



**TC01994**

**Appeal number: TC/ 2011/00360**

*Appeal against Personal Liability Notice issued against the Appellant as a director of a company which made no payments of PAYE or NIC to HMRC during period of trading – apportionment by HMRC between directors fair and equitable – statutory obligation of directors not delegable – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS CHRISTINE ROBERTS**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE J. BLEWITT  
MRS. M. CROMPTON**

**Sitting in public at Manchester on 26 March 2012**

**The Appellant did not attend and was not represented.**

**M Tebbet, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

5 1. This is an appeal against the decision by HMRC to issue a personal liability notice in respect of unpaid National Insurance Contributions (“NIC”) by TWRM Print Ltd. The Notice was issued to the Appellant on 29 June 2010 under Section 121C of the Social Security Administration Act 1992 in respect of 2008/2009 and 2009/2010 tax years.

10 2. The Appellant did not attend the hearing. Upon being contacted by the Tribunal Clerk, Mrs Roberts confirmed that she did not intend to attend the hearing due to the expense involved and the fact that she finds the situation distressing. Mrs Roberts stated that she did not feel she could add representations beyond those contained within correspondence.

15 3. The Tribunal considered it to be in the interests of justice to proceed with the case under Rule 33 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009. In order to ensure fairness to the Appellant we considered with care the bundle provided by HMRC and correspondence from the Appellant to HMRC which set out the Appellant’s submissions.

### *Background*

20 4. TWRM Print Limited (“TWRM”) was incorporated on 19 September 2008 in order to take over the business of another company, Abbotts Creative Print Limited which was purchased out of administration. The business was purchased with the promise of funding from a company called G. E. Commercial Finance. Trading began in October 2008 until TWRM was placed into administration on 17 September 2009.

25 5. The Directors of TWRM were, throughout the period of trading, the Appellant Mrs Roberts, Mr Ward and Mr Taylor.

6. Throughout its period of trading, TWRM made no payments of PAYE or NIC to HMRC although the Company records demonstrate that Class 1 NICs were deducted from employees’ wages and that net wages were paid to employees.

30 7. The 2008/2009 P35 submitted by TWRM on 18 May 2009 quantified the NIC due in respect of 32 employees as £62,370.32. A P11D (b) Return in respect of benefits provided to employees in 2008/2009 was submitted by the Company on 18 June 2009 which quantified the NIC unpaid on benefits as £1,671.94, making a total amount of unpaid NIC for 2008/2009 of £64,042.26.

35 8. The 2009/2010 Company records contained a payroll reconciliation sheet which showed the NIC due for April to July 2009 as £28,108.19. TWRM ceased trading in September 2009 and consequently, for the two months of trading for which no payroll records have been made available to HMRC, an estimate for the NIC for the last two months of trading was based on an average of the NIC figures for the first three  
40 months of the year, which amounted to £18,738.79.

9. The amount specified in the Notice of Personal Liability, that being £40,306.39, represents an apportionment, on a one-thirds basis, of the total Class 1 and Class 1A NIC underpaid by the company prior to liquidation, plus statutory interest due thereon.

5 *Issues*

10. There was no dispute in respect of the amount specified in the Personal Liability Notice nor was the basis upon which it was calculated challenged.

10 11. There was no dispute that TWRM had made no payments of NIC to HMRC during its period of trading or that such payments were due to HMRC. There was no dispute that the Appellant was a director of TWRM at the relevant time.

12. The issue for the Tribunal to determine is whether HMRC was correct to raise a Personal Liability Notice on the Appellant on the grounds that the Company's failure to pay the amount specified in the Notice was attributable to the Appellant's neglect.

*The Law*

15 13. Section 121C of the Social Security Administration Act 1992 ("SSA") provides HMRC with the statutory authority to seek unpaid company contributions from the directors or other officers of a company provided that certain conditions are met:

*(1) This section applies to contributions which a body corporate is liable to pay, where—*

20 *(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").*

25 *(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]—*

30 *(i) a specified sum in respect of that amount; and*

*(ii) specified interest on that sum; and*

*(c) where that sum is given by paragraph (b) of subsection (3) below, specifying the proportion applied by the [Inland Revenue] for the purposes of that paragraph.*

(3) *The sum specified in the personal liability notice under subsection (2)(b)(i) above shall be—*

(a) *in a case where there is, in the opinion of the [Inland Revenue], no other culpable officer, the whole of the specified amount; and*

5 (b) *in any other case, such proportion of the specified amount as, in the opinion of the [Inland Revenue], the officer's culpability for the failure to pay that amount bears to that of all the culpable officers taken together.*

...

