



Neutral Citation: [2025] UKFTT 00298 (TC)

Case Number: TC09448

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal reference: TC/2022/01172

NATIONAL INSURANCE CONTRIBUTIONS - Failure by limited company to pay NI contributions; Personal Liability Notice served on director; whether failure to pay attributable to neglect on the part of director - yes; Social Security Administration Act 1992 sections 121C&D; Appeal dismissed.

Heard on: 28 February 2025
Judgment date: 6 March 2025

Before

**TRIBUNAL JUDGE RUTHVEN GEMMELL WS
JAMES ROBERTSON CA**

Between

JOHN STRANGE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: No representation

For the Respondents: Nathaniel Campbell, Litigator of HMRC

DECISION

PRELIMINARY MATTER

APPELLANT FAILING TO ATTEND THE HEARING

1. John Strange (“the Appellant”) failed to attend the hearing. He emailed HM Courts and Tribunal Service (“HMCTS”), on 11 February 2025 stating that he noted that the hearing date “as per your letter” (the Respondents’ (“the Respondents/HMRC”) letter of 11 February 2025) is now 18 July 2025”.
2. On 21 February 2025 (at 08:21), immediately prior to the Appellant’s email of the same date at 08:57, HMCTS wrote confirming the hearing was “still taking place on 28 February 2025” and that the “18 July date should have stated 2024 and it refers to the date the initial letter was sent informing the parties of the hearing date, now attached. Therefore, please attend the hearing on 28 February at 10am in Edinburgh”.
3. The Appellant replied to this email on 21 February 2025 at 08:57 saying that he was no longer able to make 28 February 2025 for the hearing “given that the correspondence (HMRC’s letter of 11 February 2025), stated that the hearing was on 18 July 2025. He had now booked in various work visits on 28 February.
4. Furthermore having taken legal advice and stating that “whilst I have not submitted any evidence (I do not have the call recording) and I have not called any witnesses (I was relying on cross examining the HMRC staff member who was called as HMRC witness) I was completely relying on the cross-examination of this witness as they are the only one who can confirm how the call went and the things they said on the call”.
5. He continued “without this witness there is simply no case. How can I properly defend myself and the person who made the decision is not there to answer my questions? Simply not acceptable and completely unfair.” He requested that the whole case be dismissed with immediate effect.
6. HMCTS’ letter of 11 February 2025 also advised that the Appellant’s application to postpone the hearing, made on 3 February 2025, had been refused and that “the hearing will therefore take place as notified to you on 18 July 2025, but the application may be renewed at the start of the hearing.”
7. This tribunal (“the tribunal/we/us”) considered that there was some ambiguity because of the grammar and lack of punctuation in this letter. It did not say the hearing had been listed on 28 July 2025 and it was supposed to say that the hearing will take place as notified in the notice of hearing issued on 28 July 2024. It did not, of course, say that but given that the letter was advising that the Application to postpone the hearing set for 28 February 2025 had been refused, the tribunal believed that it should have raised at least a question as to what was intended as on the face of it the two statements in the letter contradict each other.
8. The appeal was in relation to an application to appeal intimated in 2021. During the course of HMRC’s enquiries into National Insurance Contributions (“NIC”), for the tax years 2016 – 2019 inclusive, the Appellant had requested (1) an extension of 30 days on 7 April 2020; (2) on 27 March 2020, in view of Covid, an extension which was requested and granted of 3 months and 30 days; (3) on 04 June 2020 extension of 30 days ;and (4) on 08 June 2020 a further 90 days, most of which were to examine an extensive number of bank statements which as the sole director were entirely under the Appellant’s control.

9. HMRC stated that no response had been given to these enquiries and that the Appellant had furthermore not complied with the Tribunal Judge's directions issued on 27 July 2022 to provide a skeleton argument and documentary evidence for the hearing at least 21 days before the hearing before the tribunal.

10. Taking all these factors into account the tribunal then considered whether to proceed with the hearing under Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

11. Rule 33 requires us to be satisfied that the absent party, the Appellant, has been notified of the hearing or that **reasonable** steps have been taken to notify the party of the hearing. [emphasis added]

12. As already noted, the Appellant on 3 February 2025 had made an application for the hearing on 28 February 2025 to be postponed had been refused and that subsequently the ambiguity/error in the letter referring to 28 July 2025, rather than to 2024, had been corrected by email on 21 February at 08:21. Taking all these factors into account we were satisfied that the Appellant had been notified of the hearing and that reasonable steps had been taken to notify him of the hearing.

