



Neutral Citation: [2022] UKFTT 189 (TC)

Case Number: TC08514

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2017/01430

INCOME TAX – National Insurance Contributions – PAYE – debt transfer notice – whether appellant was a director – yes – appeal dismissed

Heard on: 8 March 2022

Judgment date: 24 May 2022

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

NIGEL VICTOR GRADIDGE

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Davison, accountant

For the Respondents: Ms Millward, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

Introduction

1. This is an appeal against a debt transfer notice (DTN) in respect of a debt of £31,024.15 relating to income tax and Class 1 National Insurance Contributions, issued on 10 November 2016 and transferring the debt from N19 Training Services Limited (the Company) to the appellant (Mr Gradidge), a former director of the Company. The debt transfer notice was issued under s688A(2) of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) and the Social Security Contributions (Managed Service Companies) Regulations 2007 (SSC MSC Regs 2007).

Background

2. The Company was incorporated on 12 August 2011 and was set up in order to provide Mr Gradidge's services to third party agencies. Mr Gradidge's evidence, which was not disputed, was that this structure had been required by agencies in order for them to provide him with work after he had been made redundant by his employer.

3. Mr Gradidge was the sole director and shareholder, and the Company had no employees. The Company was set up by Think Accounting Limited (TAL) who also undertook statutory and financial compliance management for the Company. Mr Gradidge had been given TAL's details by a third party.

4. Mr Gradidge terminated the services of TAL's successor (New Wave) and appointed Davison & Co as the new accountants to the Company on 1 March 2015. On 19 March 2015, the registered address for the Company was changed to Mr Gradidge's home address.

5. Following enquiries into TAL, HMRC opened enquiries into the Company in August 2015.

6. Following a meeting with Mr Gradidge in December 2015 HMRC concluded, and it was not disputed, that the Company was a Managed Service Company, and that TAL was a Managed Company Service Provider in connection with the Company. Regulation 80 determinations and s8 decision notices were issued to the Company on 4 March 2016 in respect of PAYE income tax and Class 1 National Insurance Contributions for the 2011-2012 to 2013-14 tax years. No penalties were imposed as HMRC concluded that the behaviour which led to the notices and determinations arose as a result of a mistake despite reasonable care.

7. On 24 March 2016 an application was made to strike the Company off the register at Companies House. On 12 April 2016, Mr Gradidge resigned as a director of the Company; his advisers, Davison & Co, also resigned as company secretary on that date. The Company was eventually dissolved by voluntary strike off on 29 January 2019.

8. The determinations and notices were not appealed by the Company but were not paid. On 10 November 2016, HMRC issued the DTN which is the subject of this appeal. Mr Gradidge appealed to HMRC in respect of the DTN on 17 November 2016. Following a review, Mr Gradidge appealed to this tribunal on 7 February 2017.

Relevant law

9. s688A ITEPA 2003 provides, as relevant:

- (1) PAYE regulations may make provision authorising the recovery from a person within subsection (2) of any amount that an officer of Revenue and Customs considers should have been deducted by a managed service company ("the MSC") from a payment of, or on account of, PAYE income of an individual.

- (2) The persons are—
 - (a) a director or other office-holder, or an associate, of the MSC ...
 - (c) a person who (directly or indirectly) has encouraged or been actively involved in the provision by the MSC of the services of the individual ...
- (3) A person does not fall within subsection (2)(c) merely by virtue of—
 - (a) providing legal or accountancy advice in a professional capacity, or
 - (b) placing the individual with persons who wish to obtain the services of the individual (including by contracting with the MSC for the provision of those services).
- ...
- (5) In this section ...
 “director” has the meaning given by section 67 ...

