



TC05662

Appeal number: TC/2016/02487

National Insurance; Social Security (Contributions) Regulations 1979, reg 39; whether negligent director; no; appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANTHONY PETER BROUGHTON-HEAD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE J GORDON REID QC, FCIarb.

The Tribunal determined the appeal on 6 February 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 26 April 2016 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 23 July 2016 and sundry correspondence and documents.

DECISION

Introduction

5 1. The appellant appeals against a decision issued by HMRC on 14 January 2016
under s8 of the Social Security (Transfer of Functions etc) Act 1999. The decision
relates to the payment or non-payment of Class 1 National Insurance Contributions
(NICs) between 1985 and 1991 and, in particular, during the tax years 1986/87,
10 1987/88 and 1988/89 (the three tax years). This is important to the appellant for
pension purposes. It is only necessary to deal with these three years in this appeal.

2. The appeal was originally allocated to the standard category. The appellant
requested that the appeal be heard on papers only (he lives in France). The
respondents (HMRC) did not object and accordingly, on 10 August 2016, the tribunal
(differently constituted) issued a Direction consenting to the appeal proceeding
15 without a hearing. There has accordingly been no oral evidence and no written
witness statements have been produced.

3. The decision appealed against is dated 14 January 2016 and states *inter alia* as
follows:-

National Insurance contributions and statutory payments

20 My decision is that

In the period from 6 April 1985 to 5 April 1991 you have paid National Insurance as per the attached schedule
--

Schedule of National Insurances Contributions (NICs) paid

.....

Tax Year	Class 1 NICs Paid
1985-86 to 1990-91	NIL

25 Statutory Background

4. The jurisdiction and powers of the tribunal are not in dispute. In summary,
s8(1)(e) of the Social Security Contributions (Transfer of Functions etc) 1999, as
amended, empowers HMRC to decide whether contributions of a particular class have
been paid in respect of any period. S11, as amended and following tribunal reform,
30 gives the right of appeal to the tribunal.

5. Regulation 39 of the Social Security (Contributions) Regulations 1979 makes provision for the treatment for the purposes of contributory benefit of late paid or unpaid Class 1 contributions. Where the late payment or failure in making payment is shown not to have been paid with any consent connivance or attributable to the negligence on the part of the primary contributor, the primary contribution is to be treated as duly paid.

6. S309 Companies Act 1985 provides *inter alia* that directors, in the performance of their functions, are to have regard to the interests of the company's employees.

7. What lies at the heart of this appeal appears to be the conclusion that in relation to the three tax years in question, the appellant was a *negligent* director (for the purposes of the relevant provisions of the applicable NIC regulations) which was the conclusion reached by HMRC's predecessors. Details of the investigations carried out and the evidence identified have either been lost, or destroyed in accordance with HMRC policy. The appellant, too, no longer has any significant records.

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Factual Background

8. There is very little documentary evidence of the actings of the appellant and the business he operated in the 80s and 90s, or the actings of HMRC's statutory predecessor in relation to the payment of Class 1 contributions. He appears to have been the director of Broughton- Head Timber Ltd (Timber). Much of the following background is taken from correspondence between the parties between 2014 and 2016. The facts are not straightforward and there are gaps.

9. Timber was wound up on 19 January 1994. The precise circumstances of its winding up are unknown. An extract from the London Gazette date refers to the presentation of a petition, but does not identify the petitioner. According to the appellant, Timber, on professional advice, was allowed to become dormant and was dissolved by the registrar of companies in due course in 1995. The appellant believes it had no outstanding debts was therefore not insolvent and therefore no basis for concluding that he had been negligent. There is nothing to vouch this one way or the other but, if credible, it puts into serious doubt the adequacy of the *negligent director investigations* referred to below.

10. The Insolvency Section of HMRC's predecessors appear to have investigated matters and concluded that he was a *negligent* director and that no contributions had been paid for the tax years 1986/87, 1987/88 and 1988/89 (the three tax years). The appellant's National Insurance (NI) record was updated; the contributions for those three tax years were removed from his record. HMRC have produced a contemporary record showing the debits. It is one of the few contemporary records available. Underlying case records from this period concerning the investigations and the removal of the contributions are no longer available as they have either been destroyed, due to the passage of time, or lost as a consequence of the transfer of functions between various ministerial departments of HMRC's predecessors.