13. It was, of course, up to the Appellant whether to choose to attend the hearing or to attend to various work visits and we noted that he had taken legal advice in making his decision.

14. We then considered whether it was in the interests of justice for the hearing to proceed.

15. Given the extensive delay in appeal being heard by the tribunal and given the extensions already given to the Appellant in order to provide evidence, which he then did not provide, we considered the application of the overriding objective at Rule 2(2) of the Tribunal Rules

16. This requires us to deal with cases fairly and justly included avoiding delay, so far as compatible with proper consideration of the issues as well as ensuring, **so far as practicable** that the parties are able to participate fully in the proceedings [emphasis added]. We considered that both parties had been given the opportunity, so far as practicable, to participate.

17. We were also mindful of the parties' obligations to cooperate with the tribunal at Rule 2 (4) where the parties, which means both the Appellant and the Respondents, must help the Tribunal to further the overriding objective and cooperate with the tribunal generally.

18. Taking all these factors into account, therefore, the tribunal decided to proceed with the hearing.

INTRODUCTION

19. This is an appeal against a Personal Liability Notice (PLN) issued by HMRC on the 11 December 2019 under Section 121C Social Security Act 1992 ("Section 121C").

20. The issue of the PLN makes the Appellant, Mr Strange, personally liable for the NIC debts of S&M Property Maintenance Scotland Limited ("the Company") of which the Appellant was the sole Director and had control of the company bank account including signatory status during the relevant period.

21. On 5th June 2018 a creditors voluntary liquidation of the Company commenced.

POINTS AT ISSUE

22. Whether there was an underpayment of NIC by the Company.

23. Whether the Company's failure to pay NIC was attributable to neglect on the part of the Appellant.

24. Whether the Appellant was acting as an “officer” of the company at the time of the failure to pay the NIC due.

25. Whether it was reasonable for HMRC to treat the Appellant as the sole culpable officer.

BURDEN AND STANDARD OF PROOF

26. Pursuant to Section 121D (4) of the Social Security Contributions and Benefits Act 1992, the burden of proof on any matter raised by a ground of appeal lies with the Respondents.

27. The standard of proof is the civil standard of the balance of probabilities. As confirmed by Lord Hoffman in *Re B* [2009] 1AC 11:

[13] I think the time has come to say, once and for all that there is only one civil standard of proof, and that is proof that the fact in issue more probably occurred than not.

[70] ... [the civil standard of proof] is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

FINDINGS OF FACT

28. The debts of the Company to which the PLN relates are unpaid NIC for the period 06 August 2016 to 05 June 2018 in the sum of £102,259.70 plus statutory interest of £1,161.19, making a total amount of £103,420.89

29. We had before us a Document Bundle of 1,112 pages and an Authorities Bundle of 133 pages. The Document Bundle included a witness statement by Bahzad Mustafa, an officer of HMRC, prepared on 30 November 2022. Mr Mustafa no longer works for HMRC, and the Respondents had advised the tribunal and the Appellant that he would be unable to give evidence.

30. As noted in the Appellant’s email of 21 February 2025 at 08:57, the Appellant stated he was completely relying on the cross-examination of this witness as the only one who could confirm “how the call went and the things they said on the call” and, without this witness there is “simply no case”.

31. The Company was incorporated on 20 June 2008 and the Appellant was also appointed as a director on the same date. There was previously another Director Mr P McHugh (20/06/2008 to 01/12/2014) but he subsequently resigned.

32. During the period in dispute (06/08/2016 to 05/06/2018) the Appellant was the sole Director.

33. On the 08 February 2019, HMRC opened an enquiry into the Company and advised that the purpose was to investigate the circumstances and to establish the facts concerning the failure of the Company to pay NIC due to HMRC.

34. The relevant tax years were 2016-2017 to 2018-2019.

35. HMRC also wrote to the Insolvency Practitioner dealing with the Company’s liquidation, Mr Derek Jackson of Grainger Corporate Rescue and Recovery, to request records and documents which were received between March 2019 and April 2019.

36. HMRC wrote on 12 June 2019, setting out their findings. The officer advised of the amount of NIC due and unpaid and that the Appellant qualified as an “officer” of the Company. He also set out the reasons why it appeared to HMRC that the failure to pay the sums due to HMRC was because of the neglect of the Appellant.

37. On 26 June 2019, the Insolvency Practitioner confirmed that the Appellant was the sole signatory to the Company's bank account with the Bank of Scotland.