10. Paragraph 97C of the Income Tax (Pay As You Earn) Regulations 2003 (the PAYE Regulations 2003) provides, as relevant at the time the notice was issued:

- (1) This regulation applies if—
 - (a) a managed service company has a relevant PAYE debt, and
 - (b) an officer of Revenue and Customs is of the opinion that the relevant PAYE debt or a part of the relevant PAYE debt (the “specified amount”) is irrecoverable from the managed service company within a reasonable period.
- (2) HM Revenue and Customs may make a direction authorising the recovery of the specified amount from the persons specified in section 688A(2) (managed service companies: recovery from other persons).
- (3) Upon the making of a direction under paragraph (2), the persons specified in section 688A(2) become jointly and severally liable for the relevant PAYE debt, but subject to what follows.
- (4) HM Revenue and Customs may not recover the specified amount from any person in accordance with a direction made under paragraph (2) until they have served a notice (a “transfer notice”) on the person in question (the “transferee”).
- ...
- (7) HM Revenue and Customs may not serve a transfer notice on a person mentioned in section 688A(2)(c), or on a paragraph (c) associate, unless an officer of Revenue and Customs certifies that, in his opinion, it is impracticable to recover the specified amount from persons mentioned in paragraphs (a) and (b) of section 688A(2) and from paragraph (b) associates.
- (8) In determining, for the purposes of paragraph (7), whether it is impracticable to recover the specified amount from persons mentioned in paragraphs (a) and (b) of section 688A(2) and from paragraph (b) associates, the officer of Revenue and Customs may have regard to all managed service companies in relation to which a person is a person mentioned in paragraph (a) or (b) of section 688A(2) or a paragraph (b) associate.
- (9) In determining which of the persons mentioned in section 688A(2)(c) and which of the paragraph (c) associates are to be served with transfer notices and the amount of those notices, HM Revenue and Customs must have regard to the degree and extent to which those persons are persons who (directly or indirectly) have encouraged or been actively involved in the provision by the

managed service company of the services of the individual mentioned in that provision.

11. s67 ITEPA 2003 defines a director as follows, as relevant:

- (1) In the benefits code “director” means ...
 - (b) in relation to a company whose affairs are managed by a single director or similar person, that director or person, and
 - (c) in relation to a company whose affairs are managed by the members themselves, a member of the company,
- and includes any person in accordance with whose directions or instructions the directors of the company (as defined above) are accustomed to act.
- (2) For the purposes of subsection (1) a person is not to be regarded as a person in accordance with whose directions or instructions the directors of the company are accustomed to act merely because the directors act on advice given by that person in a professional capacity.

12. s112 Companies Act 2006 provides that:

- (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.
- (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

s154 Companies Act 2006 provides, as relevant, that:

- (1) A private company must have at least one director ...

Evidence and submissions

13. The general background to this appeal was not in dispute, nor was the validity of the determinations and notices in dispute.

14. For Mr Gradidge, it was contended that the requirements of the legislation were not met as he was not a director at the time that the DTN was issued. He also contended that he had never been a real director of the Company as he considered that TAL had controlled the Company and he had not played any active role in the management of the Company whilst they were involved. It was submitted for Mr Gradidge that TAL had made all of the arrangements without his knowledge or signature, and that he had no idea what a shareholder or director was, and thought of himself only as a worker. It was contended that he had tried to go to TAL's offices and was told that he was not allowed to.

15. In the hearing, Mr Gradidge gave evidence as follows.

- (1) He had contacted TAL under the instructions of one of the agencies for which he worked. TAL made all the arrangements to set up the Company, although Mr Gradidge had chosen the name of the Company which was based on his vehicle registration plate.
- (2) He recalled completing forms to do with giving them permission to deal with tax and other matters, but the ‘welcome pack’ which he had received had nothing in there about being a director. The engagement letter, which he had not actually signed, stated that TAL would provide free limited company formation, PAYE compliance, annual returns and accounts, CT600 and tax returns as well as VAT returns if required.
- (3) Before signing up with TAL he had called HMRC to find out whether being paid via a limited company was allowed, as he had always been employed before. He stated that HMRC had advised him that it was common practice. He did not undertake any other

research into the arrangements or obtain any advice from others. HMRC noted that no information had been given as to who Mr Gradidge spoke to, nor when the calls took place. The context and content of the questions asked and answer given could not therefore be established. I also consider that it is not relevant to the question of whether or not Mr Gradidge was a director of the Company, given that this Tribunal has no inherent supervisory jurisdiction.

(4) He had not noticed any income tax or National Insurance difference in the arrangements compared to being an employee and had assumed that it was all being done for him by TAL. He didn't look at the tax information in payslips, only the 'bottom line'.

(5) The arrangements 'ran well' for several years. It was only when TAL was in the news that it became clear that matters were not right. Mr Gradidge had not realised what was going on as he thought TAL would deal with everything, and that all he had to do was drive and be paid.

