



**TC06456**

**Appeal number TC/2017/07242**

*Requirement to give security - Pay As You Earn ('PAYE') and National Insurance Contributions ('NIC') under Part 4A of the Income Tax (Pay as You Earn) Regulations 2003 and Part 3B of Schedule 4 to the Social Security (Contributions) Regulations 2001 - Director controlled predecessors to Appellant company which had poor compliance records - whether reasonable to require security - yes - appeal dismissed.*

**FIRST-TIER TRIBUNAL**

**TAX**

**CRAYS SUPPORT SERVICES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE: MICHAEL CONNELL  
MEMBER: ELIZABETH BRIDGE**

**Sitting in public at Tax Appeals Tribunal, Taylor House, Rosebery Avenue, London on  
10 April 2018**

**The Appellant in person  
Mr Alex Barratt, Officer of HMRC, for the Respondents**

## DECISION

### **The Appeal**

- 5 1. This is an appeal by Crays Support Services Limited (“the Appellant”) against  
the decision of the Respondents, (“HMRC”) dated 25 May 2017 and upheld on review  
on 25 August 2017, to issue a Notice of Requirement to give security in respect of  
Pay As You Earn (“PAYE”) and National Insurance Contributions (“NIC”) under  
10 Part 4A of the Income Tax (Pay as You Earn) Regulations 2003 and Part 3B of  
Schedule 4 to the Social Security (Contributions) Regulations 2001.
2. The Tribunal dismissed the appeal. This is a statement of findings of facts and  
reasons for the decision.

### **Factual background**

- 15 3. Mr Mathew Holt and Mrs Julie Holt were joint directors and shareholders of Tri-  
Star Protection Limited. The company was incorporated on 19 February 1993. Its  
business was the installation and maintenance of fire detection systems. As at 1  
October 2014, the company owed £80,989 VAT and £119,807 PAYE. A Notice of  
Requirement (“NOR”) for security was issued by HMRC to the company, in respect  
of the liabilities. On 21 October 2014 a Creditors Voluntary Liquidation was entered  
20 into and a liquidator appointed on 29 October 2014. The company was dissolved on 9  
April 2018, with unsecured creditors (including HMRC) shown in the Liquidator’s  
report at £342,580.
4. Mr and Mrs Holt were joint directors and shareholders of Crays Property Limited  
t/a Crays Fire. Its business was the design, supply, installation, commission and  
25 maintenance of fire alarm and detection systems. The company was incorporated on  
24 November 2009. Mrs Cray resigned as a director on 1 January 2016.
5. On 13 February 2017 the company owed VAT of £83,908.08 and £45,201.43  
PAYE. A NOR for security was issued to Mr Holt, in respect of the PAYE and VAT  
liabilities.
- 30 6. On 8 May 2017, Mr Holt emailed HMRC to explain that Crays Property was not  
in a position to provide security and that he had decided to cease trading. The  
company was wound up on the petition of HMRC on 17 January 2018 at which date  
the VAT liability had risen to £102,137.04.
7. The Appellant company was incorporated on 9 February 2017. The sole director  
35 and shareholder is Mr Holt. The company’s trading activity is stated as ‘Management  
Services’. It provides the services of employing and paying workers for other  
businesses within the control of Mr Holt. These businesses have taken over the trade  
of Tri-Star and Crays Property. The company is currently active.
8. On 25 May 2017, a NOR to give security in respect of PAYE and NIC was issued  
40 to Mr Holt. HMRC explained in the notice that there was a risk that the Appellant  
company would not pay PAYE and NIC that were or may become due. HMRC

considered Mr Holt and the Appellant to be a risk to the revenue due to Mr Holt's links to other predecessor companies which had failed, leaving large debts.

5 9. The NOR required Mr Holt as sole director to give security for PAYE of £19,584 and for NIC of £19,372, the monies to be held by HMRC as a bond for a period of two years from 4 July 2017 being the required date of payment.

10. The amount of security was based on the Appellant company's first returns and represented the estimated amount of PAYE and NIC due to be paid by the company, for a four month period.

10 11. The NOR states that it is a criminal offence not to give security when required to do so and that Mr Holt could be liable to criminal prosecution and fined up to £5,000 if the security was not paid and the company carried on trading.