38. We found as a facts that there was only one telephone conversation between the Appellant and the Respondents' Mr Mustafa, which took place on 17 September 2019 for 75 minutes, and:

- a) The Appellant was the sole director of the Company, S&M Property Maintenance Scotland Ltd ("the Company"),
- b) He was responsible for all financial aspects of the Company including paying staff wages,
- c) He was the only signatory on the Company bank account,
- d) He made payments from the Company bank account, had access to the online bank statements which he reviewed and monitored on a regular basis,
- e) He was responsible for deciding which creditors to pay, following review by himself and another member of staff,
- f) He was responsible for making the payment of PAYE and NIC due to HMRC each month,
- g) He first became aware of financial difficulties 6 to 12 months down the line. The problems were caused by the numbers of staff recruited leading to cash flow problems,
- h) To address the problems, he looked for more contracts and borrowed money from family and friends to pay wages,
- i) Information was sent to the accountant who produced payslips with deductions for PAYE/NIC,
- j) The accountant having produced payslips would advise him to make payments of PAYE and NIC to HMRC,
- k) He was aware of the statutory obligation to pay PAYE/NIC, and that payment had to be made to HMRC. He tried to fulfil it but matters just got worse and worse. He ensured wages were paid by the 17th of every month,
- l) A time to pay arrangement was made with HMRC but this was not complied with due to lack of funds,
- m) He borrowed enough from the bank, family, and friends to pay wages, but HMRC were at the back of his mind,
- n) He apologised saying he had made a big mistake,
- o) He did not consider cutting staff as he could charge clients for each man per day. His focus was on paying the staff,
- p) Repayments made to him from the Company bank account were monies he said were returned to family and friends who had lent him money,
- q) There was no money available to make payments to HMRC,
- u) the Appellant confirmed that he was a director of 4 other companies when asked if they were operating PAYE and NIC schemes and how compliant they were. He replied that 2 of them had PAYE schemes running which were also fully compliant, and

r) the Appellant stated it was not worthwhile for HMRC to progress further with his case as he had no assets, house and car which were both owned by his wife.

39. The HMRC officer then drafted notes of the telephone conversation and sent them to the Appellant with an email dated 20 September 2019 which said “I would kindly request you to acknowledge this email and carefully read through the contents of the attachment. If you are happy with the contents of the attachment, please kindly inform us.”

40. The Appellant replied 03 October 2019, saying “I have now read your notes and I do not feel I can add anything at this point other than to reiterate that I did not do any of this deliberately.”

41. The HMRC officer followed this by issuing a letter on the 07 October 2019 confirming several of the items discussed in the telephone call including that the Appellant was:

a) The sole director of the Company gaining customers/clients for the business and bringing work to the business.

b) Responsible for all the financial aspects of the Company including paying wages for the staff.

c) Was the only signatory to the Company bank account and was responsible for making payments personally.

d) Was responsible for receiving the company bank statements and had access to the online bank account which he would review on a regular basis.

42. On the 11 December 2019, HMRC wrote to advise that a formal decision had been made to issue a PLN giving details of how the decision had been reached and enclosed a PLN requesting payment of £103,420.89 and noting total receipts of £782,981 and the introduction of funds by the Appellant.

43. The PLN was appealed on 14 January 2020 as the Appellant denied neglect.

44. There were then delays caused by COVID putting a hold on matters and the granting of extra time to deal with them.

45. The Appellant took legal advice and on the 05 October 2020 provided his grounds of appeal to HMRC’s decision which were –

“1. The bank statements you provided show a clear level of investment on my part that far out ways the level of withdrawal. I would refer you to the liquidation documents stating the amount owed personally to me by the company upon liquidation.

2. You will see various inputs with no references, these are ALL cash injections into the account provided by myself.

3. The everyday workings of the business were perhaps not explained fully by myself on our initial call. On the day a project was agreed there was a cost associated with that, for example £20000 plus vat (£24000). That price was then given by myself to both managers in the business whose job it was to carry out the works and return a profit on the £28000 project. Sometimes these projects would take 90 days to complete. We would then invoice and then a further 90 days later we would receive payment. During this period of time we would continue to start and finish other projects. It was not until some 180 days had passed that the staff member who was responsible for the accounts would then have all the relevant paperwork to carry out a cost analysis on that project. He would then return to me and state that the project costing £28000 had actually in materials and labour cost the business £35000. So a £7000 loss. As you can imagine this was dreadful

news. At this stage we would have been at least 10/15 projects in. Now each month that passed from month 1 I had obligations to pay staff wages which I duly did. I was always under the impression that come the 180 days we would start to see the money coming in and the profits would be available. At this point I was hoping to be paying HMRC for the amount of NIC etc that was due. As each month went by I had wages to pay. I was physically and mentally threatened by two or three members of staff that if I did not pay their wages I would be assaulted and even on one occasion threatened with my life. I quote “I will do time for you” referring to doing time in jail for assaulting me. This was very stressful so I continually fought to make sure the wages could be paid on the understanding that eventually the payments for these projects would come in and the bills would be paid and the profit invested. Unfortunately we were in too deep with almost all projects returning substantial losses. I needed to keep the staff going to try and get the projects finished in order to bring the money in.