(6) He had applied to strike off the Company as he could not understand how things had gone wrong, as he thought everything was being done correctly. He disagreed that he was trying to avoid paying the determinations and notices.

(7) He had resigned as a director because he 'never was one in the first place'. He had not realised he was a director until he had meetings with HMRC. He had not resigned in order to escape payment.

16. It was submitted that the fact that Mr Gradidge was shown as a director on Companies House records did not mean that he had been a director of the Company in reality. It was contended that TAL had completed the registration using his details. Further, Companies House did not run checks on the names of directors and Mr Gradidge's representative stated that he knew of fictitious names being used for directors of other companies.

17. HMRC submitted that Mr Gradidge chose to set up the Company and engage TAL. He had been paid via dividends and received non-employee-allowable expenses, which provided him with a tax benefit. HMRC also contended that it was not relevant that Mr Gradidge had resigned, as he had been a director of the Company at the time that the relevant debt accrued. Even if he had chosen not to control the company, he had still been appointed as a director. HMRC also contended that he should be regarded as a shadow director of the company following his resignation as there were no other directors appointed.

18. The purpose of the legislation was, it was contended, to allow for recovery of relevant debts from a person who was a director at the time that the relevant income tax and National Insurance Contributions should have been deducted and accounted for under PAYE. HMRC submitted that s688A ITEPA should therefore be regarded as applying to the period in which the debt accrued, and that the present tense used in the legislation should be regarded as stylistic. Relevant events for an annual tax such as income tax should be regarded as those in the relevant tax year. Further, the purpose of the legislation is to transfer the debt to persons who knew or should have known that PAYE should have been deducted; it was submitted that it was not appropriate to interpret the legislation as applying to persons who were not involved with the company at the time the debt accrued but enabling those involved to escape liability.

19. It was also contended that the decision in *RCI Europe* [2003] EWHC 2139 (Ch) had concluded, in the context of National Insurance Contributions, that the word 'is', in another area of statute, was stylistic and that the definition was not temporal.

Discussion

20. It was agreed that the dispute was as to whether Mr Gradidge had ever been a ‘real’ director of the Company and, if so, whether s688A(2) allows a debt to be transferred to a former director of the Company.

Whether Mr Gradidge was a director at all

21. It is not disputed that Mr Gradidge was appointed as a director and registered as such at Companies’ House. Although it was suggested that this was something that was done without his knowledge or permission, and possibly that the circumstances should be regarded as TAL (or a person associated with them) being the director under an assumed name, I consider that the evidence put to the Tribunal is such that it is more likely that Mr Gradidge simply did not pay particular attention to the arrangements that were put in place. This is because it was clear that he knew that the arrangements involved his being paid via a limited company, as his evidence was that he had made enquiries of HMRC as to whether this was permitted. Mr Gradidge agreed that he had completed various forms at the time, which he recalled as being “something to do with giving them permission to deal with tax and stuff like that” and also that he thought TAL would “deal with it all”.

22. I note the submissions that Mr Gradidge was not a director because he was “not allowed” to manage the company, but I consider it is clear from his evidence that he did not attempt to exercise any control until he realised that there was a problem with TAL and its successor. I also note that when this happened, he was able to appoint alternative advisers as accountants for the company and also to appoint them as the company secretary. It was contended that TAL’s successor had demanded fees when this happened, but it is clear that Mr Gradidge was not prevented by them from acting as director of the company.

23. Accordingly, I do not consider that the submissions that Mr Gradidge was prevented from acting as a director and that as such he should be regarded as not having been a director of the Company are not made out.

Temporal nature of s688A

24. s688A(1) and (2) is written in the present tense. This is not unusual in legislation. It states (in summary) that a relevant debt can be transferred to one of a range of specified persons, including a director of the relevant company.

25. Having reviewed the evidence and submissions, I consider that the approach taken in *RCI Europe*, referred to by HMRC, applies equally to ITEPA 2003 as it did to the Social Security Contributions and Benefits Act 1992 which was the subject of that decision. In particular, s688A(2) is also a “definition section with no specific temporal requirements” and the definitions “are categories of” person, as noted in *RCI Europe* at [356].