15 12. On 6 June 2017, an HMRC Officer spoke to Mr Holt and explained his options, which were that he could pay the security, cease the business or appeal the decision and request a review by an independent HMRC officer. In the latter event he would need to explain the difficulties of the old businesses and changes he would make to ensure that PAYE and VAT were paid on time in the future. If he wished to appeal Mr Holt had to do so within 30 days of the day after the issue of the NOR, that is, by 25 June 2017.

20 13. In the meantime, the company's PAYE was paid in full early on 23 May 2017. The NIC was also paid early, by two instalments on 23 May 2017 and 22 June 2017.

14. On 26 June 2017, Mr Holt emailed HMRC asking for an explanation of the method by which the security amounts had been calculated (although this had already been explained in the NOR).

25 15. On 27 June 2017, HMRC replied to Mr Holt stating that the security sums were based on the company's first returns dated 19 May 2017 and showing an amount of £4,896.04 PAYE and an amount of £4,843.21 NIC, each payable by 22 July 2017.

30 16. On 28 June 2017, Mr Holt emailed HMRC to say that he was going on annual leave that day and would not return until 10 July 2017. He said that he was putting HMRC on notice that he would be appealing the NOR. Mr Holt's email appears to indicate that he had not received HMRC's letter of the previous day.

35 17. Nothing further was heard from Mr Holt and on 7 July 2017, HMRC issued a PAYE and NIC reminder letter for the security payments. Mr Holt was informed that the deadline by which the security payment was required had expired and that if the company had not already ceased trading he was committing an offence under s 684 (4A) of the Income Tax (Earnings) & Pensions Act 2003 and liable to prosecution and a fine of up to £5,000.

18. Nothing was heard from Mr Holt and on 14 July 2017, a final Warning Notice was issued for the payment of the security, which advised that if the security was not

paid within 14 days of the date of the Notice, the matter would be passed to HMRC's Criminal Investigation Team.

19. The Appellant's PAYE and NIC return to 19 June 2017 showed the sum of £5,118.27 PAYE due by 22 July 2017. The PAYE was paid early on 22 June 2017.  
5 The sum of £5,021.40 NIC was due by 22 July 2017 and was paid by two instalments, the second of which was paid on 25 July 2017 and therefore three days late.

20. The Appellant's PAYE and NIC to 19 July 2017 due by 22 August 2017 were each paid three days late, that is, on 25 August 2017.

21. On 24 August 2017, Mr Holt wrote to HMRC explaining that all the Appellant  
10 company's PAYE and NIC returns and payments were up to date (although according to HMRC's records, that was not true). Mr Holt added that the company had been trading for six months and asked HMRC to re-examine the requirement for him to provide security.

22. On 25 August 2017, HMRC responded by saying that having considered the  
15 information put forward by Mr Holt, they were still of the opinion that security was required. Mr Holt was again warned that because the security payment deadline had passed, if the company had not already ceased trading he was liable to prosecution and penalties.

23. On 20 September 2017 the Mr Holt/the Appellant company lodged a notice of  
20 appeal with the Tribunal Service.

24. The Appellant company had meanwhile paid its PAYE and NIC in respect of return to 19 August 2017 on time, but for the period to 19 September 2017 its PAYE was paid three days late and its NIC by two instalments on 25 September 2017 and 7 November 2017.

25. After that, the Appellant company was then either late or defaulted entirely in respect of PAYE and NIC payments for the next five months. The amounts due were still outstanding at the date of this hearing.

### **Legislation and regulations**

26. The relevant regulations are contained in Statutory Instruments 2003/2682 -  
30 Income Tax (Pay As You Earn) Regulation 2003 - Part 4A Security for Payment of PAYE - Regulations 97M to 97X and Schedule 4 to the Social Security (Contributions) Regulations 2001 - Part 3B (paras 29M-29X) - Security for the payment of Class 1 Contributions give the Commissioners the power to require security

35 Reg. 97N(1) In circumstances where an officer of Revenue and Customs considers it necessary for the protection of the revenue, the officer may require a person described in regulation 97P(1) (persons from whom security can be required) to give security or further security for the payment of amounts in

respect of which an employer described in regulation 970 (employers) is or may be accountable to HMRC under regulation 67G

5 Reg. 29N In circumstances where an officer of Revenue and Customs considers it necessary for the protection of Class 1 contributions, the officer may require a person described in paragraph 29P(1) to give security or further security for the payment of amounts which an employer is or may be liable to pay to HMRC under paragraph 10, 11[11ZA or 11A.]