4. I borrowed money from friends each month just to make payroll and then paid them back each month just to keep afloat. These are the transactions you refer to as “My” withdrawals. Let me be clear they were not personal withdrawals.

5. I did try to negotiate this with HMRC and set up a payment plan but this was refused and that’s what forced the advice to liquidate. I had no choice. I’m sure you can request the call log between myself and HMRC at the time. I was begging them to work with me given the circumstances.

In conclusion and referring to the explanation above I strongly feel to suggest there was neglect on my part is unfair. With all of the above under consideration I would kindly request that the decision to hold me personally liable under the “Neglect” section is removed as this is simply not the case. I tried every month to make it work under threat for my life and sadly I couldn’t make it work.”

46. HMRC replied on the 07 October 2020, issuing a ‘view of the matter’ letter and offering both ADR and a review. The Appellant subsequently asked for a review which was completed on the 14 June 2021. The review upheld the position taken by the officer of HMRC and the Appellant subsequently appealed to the Tribunal.

47. The Appellant paid himself £192,526.49 and although he said this was then used to repay others, no evidence of this was provided to HMRC or to the tribunal. On the day the Company went into Liquidation, 05 June 2018, the Appellant made a payment to himself of £16,000. The Appellant also claimed he was personally owed money by the Company.

48. During the period August 2016 to June 2018, the Company bank account was in receipt of £782 981.14 but none of these funds were applied toward the Company’s PAYE/NIC liabilities.

49. The tribunal noted that the PLN was in respect of NIC, but PAYE had also stopped being paid nor had VAT been paid throughout the whole relevant period. Mr Campbell for HMRC was unable to comment on the non-payments of PAYE and VAT.

LEGISLATION

50. Section 6(1) Social Security Contributions and Benefits Act 1992 (“SSBA”)– requirement to pay Class 1 NICs on earnings

51. Regulation 67 Social Security (Contributions Regulations 2001 – collection and recovery of earnings-related contributions

52. Regulation 69 Income tax (Pay As You Earn) Regulations 2003 Statutory Instrument – due dates and receipts for payment of tax

53. Section 121C Social Security Administration Act 1992 (S121C) – liability of directors etc for company's contributions ("S121C") 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.....

(9) Officer is defined as follow:

"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; and

(b) in a case where the affairs of the body corporate are managed by its members, any member of the body corporate exercising functions of management with respect to it or purporting to do so;

54. Section 121D Social Security Administration Act 1992 (Section 121D) –appeals in relation to Personal Liability Notices issued under Section 121C ("S121D")

55. Section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 – authority for HMRC to issue a Personal Liability Notice under S121C

56. The authority of the Respondents officers to issue PLNs is set out within:

a) Regulation 1 Social Security (Contributions) Regulations 2001 which defines the term "Officer of the Board" used within Section 8 (1) (h) Social Security (Transfer of Functions, etc) Act 1999.

b) Regulations 1 and 2 Commissioners of Revenue and Customs Act 2005 (upon the creation of the Respondents, that Act repealed the Inland Revenue Regulations Act 1890) setting out the role of the Respondents to appoint Officers and to act on behalf of the Crown.

c) Section 3 (1) Social Security (Transfer of Functions) Act 1999 setting out the responsibility of the Respondents to collect and manage the payment of NICs.

CASE LAW AND RELEVANT TRIBUNAL DECISIONS REFERRED TO

57. In *Westmid Packing Services Limited* [1998] All ER 124 at 131 it was stated, inter alia that:

“It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a Company director should realise that these are inescapable personal responsibilities.”

58. In *Commissioners for HMRC v O’Rorke* [2103] UKUT 499 (TC) - an objective test is to be applied when establishing neglect under Section 121 SSA Act 1992 –

“[69] In short, in my judgement, in section 121C the word neglect is to be given its usual meaning; it is a standard of conduct, not a subjective state of mind. I do not consider that there is anything sufficient in the context which the word appears to mandate a meaning which is not its ordinary meaning.”

59. *Blyth V Birmingham Waterworks Co* [1856] Exch 781 - sets out the objective test for negligence and provides a detailed definition of the word.