(9) *In this section—*

10 “contributions” *includes any interest or penalty in respect of contributions;*

“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;...*

14. There was no dispute as to the fact that conditions (a) and (c) were met; there  
15 was an underpayment of Class 1 and Class 1A NIC and the Appellant was acting as an officer of the Company at the relevant time in her capacity as director.

15. The only area of dispute for this Tribunal to determine relates to whether HMRC have proved on the balance of probabilities that the Company's failure to pay contributions was due to fraud or neglect on the part of one or more individuals.

20 16. Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1992 provides the authority for HMRC to issue a Personal Liability Notice.

### *The Appeal*

17. The Appellant appealed under S 121D (2) (b) SSA on the basis that the failure to pay was not attributable to any fraud or neglect on her part.

25 18. The Notice of Appeal dated 30 December 2010 sets out the grounds of appeal relied upon. The Appellant contended that she was acting on advice given by G.E. Financial and MCR. All paperwork has been lost due to the involvement of administrators and the Appellant has not received a fair trial as a result, in contravention of her human rights.

30 19. In the absence of the Appellant attending the hearing, we also took into account correspondence from the Appellant to HMRC dated 12 May 2010, 17 September 2010, 20 October 2010 and 29 October 2011, the contents of which can be summarised as follows:

20. TWRM was purchased out of administration in September 2008 with the promise of help funding the business from GE Commercial Finance. Two connected businesses (Print Wright Limited and Rhodes Labels Limited) were used to raise funds to purchase the business from the administrators. £32,000 identified by HMRC in the Company's bank account for a number of months over its period of trading had been set aside for the new lease of the premises and which could not be paid immediately for reasons beyond the control of TWRM. The Company was affected by the recession; "at this time it could be argued that a decision to close the business should have been taken, however, the decision was not taken as the opinion of not just the directors but also the key staff the business could be turned around." Discussions took place with "one of the advisors" who stated that a payment plan could be negotiated with HMRC by them on behalf of the Company; it subsequently transpired that this was not done.

21. Mrs Roberts disagreed with HMRC's contention that she had not acted as a "reasonable and prudent" person and that the Company's failure to make NIC payments was a result of neglect on her part. The Directors had a number of other print businesses and members of staff were tasked with various day-to-day functions, including accounts. The Accounts team at Abbotts Creative Print (the Company bought out of administration by the TWRM) made contact with HMRC regarding PAYE/NIC and VAT, however there is no documentary evidence to support this as it was retained by the administrators. The Appellant accepted that funds were used to pay other creditors, including connected companies however stated that as the majority of products produced did not attract VAT, the Company would have been entitled to a refund which was intended to be used to help reduce the deficit of PAYE/NIC.

22. Monies received from G. E. Commercial Finance paid fees, rent, wages and repaid other companies for materials. G. E. Commercial Finance dictated all financial matters.

23. The directors had regular meetings with G. E. Commercial Finance who funded the business via Invoice Discounting and which was aware that the Company was not paying all of its debts including those to HMRC. G. E. Commercial Finance suggested that the Company sought advice from MCR Corporate Restructuring, however the directors were reluctant "as these discussions revolved around placing TWRM into administration. G E reflected on this and suggested that we reviewed in 3 months...The Directors were also very nervous of the involvement of MCR as they had previously been involved with one of the other connected businesses which in the opinion of the Directors would have still been trading if MCR had not been involved"

24. The Appellant asserted that she had acted on the advice offered from the company's advisors and financiers, i.e. G. E. Commercial Finance and MCR Corporate Restructuring and therefore had not been negligent. The Appellant queried why HMRC did not contact the Company when first made aware of its underpayments in July 2009.

*Evidence*

25. HMRC Officer Andrew Powley provided a lengthy and detailed written statement to the Tribunal which stood as his evidence-in-chief. We will not simply rehearse the contents verbatim, however the salient points can be summarised as follows:

5 26. On 2 February 2010 Mr Powley opened a PLN enquiry into TWRM, a company that was in liquidation as a result of the following information:

(a) TWRM had made no payments of PAYE tax or NIC for the full period of trading from October 2008 to September 2009;

(b) The NIC debt was considered significant;

10 (c) Two of the directors, Mr Ward and Mr Taylor, had been associated with at least 2 other failed companies (Rhodes Labels Ltd and Rhodes (St Helens) Ltd'

(d) There was no evidence that the Company had contacted HMRC to discuss underpayments and make arrangements prior to July 2009.