26. Although *RCI Europe* was referring to the definition of an employee, rather than a director, the decision noted particularly that the legislation overall did not support the contention that a person should escape liability simply because they had ceased to be an employee. I consider that s688A(2) should be interpreted in the same way, being a definition section and defining categories of person rather than specifying particular periods of time. I consider that the use of the present tense in s688A(2) does not preclude the issue of a debt transfer notice to a former director of the relevant company.

27. I therefore find that there is no temporal aspect to s688A(2), requiring a director to have been in office at the date of the issue of the notice and, as I have found that Mr Gradidge was a director of the Company, the DTN was therefore correctly issued and is upheld.

Whether Mr Gradidge was a director at the time of the DTN

28. However, even if the language of s688A(2) should be regarded as being temporal in nature, I note that “director” is defined in s688A by reference to the definition in s67 ITEPA 2003. That definition states, inter alia, that a director is a member of the company where the company is managed by the members themselves.

29. At the date of the debt transfer notice, Mr Gradidge was the sole member of the Company and there was no director or other officer appointed. He was, therefore, the only person who had standing to make decisions regarding the Company. Accordingly, I find that the Company was managed by its sole member and therefore that Mr Gradidge was a director of the Company for the purposes of s688A at the time that the DTN was served.

30. Accordingly, even if it were the case that s688A(2) should be regarded as having a temporal requirement, Mr Gradidge remained a director for the purposes of s688A at the time that the DTN was issued and so the DTN was correctly issued and is upheld.

31. Finally, I note that the DTN stated that Mr Gradidge was “a person within Section 688A(2)(a)” ITEPA 2003. The DTN does not state which of the three categories of person set out in that section specifically applies: “director or other office-holder, or an associate”.

32. An “associate” is defined in s688A by reference to the definition in s68I ITEPA 2003, as a “person connected with the company” A person is connected with a company where that person controls the company (s718 ITEPA 2003 and s993 Income Tax Act 2007) and, as sole shareholder, Mr Gradidge controlled the Company and was therefore an associate of the Company at the time that the DTN was issued.

33. Although I asked the parties for their comments on this aspect of s688A(2)(a), there were no specific submissions made as to its application. As I have concluded that Mr Gradidge was liable as a director, this is included for information as it was referred to in the hearing.

Whether the DTN should have been issued under s688A(c)

34. As this point was argued briefly, I note that it was also submitted that the DTN was incorrectly issued and that, to be valid, HMRC should have issued the debt transfer notice on the basis of s688A(2)(c), as Mr Gradidge had been actively involved in the provision of the relevant services rather than under the provisions relating to directors. Given my findings above, and the provisions of paragraph 97C of the PAYE Regulations, I conclude that this submission is not made out. The PAYE Regulations are clear that a notice under s688A(2)(c) cannot be issued unless HMRC consider that it is impracticable to recover from a director (or another relevant person).

Expenses

35. The grounds of appeal appear to include an appeal against the amount of the DTN, on the basis that HMRC had not taken into account expenses which had been properly incurred by Mr Gradidge and reimbursed by the Company. This was briefly mentioned in the hearing, in a statement on behalf of Mr Gradidge that the expenses had been properly incurred and that the DTN was “not correct on that basis”. No outline of case was provided on behalf of Mr Gradidge.

36. As no further information or detail was provided, I consider that this ground of appeal was not made out. Further, it appears from the legislation that any appeal as to the amount of the debt should have been made by the Company, rather than Mr Gradidge.

Note

37. I note that it was submitted that Mr Gradidge was a victim of others, that he had no choice but to use this structure as it was required by those who would provide him with work, and that

he had no idea what was going on. Mr Gradidge was therefore “looking for fairness” from the Tribunal.

38. As is clear from HMRC’s decision not to impose penalties, there is no assertion that Mr Gradidge was knowingly involved in the arrangements or that he sought a tax benefit. However, the purpose of this legislation is clearly to ensure that those who benefit from this type of arrangement, even without specific intention to do so, should be liable in order to ensure a ‘level playing field’. I note that this Tribunal does not have any inherent supervisory jurisdiction and there was no submission that the legislation provided any such jurisdiction that was applicable in this case.

Conclusion

39. For the reasons set out above, I find that the DTN was correctly issued and should be upheld in full. The appeal is dismissed.

Right to apply for permission to appeal

40. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 25 MAY 2022