60. In *Mrs C Roberts V HMRC* (2012) TC01992 - where it was held that financial difficulties do not remove the statutory duty to pay over deductions to HMRC.

61. *Charles O’Rorke v HMRC* (2017) TC06008 – held that payment of PAYE/NIC is a statutory obligation and is not dependent on availability of cash.

62. *Michael Eames v HMRC* (2022) TC08450 – held that a prudent and reasonable person, knowing that amounts deducted from payroll were owed to HMRC, would not use those funds to pay themselves in priority to HMRC.

The Appellant’s Submissions/ Grounds of Appeal

63. The Appellant feels that the case officer has not understood the reasons for the company being in trouble and has held him 100% or solely responsible.

64. The case against the Appellant only came to light after the Company was liquidated.

65. He feels that the case officer used his words and came to the wrong conclusions. In his haste, the Appellant agreed that he was responsible for the debt but clearly the situation surrounding the reason for it building up so quickly were not considered at all.

66. He does not feel given the circumstances that he should be personally liable for the company debt that he tried to pay back but HMRC refused to engage with him on.

67. He would like the debt notice issued to him personally to be removed and the debt to be allocated back to the company it belongs to. This is not a personal matter, and he feels that he is being victimised.”

68. There is no case because the HMRC Officer, Mr Mustafa, is not to be present at the hearing and cannot be cross-examined in relation to his witness statement.

HMRC’s SUBMISSIONS

69. Pursuant to S121C, for PLN to be issued in circumstances where a Company has failed to pay NIC to the Respondents, three conditions must be satisfied:

(i) There must have been an underpayment of the NIC’s due.

- (ii) It must appear to HMRC that the Company's failure to pay the NIC's due was attributable to fraud or neglect on the part of one or more individuals; and
 - (iii) The individual in question must have been acting as an 'officer' of the Company at the time of the failure to pay.
70. Paragraph (9)(a) of S121C defines an 'officer' for the purposes of the legislation.
71. The Respondents submit that the three conditions under S121C are satisfied and that the PLN has been properly issued.
72. S121D specifies the grounds on which a PLN may be appealed. In summary these are:
- (a) The amount claimed or part of it is not the proper subject of a PLN,
 - (b) The failure to pay was not attributable to any fraud or neglect by the individual in question,
 - (c) The individual was not an officer of the Company at the time, and
 - (d) HMRC's opinion as to the level of culpability attached to the individual in question was unreasonable.
73. The Appellant has only challenged that he was negligent and says that he did do anything deliberately. The appeal grounds do not cover any of the other headings and are, therefore, not in dispute.
74. The legislation imposes a statutory duty to pay over to HMRC contributions due on the earnings of an employee.
75. Liability for Class 1 contributions arises under Section 6 SSCBA 1992 at the time the earnings are placed, unconditionally, at the employee's disposal. So, where earnings are paid to or for the benefit of an earner over the age of 16 then Class 1 NIC 'Primary' and 'Secondary' contributions shall be paid. The liability of 'Primary' contributions shall be the earner, and the 'Secondary' contributor is the employer.
76. The legislation requires an employer to pay over any contributions due to an employee's earnings and an employer has a statutory obligation to pay it within 14 days of the end of the tax month which ends on the 5th of each month. The monies are due on the 19th of each month (or 22nd if paid electronically). If the correct contributions are not paid, S121C provides HMRC with authority to seek to recover from officers of the Company any unpaid contributions plus interest, provided certain conditions are satisfied.
77. The Appellant has confirmed that he was an officer of the Company in his role as Director during the period in question. He had significant control over the business for several years and was the sole authorised signatory/user of the Company bank accounts.
78. The Appellant made the payments to staff, received and reviewed the Company's bank statements, and had access to the online account. The Appellant, according to Companies House, was the sole Director during the period NIC was unpaid.
79. HMRC submit that he was an officer of the Company for the purposes of S121C.
80. The total amount of £175,088.71 was unpaid when due and represents unpaid NIC of £102,259.70 and PAYE of £72,829.01.
81. For the period August 2016 to May 2018, no payments at all were made to HMRC in respect of PAYE or NIC.

82. During the 2016/2017 tax year and prior to August 2016, three payments were made to HMRC in respect of PAYE and NIC: on 26/05/2016, £1,200.00; on 24/06/2016, £2,300.00 and on 26/07/2016, £2,300.00.

83. Throughout the period in question NIC was deducted from employee wages and Returns were submitted to HMRC declaring the NIC (and PAYE Tax) due. If the Company used those sums deducted as part of its circulating capital (and loses it or no longer has it available) then it can have no excuses for not paying on time.

