Mr Eames) on 6 March 2019, in the sum of £108,059.07 plus statutory interest. The PLN was issued pursuant to s121C Social Security Administration Act 1992 in respect of a National Insurance Contributions (NICs) debt relating to A1 Recovery Portsmouth Limited (A1RP).

2. There was no dispute as to the amount of the NICs debt, and the background facts of the matter set out below were not generally disputed. HMRC did not allege that there had been any fraud: the question for this tribunal was whether the failure by A1RP to pay the NICs debt was due to neglect on the part of Mr Eames.

Background

3. Mr Eames was the sole director and shareholder of A1RP. This company entered compulsory liquidation on 3 July 2017, owing HMRC the NICs debt referred to in [1] above.

4. Mr Eames had been the sole director and shareholder of two other prior companies which had gone into liquidation:

(1) A1 Recovery Limited operated from (approximately) April 2013 to June 2014 and owed HMRC £70,301.59 in PAYE and NICs at liquidation.

(2) A1 Recovery & Garage Services Limited operated from (approximately) July 2014 to December 2015. At liquidation, it owed £79,151.41 in unpaid PAYE and NICs.

5. Each of these companies, including A1RP, undertook maintenance and repair of motor vehicles, and provided roadside recovery services on a contract basis for national breakdown assistance services. Both A1 Recovery & Garage Services and A1RP acquired the business and assets of its predecessor company in order to commence trading.

6. Mr Eames was also the director and shareholder of a number of other companies, including JLE Havant Limited and JLE Hire Limited. Mr Eames was disqualified from acting as a director for six years from 6 February 2019 although he remains a director of JLE Havant Limited with the permission of the court. The disqualification arose from the liquidation of A1 Recovery and Garage Services Limited.

7. A1RP was set up in June 2015 and began operating in approximately January 2016. The company made a payment in respect of PAYE/NICs on 23 February 2016, in respect of the January 2016 period. This was made one day late.

8. Thereafter A1RP continued to make net payments to employees, deducting NICs, but did not make any further payments in respect of PAYE and NICs until a time to pay arrangement was entered into with HMRC on 26 July 2016. The terms of the arrangement were that the company would make six payments of £7,000 each and final payment of £12,780.62 to clear the PAYE and NICs debt which had accumulated between February 2016 and June 2016. The company was also required to pay the company's PAYE and NICs liabilities as they fell due from July 2016 onwards.

9. The company made three payments in relation to the time to pay arrangement of £7,000 each on 26 July 2016, 15 August 2016 and 15 September 2016. No further payments were made thereafter. The company made and continued to make net payments to employees but the accruing NICs liabilities in those months and thereafter were also not paid to HMRC.

Submissions and evidence

10. HMRC contended that there had been neglect in that Mr Eames had prioritised A1RP making payments to related companies and to himself while A1RP had, and was still accumulating, debts to HMRC.

11. Mr Eames contended that the failure to pay was not attributable to neglect on his part, and HMRC had not taken account of the fact that the issue had arisen only because of poor business decisions made in good faith in a difficult marketplace and that Mr Eames lacked any formal qualifications.

Payments to other related companies

12. During the period in which the NICs debt accumulated, HMRC's evidence, taken from bank statements, was that A1RP made net payments to JLE Havant of £313,893.48 and to JLE Hire Limited of £79,450.97. Mr Eames questioned whether this took into account loans and associated repayments. Officer Mustafa's evidence was that any amounts received by A1RP from these companies had been deducted from the total payments made to them. The turnover of A1RP during this period was approximately £1,700,000 (per bank statements).

13. Mr Eames' evidence was that he had to make the payments to the related companies in order to ensure that those companies continued in business; if he had not made the payments, JLE Havant in particular would have failed and his entire business would have come to an end. Mr Eames explained that, when A1RP went into liquidation, JLE Havant had lost over £100,000 which had to be paid out to satisfy guarantees in respect of A1RP.

14. Mr Eames explained that the amounts paid were for the hire of vehicles, and payments for fuel and recovery vehicles which had been paid for by JLE Havant on behalf of A1RP. The company had been unable to get credit and so had relied upon the related parties using their credit facilities to obtain items and services needed to trade. He contended that these were, therefore, genuine business expenses.

15. Mr Eames had expected that A1RP would win a contract for recovery of police vehicles and spent considerable amounts via the related companies to acquire the necessary recovery vehicle and improving the yard. However, A1RP did not win the contract and he argued that this had led to the cashflow problems.