15 27. The Company bank statements were examined by Mr Powley who noted that throughout the period in question TWRM was in receipt of regular and significant payments from G. E. Commercial Finance, for example between 9 October 2008 and 15 July 2009 payments of at least £888,197.00 were credited to the Company bank account. Throughout the relevant period the Company bank account was significantly  
20 in credit, for example between 9 October 2008 and 23 December 2008 the minimum balance shown on the Company bank account was £32,900.00 in credit and between 9 January 2009 and 9 March 2009 the average balance exceeded £20,000.00. In comparison, during these periods the average monthly NIC remittances were just in excess of £10,000.00.

25 28. The Company bank accounts revealed payments of significant sums to the benefit of connected companies during the relevant period, including payments totalling £34,660.00 to Print Wright Limited (a company in which Mrs Roberts, Mr Ward and Mr Taylor were all directors), payments of £40,720.00 to Rhodes Labels Ltd (a company in which Mr Ward and Mr Taylor were directors) and £47,437.00 to  
30 Rhodes (St Helens) Ltd (a company in which Mr Ward and Mr Taylor were directors).

29. No response was received to the opening letter and questionnaire sent to the Appellant on 25 March 2010.

30. A Decision Letter was sent to the Appellant and fellow directors on 29 June  
35 2010 advising of HMRC's decision to issue a PLN in respect of the Company underpayment of NIC. The main factors which led Mr Powley to conclude that the Company's failure to pay the NIC due was attributable to neglect on the part of the Appellant, Mr Ward and Mr Taylor and their failure to act in a manner that a reasonable and prudent person would have acted are as follows:

40 (a) No payments of PAYE or NIC were made from the start of trading to liquidation;

(b) There was no evidence that the Company had attempted to contact HMRC to discuss the non-payment;

(c) At the time of withholding the payment of PAYE Tax and NIC the Company was in receipt of substantial funds from G E Commercial Finance;

(d) At the time of withholding payment of PAYE Tax and NIC the Company, through its directors, chose to make a number of payments to connected companies;

(e) In making the decision to withhold payment of PAYE Tax and NIC the inference was that the Appellant and her fellow directors funded the business of TWRM, at least in part, with money which ought to have been remitted to HMRC to meet its statutory obligations.

31. Further information was provided by the Appellant to Mr Powley on 6 August 2010 and 15 August 2010. Mr Powley considered the information provided and wrote to the Appellant on 16 August 2010 stating that at the time MCR Corporate Restructuring became involved (on or about 3 June 2009) the Company had already been trading in breach of its statutory obligations for a significant period of time during which no payments of PAYE Tax or NIC had been made nor had there been any attempt to contact HMRC to discuss the underpayments. The failure to pay or contact HMRC occurred throughout a period during which the directors were aware of the Company's financial difficulties and the directors had made the clear and deliberate decision to prioritise and make payments to connected companies and other creditors.

32. Mr Powley reviewed HMRC's decision following receipt of the Appellant's letter of appeal dated 22 September 2010 in which Mrs Roberts stated that she had acted on the advice of the Company's advisors and financiers. He concluded that the Appellant and her fellow directors did not always follow advice offered by advisors (such as the suggestion that the Company contacted MRC Corporate Restructuring) and that at least 6 months prior to liquidation the Appellant was fully aware of the Company's serious financial difficulties and increasing HMRC debt, despite which the Company continued to trade and continued to withhold payments due to HMRC. Mr Powley noted that there was no evidence that G E Commercial Finance had advised the Company to withhold payment due to HMRC; rather the evidence suggested that G E Commercial Finance had suggested bringing in MCR Business Consulting with a view to administration 6 months prior to liquidation.

33. By letter dated 28 September 2010 the Appellant was advised of Mr Powley's conclusion that the decision to issue a Personal Liability Notice was correct and consistent with the evidence available.

34. The decision was formally reviewed by Mr Wilde of HMRC who informed the Appellant by letter dated 1 December 2010 that the decision would be upheld. Mr Wilde explained that there had been a complete lack of compliance by the Company with a component requirement of the PAYE system. The Company had a statutory responsibility to ensure that deductions were made and accounted for to HMRC; the

monies were not for the disposal of the Company for “whatever purpose was seen as more appropriate during 2008/2009 and 2009/2010”. Mr Wilde did not accept that the Appellant, as a director and head of finance could be absolved of blame and concluded that the restriction of the liability to one-third of the total liability was fair and equitable.

### *Decision*

35. Due to the non-attendance of the Appellant at the hearing, as was her right, the evidence of HMRC went unchallenged. In the interests of justice and to ensure fairness to the Appellant we considered the explanations set out in all of the correspondence from the Appellant to HMRC and the Tribunal contained in the bundle provided by HMRC.

36. We were satisfied that the Appellant was an officer of the Company by her role as Director and there was no issue as to the fact that the Company had not made payments of PAYE Tax and NIC to HMRC during its period of trading.