84. No payments of PAYE and NIC were made for the period of 22 months despite deductions being made each month which amounts to a persistent failure of behalf of the Appellant to pay what is due. HMRC have concluded that this lengthy and persistent failure was attributable to the negligence of the Appellant.

85. The legislation does not define the term 'negligence', so the word takes on its ordinary everyday meaning. The objective test of what is neglect was discussed in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch.781 at 786 in the Judgement of Alderson B when he said:

"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 able 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."

86. In *the Commissioners' for HMRC v O'Rorke* [2017] UKUT 499 (TC) questioning whether "neglect" should bear anything other than its ordinary meaning of an objectively tested departure from a standard of care, as explained in *Blyth v Birmingham Waterworks Co*, the Tribunal stated at [69]:

"In short, in my judgement, in Section 121C the word neglect is to be given its usual meaning: it is a standard of conduct, not a subjective state of mind. I do not consider that there is anything sufficient in the context which the word appears to mandate a meaning which is not its ordinary meaning."

87. In *Charles O'Rorke V HMRC* [2007] TC06008, Judge Brown considered the availability of cash to pay and stated:

"Payment of PAYE and NICs is a statutory obligation and is not dependent on availability of cash."

88. The question of payment was also considered in *Christine Roberts V HMRC* [2012] TC01994 where Judge Blewitt found as follows at [39-45]:

"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 19th of every month and that this duty existed irrespective of any financial difficulties the Company may have experienced.

We found as a fact that the Appellant, together with her fellow Directors, was aware of the obligation to account each month for NIC's 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 the period, paying wages of employees. 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.”

89. In *Stephen Roberts and Alan Martin v HMRC* [2011] UKFTT 268 the Tribunal considered the statutory obligation to pay and neglect and concluded at [34]:

“We have ... no difficulty in holding on the balance of probabilities that Innova’s failure to pay the NIC specified in the PLNs was attributable to the neglect on the part of the Appellants. ... It was plain that the Appellants were fully aware of the statutory obligations in relation to the payment of NIC. They received information each month about the financial health of Innova including the amount of NIC due and payable by the 19th of the month. They were responsible for the decision each month, while Innova traded, not to pay NIC ... and chose instead to pay other creditors and their own salaries; they thus propped up for as long as possible an ailing business with funds which should have been remitted to HMRC...”

No reasonable and prudent businessman would have behaved in this way or conducted business in this manner. No reasonable and prudent businessman would have neglected to pay the NIC as it fell due. Any reasonable and prudent businessman, having control of the operations of Innova, would have ceased trading within a few months of start-up at the latest... The irresistible inference from the facts as we have found them to be is that Innova’s business was being funded at least in part by money which ought to have been remitted to HMRC to meet the company’s statutory obligations...”

The Tribunal then had no hesitation in concluding that the Appellants had behaved negligently.

90. The general duties of a Director are set out under The Companies Act 2006 at Sections 170 to 177, but these are not the only requirements that Directors must meet. There are other legislative and regulatory provisions relevant to their business which include ensuring that the Company complied with the relevant legislation surrounding tax and NIC.

91. There is an obligation on Directors to safeguard company assets and take reasonable steps to ensure that the company can settle its debts as they fall due.

92. The duty of the Director includes conducting a company’s affairs in a proper and business-like manner, which necessarily includes ensuring that the company abides by its statutory duties. As such, a director’s financial responsibilities include paying staff correctly and deducting income tax and NIC where they apply and then remitting these payments on time to HMRC.

93. The Appellant was clearly aware of his statutory obligations regarding PAYE and NIC during the period under dispute. From August 2016 to June 2018 PAYE and NIC were deducted from the wages paid to employees, returns of these amounts were made to HMRC, but no payments made to HMRC. Accordingly, the Appellant ran the Company for 22 months in clear breach of its statutory obligation to make payments of PAYE and NIC to HMRC.

94. HMRC’s enquiry officer examined the Company’s bank statements for the period August 2016 to June 2018 and identified Company receipts of £782,981 being deposited into the bank account.. During the same period, the Appellant also transferred into the bank account deposits of around £235,000 stated as being from family and friends to fund the business. The officer further identified payments of around £192,000 as being transferred directly to the Appellant.