16. In the hearing, Mr Eames accepted that he had made these payments, and payroll payments to himself, in preference to paying debts owed to HMRC. He argued that although these may have been poor decisions, they were made in good faith in a difficult market.

Time to pay arrangements

17. Mr Eames stated that he had contacted HMRC in June 2016 to request a time to pay arrangement for A1RP and starting paying instalments as agreed. He submitted that this was not something that could be regarded as 'neglect'.

18. HMRC contended that he entered into the time to pay arrangement only after HMRC had attempted to contact him several times to discuss the accruing debt. Their evidence was that Mr Eames refused to discuss the matter on the telephone and it was only once a visit had been arranged that the time to pay arrangement was able to be set up.

19. Mr Eames accepted that A1RP had only paid three instalments of the agreed amount. Three months later, in September 2016, the factoring company used by A1RP went into administration. This caused cash flow problems and so A1RP was unable to continue to make payments to HMRC. Mr Eames accepted that he did not contact HMRC when he realised that there would be a problem with continuing to make payments.

20. Mr Eames contended that, if he was to be liable for anything, it should be limited to the NICs unpaid after the time to pay arrangement broke down as he contended that his behaviour before that could not be described as ‘neglect’. He noted that other cases on PLNs had not involved time to pay arrangements and that in *Livingstone* [2010] TC 00369, HMRC had stated that a reasonable person would have sought a time to pay arrangement and, as such, his behaviour should be regarded as reasonable.

Other arguments

21. In his grounds of appeal, Mr Eames had set out various promises which he stated had been made by ministers when the legislation was introduced which he considered should have been taken into account in deciding whether or not to issue the PLN on the basis of the principle in *Pepper v Hart*. Mr Eames accepted in the hearing that the principle in *Pepper v Hart* as to the relevance of statements of ministers did not apply in this context, as there was no ambiguity in the legislation. We have therefore not set out any further detail on this aspect of his grounds of appeal.

Relevant law and definition of neglect

22. s121C of the Social Security Administration Act 1992 states, as relevant:

- (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 Inland Revenue—
 - (i) a specified sum in respect of that amount; and
 - (ii) specified interest on that sum;

...
- (3) The sum specified in the personal liability notice under subsection (2)(b)(i) above shall be—
 - (a) in a case where there is, in the opinion of the Inland Revenue, no other culpable officer, the whole of the specified amount; and

...

23. In this case, there is no allegation of fraud and the amounts are not disputed. The matter in dispute is whether or not the failure to account for the contributions is attributable to neglect by Mr Eames.

24. Case law has established that “neglect” is an objective standard of conduct, summarised in *Blyth v Birmingham Waterworks Co* ([1843–60] All ER Rep 478 at 479–480) as follows:

“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.”

25. In *O’Rorke* ([2013] UKUT 499 (TCC)), the Upper Tribunal concluded (at [69]) that “the word neglect is to be given its usual objective meaning: it is a standard of conduct, not a subjective state of mind”. The judge made specific reference to the decision of *Blyth v Birmingham Waterworks Co* in this context, confirming that neglect and negligence have the same meaning for these purposes.

Discussion

26. Having considered the evidence, we find that the failure of A1RP was attributable to neglect by Mr Eames.

27. When A1RP started trading, Mr Eames was well aware that there were substantial risks involved with the business as he had had two previous companies undertaking the same type of business fail owing substantial amounts to HMRC. We note his misplaced optimism that profits would come from growth of the business as A1RP was to tender for a police contract but also note that he could not say when he would have expected that contract to have been awarded or indeed when any profits from that contract could have been expected. As such, we are not satisfied that he had mitigated the risks to any extent in A1RP by comparison to the business model which failed in his previous companies.

28. Mr Eames did not suggest that he was not aware of the obligation to ensure that PAYE and NICs amounts were required to be paid over to HMRC each month. Mr Eames stated in writing to HMRC that he accepted that he should have made all of the payments on time and that he did not do so.

29. This failure to account to HMRC for NICs deducted from payroll amounts began shortly after his previous company had failed, owing money to HMRC in similar circumstances. We consider that a prudent and reasonable taxpayer in these circumstances would have made sure that they met their NICs obligations from the outset and continued to do so.

Payments to other companies

30. Mr Eames repeated several times that he had not profited from the payments totalling £393,344.45 (net) which were made to related companies as he argued that these were trade creditors. They were also companies which were under Mr Eames’ control.

31. We note that he also paid himself £49,162.49 during the period in which he paid to pay NICs due to HMRC, which he explained as being “payroll rather than anything else”. It would appear, therefore, that Mr Eames not only paid himself in preference to HMRC but in paying himself actually increased the A1RP debt to HMRC.