### **Evidence**

10 27. Evidence before the Tribunal included a copy of the NOR to give security and the review decision; a copy of the exchange of correspondence between the Appellant and HMRC regarding the decision; copy PAYE and NIC documentation regarding the Appellant, including its record of compliance; copy documentation and compliance records relating to the Appellant company's predecessors, Tri-Star and Crays Property, and the Appellant's Notice of Appeal. Mr Holt gave evidence on behalf of  
15 the Appellant and Ms Linda Andrews, Officer of HM Revenue and Customs, gave evidence on its behalf.

### **Appellant's Submissions**

28. The Appellant's/Mr Holt's appeal to the Tribunal, as set out in the Notice of Appeal is on the grounds that:

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- The Appellant company is a recently formed company and employs support staff only. It has no commercial sales.
  - The company's PAYE and NIC are fully up to date and have never fallen in arrears.
  - The reason given for the NOR is that Mr Holt was previously involved with  
25 organisations which went into receivership owing the Revenue money. "This is a very subjective requirement and does not take into account that although the previous companies failed, no proceedings were taken against the previous Directors for criminal or fraudulent activities and the companies have now been liquidated. It is very difficult to prepare an appeal when the reason for  
30 the decision is based on the opinion of someone which is supported by very little information."
  - Payment of a security would force the company into liquidation although it has no debt and is trading solvently.

35 29. Mr Holt in giving evidence said that the security required by HMRC would significantly damage the cash flow of the Appellant company. He acknowledged that he and his wife had been joint directors and shareholders of Tri-Star and Crays Property, each of which had failed owing a collective total of PAYE, NIC and VAT to HMRC of £364,054.

30. He explained that the business turnover of Tri-Star had reduced dramatically from the onset of the economic recession in 2007-08, although he acknowledged that Tri-Star had continued trading up until 2014. He acknowledged that as that 1 October 2014, the company had accumulated liabilities to HMRC of £80,989 VAT and £119,807 PAYE, eventually becoming insolvent in 2016.

31. Mr Holt said that Crays Property failed because the company had inherited liabilities from Tri-Star from which it was unable to recover. A NOR to provide security had been issued by HMRC, which the company could not comply with and as a consequence ceased trading. Mr Holt acknowledged that he had been served with a notice of prosecution, having continued to trade following the NOR to provide security, beyond the security deadline date, and criminal proceedings were only suspended following an appeal against the Notice. In the event the company was wound up on the petition of HMRC in 2017.

32. Mr Holt said that the Appellant company had succeeded to the business of Crays Property, having purchased the assets of the company from the liquidator.

33. He acknowledged that the company had defaulted in respect of its PAYE and NIC payments to HMRC for the seven periods between September 2017 and February 2018 inclusive.

34. Mr Holt said that the Appellant company had eight employees including himself as a director. The employees were the same as those employed by the previous companies he had been associated with. He also acknowledged that part of the PAYE debt to HMRC was PAYE due on the salary paid to himself.

#### **HMRC's submissions**

35. In carrying on trading, the Appellant company and Mr Holt as director represent a risk to HMRC and to the collection of PAYE and Class 1 NIC. It is therefore necessary for Mr Holt to pay the security amounts before being allowed to continue to trade.

36. HMRC's decision to issue a NOR in respect of PAYE and NICs is appropriate. Mr Holt is liable to give the full amount of security as he is in a position within the company to influence the payment of PAYE and NIC to HMRC.

37. The amount required is appropriate. It is reasonable to base the calculation on the declarations made by the business. It is reasonable and proportionate to hold as a deposit an amount equivalent to four months liability at the date the notice was served as protection against future default.

38. With regard to the grounds of appeal, the only matter that may be considered by the Tribunal is that of revenue risk which on the facts is self-evident given Mr Holt's directorships of the predecessor companies. Security action had to be taken in respect of Tri-Star and Crays Property, and each of those companies eventually became insolvent owing HMRC £364,054.

39. The Appellant has been deducting PAYE/NIC from its employees but has failed to pay over those deductions to HMRC.

40. The security deposits required are based on the actual returns submitted by the company for PAYE/NIC. HMRC consider these to be reflective of the Appellant's continuing trade at the date the notices were served.