These sums were not disputed by the Appellant and in the officer's in a letter of 11 December 2019 he stated:

"The Company bank statements point to you choosing to repay monies to yourself and possibly friends and family in priority to monies owed to HMRC. Furthermore, the fact that you have referred to borrowing money from friends and family shows a recognition of the financial difficulties facing the Company. It also points to monies that should have been remitted to HMRC being used to boost cash flow and support an ailing Company.....In my opinion, a reasonable Company Director would not trade a company in this manner, and trade to the clear detriment of the Crown for such a prolonged period. Your actions on this matter were negligent, and not the actions of a reasonable person."

95. It was the responsibility of the Appellant to meet with the statutory obligation to make payments of PAYE and NIC to HMRC by the prescribed date each month which he failed to do for 22 consecutive months.

96. Although the Appellant has said that the Company owed him money, he should have been aware of the risks of losing money loaned to the Company during times of financial difficulty. Irrespective of whether the payments identified in the bank statements as made to the Appellant were repayments of loans, as the Appellant has contended, the fact is that he chose to give priority to these payments at a time that NIC was being withheld from HMRC, and the company liabilities were increasing.

97. Statutory payments due to HMRC should have taken priority over payments made to himself, and/or family and friends. The Appellant chose to risk his money, but HMRC was an involuntary creditor.

98. In *Michael Eames v HMRC* [2022] TC08450 Judge Fairpo at [33] considered the use of Company money and stated:

"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."

99. The Respondents say that the absence of their witness is not to the detriment of the Appellant. The terms of the telephone conversation of 17 September 2019 were committed to writing and sent with an email to the Appellant on 20 September 2019 for his approval and or amendment. On 3rd October 2019 he approved of the note of the telephone call and other than saying that he did not do anything deliberately did not dispute what was written.

100. The witness could only have given evidence in relation to matter more than five years ago and being able to ask questions about matters which were not covered by the subsequent note of the telephone call is irrelevant.

101. In relation to the threats that the Appellant says he received from his employees in relation to the payment of their wages, HMRC say they have received no evidence of this and in any event, it is a matter for the Police and not for HMRC.

102. The Appellant confirmed in the telephone call of 17 February 2019 that he was a director of four other companies, two of which had PAYE schemes running and were fully compliant

which provided evidence that he knew how PAYE and NIC schemes operated and what was required for compliance.

103. The Respondents are not aware of any attempt by the Appellant to try and pay back the amount due and there is no evidence of this.

Conclusion/Orders Sought

104. During the period of non-payment, the Appellant was the sole Director of the Company and was an ‘Officer’ of the Company. He had a non-delegable duty to ensure that NIC was duly deducted from the Company employees’ wages and was paid to HMRC by the statutory deadline. The failure to do this was attributable to neglect on the part of the Appellant.

105. The Tribunal are asked to uphold the decision of HMRC to raise the PLN under S121C on the Appellant and to confirm that he is liable for the Company’s NIC debt of £103,420.89.

TRIBUNAL’S DECISION

106. Whether or not the Respondents’ witness would have been able to provide any further evidence or confirmation in addition to information in the notes he prepared of the telephone conversation of 17 December 2019, the fact is he was not able to confirm his witness statement and, accordingly, the tribunal decided, in accordance with the overriding objective at Rule 2, of the Tribunal Rules, to disregard it.

107. The tribunal ruled that it would, therefore, hear the appeal on the basis of or other evidence before it, noting that the Document Bundle contained correspondence from the Appellant and argument and submissions on his behalf and also that in his email of 21 February 2025 he stated he had, having taken legal advice, provided no evidence and no witnesses and that he was only going to rely on the cross-examination of HMRC’s witness.

108. The tribunal considered that there was sufficient opportunity for the Appellant to participate fully in the proceedings and put forward his submissions on the evidence that was before the tribunal.

109. The tribunal, therefore, refused the Appellant’s “official request” that, given “the fact that the main witness for both parties was not available”, the whole case should be dismissed with immediate effect.

Underpayment of NIC

110. We were satisfied that there had been an underpayment of NIC. No payments had been made by the Company in respect of NIC, and PAYE from the period August 2016 to May 2018 period during which the company were in receipt of £782,981 deposited in their bank account.

111. There was no evidence to the contrary.

Acting as an “officer if the company

112. We considered that the Appellant was acting as an “officer” of the Company at the time of the failure to pay.

113. In the notes of the telephone conversation of 17 September 2019 which were committed to writing, sent to the Appellant on 20 September 2019 and confirmed without amendment, other than to say that he did not do anything deliberately, on 03 October 2019, the Appellant confirmed that (1) he was the sole director of the company; (2) responsible for all financial aspects of the company including paying staff wages; (3) was the only signatory on the company bank account; (4) made payments from the company bank account; and (5) had access to the Company’s online bank statements which he reviewed and monitored on a regular basis.