11. In September 2014, the appellant wrote to HMRC stating that due to impending legislative changes he would need 35 years qualifying years to obtain a full pension. He pointed out that there were missing NI contributions on his NI record from 1985-1991 as disclosed in Form E205 UK which he had received two years previously.
5 HMRC replied in November stating that a *period of insolvency* was held on his record from 6 April 1986 to 5 April 1989. They also explained the number of qualifying years held and the changes to the State Pension being introduced on 5 April 2016. The Appellant responded by letter dated 21 November 2014 stating that the information held by HMRC as to the insolvency was incorrect. He was unable to produce any
10 documents showing that NI contributions had been paid. HMRC in turn responded, by letter dated 21 April 2015, by stating that contributions for the three tax years were deemed to be a *negligent director* on 9 November 1994 by HMRC predecessors' Insolvency Section; and stated that before any contributions were removed the Insolvency Section *would* have made investigations to establish negligence and would
15 have written to the director in question.

12. By letter to HMRC dated 15 May 2015 the appellant refuted the notion that he had been negligent and said that he had received no correspondence from the Insolvency Section. He requested that the contributions for the three tax years be re-credited.

20 13. By letter to the appellant dated 4 August 2015, HMRC stated that Insolvency Section could not investigate further because of administrative reorganisation and case records were no longer available. They stated that the appellant was a director of Timber during the three tax years and that correspondence would have been sent to him at his accountant's office at Abingdon. They acknowledged that the appellant
25 had said that he had had a company accountant who had subsequently committed fraud.

14. In his letter to HMRC dated 28 August 2015, the appellant stated that he checked bank statements *religiously*. He felt he had done enough. He paid voluntary contributions in tax years 1993/94 and 1994/95 (as HMRC's form E205UK discloses)
30 when notified of shortfalls. There was no request, he said, for the years between 1985 and 1991. There were also other unexplainable gaps in his record history which he set out in a table.

15. HMRC wrote further to the appellant on 20 November 2015. Among other things, they explained *deficiency notices* which would, according to HMRC, have
35 been sent to the appellant. According to HMRC's Statement of Case (para33) the letter stated that they had informed the appellant of the shortfalls on his NI record in July 2011.

16. The appellant wrote HMRC by letter dated 5 December 2015. He mentioned another company (Broughthon- Head Ltd [Head] which had been set up on
40 professional advice. He said in effect that someone (presumably HMRC) put Head into liquidation. He also said he was paid compensation by Customs and Excise and awarded compensation by the *adjudicator*. None of this appears to be directly relevant as it seems to have related to a VAT matter.

17. He said that in 1991 he took professional advice on the dissolution of Timber which was then still solvent. He appeared to be in financial difficulties at that stage. He said he received advice about the company becoming dormant and resigning as a director.

5 18. The appellant also explained that the reason he did not receive deficiency notice was that he used his parents' address. They moved house in August 1969. It is not clear how this fits in with dealings with Timber. He requested HMRC to reinstate the *three years when payments were submitted and subsequently taken away when he was deemed to be a negligent director.*

10 19. HMRC's response was to issue the formal decision letter on 14 January 2016. (see above). They again pointed out that returns were received for the three tax years but no payment. The records disclosed this, they said. They acknowledge that they were unable to provide detailed information about the insolvency investigations.

15 20. By letter dated 30 January 2016 the appellant sought a review. He made a point about postcodes of the registered address of Timber and pointed out what he regarded as a number of errors. He required clarification of the period he was said to be a negligent director pointing out that during the period between 6/4/86 and 5/4/89 his accountant had submitted payments which were credited to his record and later removed. He pointed out that he had received no correspondence from the insolvency section. He asserted that HMRC had no evidence of what was actually done