41. The amount of security is not an appealable matter and its calculation is reasonable and proportionate.

42. Hardship applications do not apply to securities. The inability to pay a security deposit is not a matter that the Tribunal may take into account. In any event Mr Holt appears to have significant personal assets and has not provided any evidence that he would have difficulty supporting the Appellant company and complying with the NOR to provide security.

43. HMRC regularly review the requirement for security and would return it if and when they considered there was no longer a risk to the collection of PAYE and NIC.

#### 15 **Decision**

44. The Tribunal's jurisdiction when considering a requirement for a taxpayer to give security is appellate, but is exercised applying supervisory principles. It is necessary therefore for the Tribunal to consider whether HMRC have acted in a way which a reasonable panel of Commissioners would have acted. We must decide whether relevant matters have been taken into account and whether matters which should not have been given consideration have been disregarded (see *C&E Commissioners v J H Corbitt (Numismatists) Limited* [1980] STC231). The Tribunal cannot exercise a fresh discretion and substitute its own decision for one that may have been reached on an incorrect basis, as the protection of revenue is not the responsibility of the Tribunal or a court. To do so would involve assuming the mantle of the administrative decision maker.

45. In circumstances where an officer of Revenue and Customs considers it necessary for the protection of the revenue, the officer may require a person described in regulation 97P(1) (persons from whom security can be required) to give security or further security for the payment of amounts in respect of which an employer described in regulation 970 (employers) is or may be accountable to HMRC under regulation 67G. In short HMRC may require security from a director where there is a risk that the company may not honour its obligations to collect and pay over PAYE and NIC to HMRC.

46. It is the employer who must give security. Where the employer is a limited company security may be required from one or more of the company directors or from any person who controls the company or partnership and has the ability to influence whether the PAYE and National Insurance contributions are paid.

47. The security can be of such amount as HMRC determine but is normally calculated at four times the amount returned in the company's last return. The

amount of the security required should be calculated so as to give a realistic possibility that the security will be capable of being given, in order that the revenue, to that extent, will be protected.

5 48. Mr Holt says that if required to provide the security bond, the company “would be forced into liquidation”. However the Notice is to Mr Holt personally and no evidence has been provided to show that he cannot pay the security. In any event as stated in *Highlake Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT808 (TC) by Judge Scott:

10 “I have noted that apparently Highlake could not afford the level of security demanded. My view is that this is not a relevant consideration in relation to considering whether security is required for the protection of revenue or the amount of security. Whether a company is able to trade or not in view of the security requirement or amount is a consequence of the security requirement. The legislation is concerned with protection of revenue. It does not suggest that this objective is intended to be balanced against, or  
15 subject to, the objective of enabling the person upon whom the requirement is imposed to continue trading.”

20 49. The Tribunal must limit itself to considering the facts and matters which existed at the time of the appeal of the decision and cannot take into account a subsequent event, or that the company may now be up to date with PAYE and NIC payments and returns, as the Tribunal cannot consider the effect of matters which the Decision Maker did not take and could not have taken into account in arriving at his decision. Having said that, the company had in any event defaulted in every month following the Notice of Appeal.

25 50. In this case, Mr Holt was a director and in control of both Tri-Star and Crays Property, both of which went into liquidation owing substantial amounts of PAYE, NIC and VAT to HMRC. The Appellant company has also defaulted on its last seven months PAYE and NIC.

30 51. Little or no information has been supplied by Mr Holt which may indicate that the Appellant company is likely to be in a better position to avoid the financial difficulties experienced by its predecessors and comply with its obligations. In fact no information of substance has been provided by Mr Holt to show how the defaults by Tri-Star, Crays Property or the latest defaults by the Appellant company have occurred, whilst at the same time maintaining the company’s workforce and their salaries, including his own. As HMRC say, Mr Holt has been deducting PAYE/NIC  
35 from the company’s employees but has failed to pay these deductions over to HMRC. It is evident that these receipts are and have been used to support the cash flow of the business and the director’s remuneration.

40 52. We are satisfied that the decision and the review decision which HMRC took, that the giving of security was necessary for the protection of the revenue, was not unreasonable. HMRC took all relevant factors into account, and did not have regard to anything irrelevant. There was no error of law in those decisions.



53. In these circumstances the facts do not justify the Tribunal allowing the appeal, which was accordingly dismissed.

54. 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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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 19 APRIL 2018**

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