32. Mr Eames’ contentions in this regard do not assist: the test for a PLN is not whether the company officer benefitted personally but whether the failure to pay was due to their neglect.

33. We consider that a prudent and reasonable person, knowing that amounts deducted from payroll were owed to HMRC, would not use those funds to pay connected companies and themselves in priority to HMRC. Mr Eames was endeavouring to support his companies through non-payment of tax; HMRC is not a short-term lender to be called on by taxpayers at will to support connected (or, indeed, unconnected) businesses. We consider that a prudent and reasonable person would not conduct business in this way. They would comply with their statutory duty to ensure that funds deducted for NICs from employees are paid to HMRC on time each month.

Time to pay arrangement

34. We do not accept Mr Eames' contention that seeking a time to pay arrangement meant that he acted reasonably and that there was no neglect prior to the time to pay arrangement breaking down. Although Mr Eames did agree a time to pay arrangement for A1RP, he did so only after failing to make payments for at least three months and it was only as a result of an HMRC visit that this action was taken. A1RP also continued to fail to pay NICs as they accrued.

35. Mr Eames suggested that the time to pay arrangement had broken down when A1RP's factoring company went into administration in September 2016: the arrangement had in fact broken down from the outset when A1RP failed to pay the current accruing liabilities. Payment of those accruing liabilities was also a condition of the arrangement, not merely payment of the historic debt.

36. In fact, at the time that the company agreed to pay £7,000 per month together with making payment of current liabilities (by then approximately £12,000 each month), the company had £4,000 in the bank. Although Mr Eames explained that there were cashflow problems at the time as a result of the factoring company already being in difficulties, we do not consider that A1RP had any realistic prospect of complying with the time to pay arrangement at the time that it entered into that arrangement. We do not consider that a prudent and reasonable person would have entered into such an arrangement at a time when they did not have the funds required to meet the payments required. We also consider that a prudent and reasonable person would not have continued trading in these circumstances.

37. We also note that one of Mr Eames' previous companies had a time to pay arrangement with HMRC and so consider that he would have been well aware of the possibility of making such an arrangement when he first encountered difficulties in making payment in respect of the February 2016 amounts.

38. Mr Eames contended that he had requested the time to pay arrangement at the earliest opportunity, during a field visit from HMRC. Although HMRC had called him previously, he had considered that those phone calls might have been scams and refused to discuss the company in those calls. There was no explanation as to why Mr Eames could not have written to HMRC, or telephoned them, when the company first had difficulty making payment.

39. Seeking a time to pay arrangement might be regarded as a reasonable course of action, but this will depend on the specific facts of the case.

40. We consider that allowing a company to accrue a large NICs debt before seeking a payment arrangement, and then failing to ensure that the company made the required current payments such that the net debt to HMRC increased despite payment of instalments on those arrangements, is not a reasonable course of action and therefore in this case the seeking of a time to pay arrangement does not mean that there was no neglect by Mr Eames.

Overall

41. Mr Eames has now had three companies, all with very similar names and all undertaking the same type of work, fail owing considerable amounts in NICs (and other debts) to HMRC. Mr Eames was well aware, when he commenced trading with A1RP, of the requirement to account to HMRC for the PAYE and NICs deducted from employee payments. He nevertheless chose to use the NICs funds withheld from staff payments to make payments to his other companies and to himself after the first month of trading.

42. We find that Mr Eames made the positive choice to meet his own companies' costs, and to pay himself, out of funds which he knew were owed to HMRC. Mr Eames' contention that A1RP could not have traded if it had made the payments to HMRC does not assist: there is a statutory duty to make payment to HMRC of PAYE and NICs amounts withheld from

employees. There is no facility for companies to choose to use those amounts for their own purposes.

43. With regard to Mr Eames' argument that the decisions were made in good faith in a difficult market, we consider that a prudent and reasonable person in his circumstances would not have prioritised payments to connected companies, and themselves, over payment to HMRC. We also consider that a prudent and reasonable taxpayer would have taken steps at the outset to conduct the business of A1RP in a different manner in order to minimise the risk of repeating the difficulties that had arisen with the predecessor companies.

44. Accordingly, considering the evidence in the context of the meaning of the term "neglect" we find that the failure of A1RP to account for NICs was due to neglect by Mr Eames.

Conclusion

45. We therefore dismiss the appeal and uphold the personal liability notice issued to Mr Eames in full.

Right to apply for permission to appeal

46. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 04 APRIL 2022