25 21. By letter dated 9 March 2016, HMRC upheld the decision. In that letter HMRC also made a number of corrections to errors which the appellant had pointed out. The reasons for upholding the decision were (1) a compliance check did take place between the three tax years; they stated that HMRC would have contacted the directors to give them an opportunity to pay the shortfall or allow them to provide an explanation why the responsibility for payment did not lie with them. (2) the removal of Class 1 NI contributions for the three tax years were related to his directorship of Timber which was subject to a winding up order on 19 January 1994, (3) the insolvency investigation section found negligent activity during the three tax years and so the NI contributions were removed and (4) as documentation was destroyed in accordance with record management policy and not with the intention of destroying evidence, the principle of the *Ophelia* (see below) applied; the absence of documents and evidence did not mean that the investigation did not take place or that the decision that he was classified as a negligent director was incorrect HMRC also clarified their position by stating that only returns were submitted during the tax years and not payment of NI contributions.

22. Thereafter, the appellant appealed to the tribunal on or about 26 April 2016.

40 23. In a letter to HMRC dated 1 April 2016, the appellant referred to a letter he received from the Inland Revenue in the 1980s' (the letter is no longer available). He said that a meeting followed. He later received a demand for over £800 which he paid This must have related to income tax or VAT as at that stage the Inland Revenue was

not responsible for administering NICs), although he maintains it related to NICs and that he paid it.

24. He also stated that he employed an accountant (presumably company accountant). He was *baffled* as to why he was deemed to be a negligent director for only three of the six years when NI was *supposedly not paid*. The £800+ was paid and it related to NI but it has not been identified by HMRC.

25. An online statement of account relating to the appellant with an issue date of 29/09/15 shows for each of the three tax years a credit entry and an equivalent debit entry bringing out a nil balance for each of the three years. In other words, a sum has been added then removed.

26. For the years 1989/90 and 1990/91 £0.00 is shown with nothing more.

27. There are three documents produced headed *Construction Deduction Card for Class 1 Contributions* relating to the appellant. They contain the same total figures set forth in the online statement of account mentioned above. In the box headed *Other Information* the words *neg directors* are noted in manuscript. They bear the stamp *Insolvency Section* and a stamp date of November 1994. There is no information about insolvency investigations, deficiency notices or the like. The papers did not contain any further explanation of these documents.

28. An extract from the London Gazette dated 22 March 1994. It records that timber was wound up by Order dated 19 January 1994 following on a petition presented on 2 December 1993.

Notice of Appeal (submitted about 26 April 2016)

29. In summary, the appellant asserts that (1) the appellant requests that HMRC reinstate the three years when payments were submitted and subsequently taken away when he was unknowingly deemed to be a negligent director, (2) HMRC have provided conflicting information; compliance checks by HMRC's insolvency section, were at one stage said to have taken place in 1994 and then at another stage they were said to have taken place between the 1986/87 to 1988/89 tax years, (3) he paid about £800 in missing NI contributions in the late 1980s which have not been recorded, (4) he said there were discrepancies in the post code of Timber, (5) he was fully aware of his responsibilities as a director, complied with him and kept all relevant company business records until 2002 when they were destroyed. These records would have established that all relevant national insurance contributions had been paid, (6) HMRC evidence is sketchy or non-existent and he received no correspondence from HMRC, (7) he recognised he received deficiency notices (shortfall in NIC) in the 1990s; he was unaware of any deficiency notices in the 1980s otherwise he would have dealt with those too as the sums were relatively insignificant (he accepts he received Deficiency notices in the 90's)

HMRC Case

30. HMRC say that the appellant's record was updated in 1994. Documents were destroyed with the passage of time in line with departmental policy.

31. Any payment made by the appellant to the Inland Revenue in the late 1980s would have related to his tax affairs and not to Class 1 NI contributions,

5 32. The postcode referred to in correspondence by HMRC was taken from the London Gazette intimating the winding up of Timber in 1994.

33. HMRC have searched their records and are unable to trace any Class 1 NI contributions paid in the 1986-87 to 1990-91 to tax years other than those removed by Insolvency Section for that period.

10 34. They rely on the *Ophelia* and cite *Whittaker v HMRC* Sc3308/2005 which makes reference to it.