37. We then turned to the issue of whether, on the balance of probabilities, we were satisfied that the failure was attributable to neglect on the part of the Appellant and her fellow directors.

38. In considering the issue of neglect, we applied the test set out in *Blyth v Birmingham Waterworks Co* [1856] 11 Ex 781 as relied upon by HMRC:

*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.*

39. We found as a fact that the Company, through its directors, had a statutory duty to deduct PAYE and NIC where appropriate and make a remittance to HMRC no later than the 19<sup>th</sup> of every month and that this duty existed irrespective of any financial difficulties the Company may have experienced.

40. We found as a fact that the Appellant, together with her fellow directors, was aware of the obligation to account each month for NICs and PAYE Tax to HMRC yet they failed to do so for a consecutive period of 11 months from October 2008 to September 2009 despite, during that period, paying the wages of employees.

41. In addition, we accepted the evidence of Mr Powley and found as a fact that throughout the period in question TWRM was in receipt of regular and significant payments from G. E. Commercial Finance, and the Company bank account was significantly in credit. We found as a fact that during the relevant period the Company made payments of significant sums to the benefit of connected companies. We reached the irresistible inference that the Company, through its directors, made the deliberate decision to withhold payment of PAYE Tax and NIC and, in doing so, funded the business of TWRM, at least in part, with money which ought to have been remitted to HMRC to meet its statutory obligations.

42. As regards the assertion that G. E. Commercial Finance dictated all financial matters, there was no evidence to support such an assertion and we did not accept that this absolved the Appellant and her fellow directors from their statutory obligations.

5 43. We did not consider that a reasonable and prudent person would conduct business in this manner. We found as a fact that as a director of the Company, and indeed Head of Finance, the Appellant had a statutory duty to ensure that the Company met its obligations and that her failure to do so was negligent.

10 44. In the absence of any evidence to support the contention, we did not accept that either G. E. Commercial Finance or MCR Corporate Restructuring had instructed or advised the directors not to make payment of PAYE Tax and NIC. Even if we are wrong in rejecting such a contention, we consider that the statutory obligation on the Appellant and her fellow directors was not one which could be delegated and therefore even if such advice had been tendered by G. E Commercial Finance, this would not absolve the Appellant of responsibility. As regards MCR Corporate  
15 Restructuring, we noted that the company was not formally engaged until on or around 3 June 2009, as implied in the letter of correspondence from MCR Corporate Restructuring to Mr Taylor of Print Wright Limited and TWRM Print Limited which states *“Further to our conversations with G E Commercial Finance and yourself, we write to set out the services that MCR Business Consulting...will provide....*, by which  
20 time the Company had already been trading for a period of 9 months without making payment of NIC and PAYE Tax. In our view, the Appellant’s attempt to displace responsibility onto MCR Corporate Restructuring simply cannot succeed as the onus of ensuring that all tax obligations were met rested with the Appellant and her fellow directors from the start of the Company’s trading.

25 45. We considered the Appellant’s contention that £32,000 identified by HMRC in the Company’s bank account for a number of months over its period of trading had been set aside for the new lease of the premises and which could not be paid immediately for reasons beyond the control of TWRM. There was no evidence to support this assertion, however even if we had accepted this to be the position, we  
30 considered this to be another example of the Appellant and her fellow directors prioritising expenditure of available monies over their statutory obligations to HMRC and we concluded that a reasonable and prudent person would not conduct business in this way.

35 46. We accepted that discussions took place regarding the potential payment plan that could be negotiated with HMRC on behalf of the Company, as evidenced by the letter from MCR Corporate Restructuring dated 3 June 2009; however we found as a fact that by this time the Company was already in breach of its obligations, having traded for 9 months without making any payments of PAYE Tax and NIC. In our view no reasonable business person would have continued trading for such a lengthy  
40 period without making contact with HMRC and we found as a fact that the directors’ failure to do so was negligent.

47. We did not find the Appellant’s assertion that the Accounts team at Abbotts Creative Print (the Company bought out of administration by the TWRM) made

5 contact with HMRC regarding PAYE/NIC and VAT assisted us determining the issue in this case; in our view any agreement (if indeed one was reached) between Abbotts Creative Print would be a separate issue and could not absolve the directors of TWRM of their responsibilities once they had bought Abbotts Creative Print out of administration.

*Conclusion*

48. On the evidence available to us, we were satisfied that the underpayment of NIC and PAYE Tax was attributable to the neglect of the Appellant and her fellow directors. We found that the apportionment of the liability was fair and equitable.

10 49. The appeal is dismissed.

50. 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.

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**J BLEWITT  
TRIBUNAL JUDGE**

**RELEASE DATE: 11 April 2012**

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