114. The Appellant, as a director of the Company, was under an obligation to settle its debts as they fell due and conduct the Company's affairs in a proper and businesslike manner. The Appellant was clearly aware of his statutory obligations regarding NIC and PAYE during the period under dispute and had experience of doing so in relation to two other companies. We find that he ran the Company for 22 months in clear breach of its statutory obligation to make payments of NIC to HMRC.

115. Notwithstanding the large number of bank statements, the tribunal had difficulty understanding why the Appellant required so many extensions of time to examine bank accounts which he solely controlled and monitored, and which postponed the conclusion of HMRC's enquiry, nor why these enquiries resulted in no results being provided to HMRC.

Whether the Company's failure to pay NIC was attributable to neglect on the part of the Appellant

116. We considered the explanation given during the telephone conversation of 17 September 2019, that the Appellant became aware of financial difficulties caused by the increased number of staff recruited which led to cash flow problems. The Appellant took steps to address the problems and look for more contracts and borrowed money from family and friends to pay wages.

117. The Appellant explained the everyday workings of the business and in particular an issue that arose in relation to the company's decision to pay its staff, notwithstanding that the company would not start to see money coming in and profits would be available for some 180 days.

118. The Appellant and the Company were hoping to pay HMRC the amount of NIC that was due but in view of the threats that the Appellant said he received and the need to keep the staff going to try to finish projects and bring money in, it was clear to us that these took precedence over the Company's obligations, of which the Appellant had confirmed he was fully aware, to pay HMRC.

119. Returns of NIC to HMRC were not followed up by payment which was due at the statutory date and are not payable on a deferred basis dependent on receipt of future cash from projects.

120. The Appellant said he used his own money and borrowed money from family and friends "just to make the payroll and then pay them back each month just to keep afloat."

121. We did not consider that this amounted to a suitable explanation or basis on which to consider that the neglect of the Appellant was unfair.

122. Instead, we preferred HMRC's submissions that whatever the reasons, the Appellant chose to pay approximately £192,000 to himself, (and possibly to friends and family but there was no evidence to support this), in priority to monies owed to HMRC. Throughout the whole 22 months the Company, controlled by the Appellant, was paying wages to the staff without paying PAYE and NIC on a regular basis on the prescribed date each month.

123. We adopt the reasoning of Judge Fairpo in *Michael Eames vs HMRC*.

124. Consequently, we consider that a prudent and reasonable person knowing the amounts deducted from payroll were owed to HMRC would not use those funds to pay himself, family, or friends in priority to HMRC. The Appellant was endeavoring to support his company through the non-payment of tax; HMRC is not a short-term or long-term lender to be called upon 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. Instead

that person would comply with the statutory duty to ensure the funds deducted for NICs from employees are paid to HMRC on time each month.

125. The Company and the Appellant failed to do so and the Appellant, was the person responsible for making payment of PAYE and NIC due to HMRC each month and deciding which creditors to pay, which included the payments to himself. He, whilst fully aware of the statutory obligations and the financial health of the Company, made the deliberate decision to withhold payment of PAYE and NIC to assist in part funding his business and pay other creditors with money that ought to have been remitted to HMRC. These were not the actions of a 'prudent and reasonable man'.

126. 'Neglect' as stated in *Commissioners' for HMRC v O'Rourke* is a standard of conduct, not a subjective state of mind. It involves 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.

127. In applying this test, we consider, for the reasons stated, that the failure to pay NIC was attributable to the neglect on the part of the Appellant to comply with the company's statutory obligations in relation to PAYE and NIC.

Level of Culpability

128. We consider that HMRC's opinion, as set out in their submissions and based on the evidence before us, to treat the Appellant as the sole culpable officer was reasonable in all the circumstances.

Conclusion

129. Accordingly, we consider that the PLN issued by HMRC on 11 December 2019 under S121C makes the Appellant the person responsible for the NIC debts of S&M Property Maintenance Scotland Ltd, the Company, for which the Appellant was the sole director during the period of the PLN and who had sole control of the company bank account during the relevant period.

130. The PLN relates to unpaid NICs for the period 06 August 2016 to 05 June 2018 in the sum of £102,259.70, plus statutory interest of £1,161.19 making a total of £103,420.89.

Disposal

131. We therefore dismiss the appeal and uphold the PLN issued to the Appellant, Mr John Strange, in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

132. 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.

**WILLIAM RUTHVEN GEMMELL WS
TRIBUNAL JUDGE**

Release date: 06 March 2025