Discussion

35. The question in relation to these competing accounts, untested by much in the way of contemporary evidence, and unchallenged by cross examination, is where the
15 balance of probabilities lies. It seems inconceivable that an investigation by the relevant insolvency section could go unnoticed by the appellant Timber or his advisers. Timber was wound up on petition. It seems reasonable to infer that the petition would have been at the instance of HMRC's predecessor and on the grounds that it was unable to pay its debts. If that is so, the insolvency investigation and the
20 debiting of the NI record fit with the decision of HMRC if it was in financial difficulties in the 1980s.

36. On the other hand, it is at least plausible that the insolvency investigation set off on the wrong foot and used incorrect addresses to serve deficiency notices. That might explain the appellant's assertion of lack of knowledge of the investigation.

25 37. *Tracy v HMRC* [2013] UKFTT 273 (TC), concerned the NIC record of an individual who was a director of several companies. Like the present appeal, the record was important to the appellant as it affected the amount of his pension. One of the issues was whether certain contributions were made at all and if not made whether the failure was not with the consent or connivance of the earner or attributable to his
30 negligence (paras 28 and 29). The tribunal observed *inter alia* that (1) the fact of insolvent liquidation does not make it more likely than not that a particular director was negligent in a manner which gave rise to the non-payment of NICs (para 32); (2) whilst insolvency allows the possibility of negligence it does not require such a conclusion (para 32); (3) there was no evidence as to what evidence HMRC received
35 as a result of the insolvency investigation, how the investigation was conducted or whether its evaluation of the evidence would have matched the tribunal's (para 34) (4) while it could be accepted that someone (from HMRC) thought the appellant was negligent that was not enough for the tribunal to conclude that the appellant was negligent having regard to contrary evidence from *inter alios* the appellant and (5) the
40 absence of evidence that HMRC was wrong did not prove they were right. That led the tribunal to conclude that the appellant was not negligent in relation to the non-

payment of NIC contributions by two of the companies in the period in which they became insolvent (para 35). Ultimately, the conclusion of the tribunal in *Tracy* was that *in relation to* (one of the companies involved), *if it failed to pay NIC*, (the appellant) *was not negligent and did not connive at any such failure*. (para 82).

5 38. The tribunal agrees with the approach to the evidence in *Tracy*. The facts were, of course, different but there is a clear resonance here with the evidence of Timber's insolvency, based on some form of investigation the breadth, depth and detail of which are largely unknown and the strong assertions by the appellant that Timber was never insolvent at least in the 1980s. On the basis of such evidence as there is, the
10 tribunal is unable to conclude that the appellant was negligent or somehow guilty of connivance. The justification for the removal of the contributions for the three tax years in question therefore falls away and the appeal must be allowed at least in relation to the three tax years.

15 39. The fact that there is a record from 1994 that the appellant was negligent has to be balanced with the evidence of the appellant that he was not, that he instructed accountants to act for him and that all contributions were duly paid. In the light of the appellant's evidence, which the tribunal finds reasonably convincing on paper, a manuscript note stating *neg director* without more does not negate his account. It would be remarkable if the appellant in this case had falsified his account of events.
20 It would be a very odd way of making a false claim. It is perfectly possible that discrepancies with the post code may have led to correspondence going amiss. The nature of the insolvency investigations in this case is simply unknown.

25 40. The principles of the *Ophelia* [1916] 2 AC 206 at 229-230 apply to both HMRC as well as the appellant and, in a sense, cancel each other out. As was pointed out in *Tracy*, the fact that HMRC cannot be shown by documents to be wrong does not mean they must be right and that the appellant was a negligent director. The tribunal is entitled to take into account the facts and circumstances advanced by the appellant and weigh them accordingly (whether admissible in law in a court). The appellant's account, such as it is, is the only contemporary account of what happened in the 80s
30 and early 90s. His explanations and assertions more than balance the statement that an unidentified investigation *would* have taken place without more about what did take place. That is just sufficient to rebut any presumption against him and to tip the balance in his favour.

Disposal

35 41. The appeal is allowed in relation to the three tax years. The contributions removed should be restored.

40 42. 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 GORDON REID QC, FCI Arb.
TRIBUNAL JUDGE**

RELEASE DATE: 14 FEBRUARY 2017

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