[2021] UKFTT 0338 (TC)

# TC08272

*NATIONAL INSURANCE CONTRIBUTIONS – lower earnings limit – should earnings from two employments be aggregated – were the employers carrying on business in association with each other – no – appeal dismissed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2019/03155**

**BETWEEN**

**MARTIN JOSEPH LONG** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**
**MR LESLIE BROWN**

**Hearing conducted in public remotely by video on 24 and 25 August 2021**

**John Long, the Appellant's brother for the Appellant**

**Cleo Lunt, Officer of HMRC for the Respondents**

## DECISION

## INTRODUCTION

1. This appeal concerns the amount of National Insurance Contributions ("**NICs**") which the appellant alleges should have been made in the tax year 2014/2015 on the earnings which he received from two employments. It is the appellant's view that the earnings from these employments should have been aggregated with the result that more NICs than were actually paid, should have been paid, with the consequence that he is entitled to claim employment support allowance for that year. HMRC do not consider that the earnings from the employments should have been aggregated and that the correct NICs were paid for that year.

## THE LAW

2. There is no dispute about the law which is set out in the appendix. However, given that the focus of this appeal concerned aggregation, we set out below Regulation 15 of the Social Security (Contributions) Regulations 2001 ("**Regulation 15**") for ease of reference.

> "15 Aggregation of earnings paid in respect of different employed earner's employments by different persons and apportionment of contribution liability
>
> (1) Subject to regulation 7, for the purposes of determining whether earnings-related contributions are payable in respect of earnings paid to or for the benefit of an earner in a given earnings period, and, if so, the amount of contributions, where in that period earnings in respect of different employed earner's employments are paid to or for the benefit of the earner—
>
> (a) by different secondary contributors who in respect of those employments carry on business in association with each other;
>
> (b) by different employers, one of whom is, by virtue of Schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978, treated as the secondary contributor in respect of each of those employments; or
>
> (c) by different persons, in respect of work performed for those persons by the earner in those employments and in respect of those earnings, some other person is, by virtue of that Schedule, treated as the secondary contributor,
>
> the earnings paid in respect of each of the employments referred to in this paragraph shall, unless in a case falling under sub-paragraph (a) it is not reasonably practicable to do so, be aggregated and treated as a single payment of earnings in respect of one such employment**.**
>
> (2) Where, under paragraph (1), earnings are aggregated, liability for the secondary contributions payable in respect of those earnings shall, in a case falling within paragraph (1)(a), be apportioned between the secondary contributors in such proportions as they shall agree amongst themselves, or, in default of agreement, in the proportions which the earnings paid by each bearer to the total amount of the aggregated earnings."

## EVIDENCE AND FINDINGS OF FACT

3. We were provided with a bundle of documents. The appellant tendered a witness statement which he adopted. He was not cross examined on that statement. Oral evidence was also given by Mr Mark Noble an employee of South West Ambulance Services NHS Trust ("**SWAST**").

4. From the evidence we find the following as facts:

(1) Around April 2013, SWAST, which prior to that time had been responsible for providing both ambulance services and patient transport services tendered for contracts to provide both services. It was awarded a contract only for ambulance services. The patient transport services contract was awarded to a private company, NSL Ltd ("**NSL**"). The contracts went live on 1 October 2013.

(2) The appellant had provided his services as a driver of both ambulances and patient transport vehicles, and his services in respect of the latter were transferred across to NSL when it was awarded the patient transport contract. He therefore had two employments, one with SWAST and the other with NSL in 2014/2015. His job description with SWAST was a patient support vehicle assistant while his job description with NSL was a patient transport services assistant. He was on a zero hours contract with SWAST.

(3) Due to health problems, the appellant retired from the NHS pension scheme on 8 September 2013 but decided to continue to work for the NHS on a reduced scale.

(4) An example of the work which the appellant carried out in these two roles was that he could take a patient to hospital in his SWAST job and then later collect that same patient in his NSL job to take them to another venue.

(5) The appellant made a claim for employment and support allowance on 3 November 2016. On 27 November 2016 the Department of Work and Pensions ("**DWP**") wrote to the appellant telling him that he had not paid enough NICs on his earnings in the tax years 2013/2014 and 2014/2015 to make them qualifying years to receive such payments.

(6) On 5 June 2018 HMRC provided the appellant with details of the earnings and NICs paid in the year 2014/2015. The appellant indicated dissatisfaction with this and was advised by an HMRC officer that combined earnings from separate employments could not be used to calculate weekly earnings for NIC purposes and that as the DWP calculate entitlements to employment support allowance, HMRC could not comment on the appellant's dissatisfaction regarding the calculation. The appellant, following the release of a stage 2 decision, appealed that original decision on 16 October 2018 and the appellant's appeal was allowed by the First-tier tribunal. The matter was then remitted to the Secretary of State to make a final decision on the appellant's entitlement to employment support allowance.

(7) On 3 December 2018 the appellant provided information to HMRC relating to the appeal and confirmed that the issue on NICs had not been considered by the First-tier tribunal which had advised that it did not have jurisdiction on the matter and that HMRC would correspond with the appellant in relation to this. Following correspondence a second notice of decision showing his earnings and the NICs from those earnings for 2014/2015 was issued by HMRC on 27 December 2018. It is this notice of decision against which the appellant appeals. That notice shows that no NICs were paid on his earnings from NSL and only £26.93 NICs were paid on his earnings from SWAST.

(8) Mr Noble is a qualified accountant and the financial controller of SWAST. This is a role which he occupied in 2013. His job entails, amongst other things, dealing with the Ambulance Trust's payroll which is operationally outsourced and dealt with by Plymouth Hospital Trust ("**Plymouth**"). He also has to liaise with HMRC and uses tax advisers to make sure that SWAST does not break or misinterpret HMRC rules.

(9) Decisions on aggregation of earnings are dealt with by Plymouth in discussion with SWAST.

(10) The background to the tendering for the two contracts arose because of the involvement of the Clinical Commissioning Group ("**CCG**") and it is the CCG which awarded the contracts. When the patient transport services contract was awarded to NSL, SWAST sold nearly 90 of its patient transport vehicles retaining only 10 for non-emergency/life-threatening use.

(11) Payment for the provision of the ambulance services was made by the CCG who, separately, paid NSL for the provision of the patient transport services. It was then up to the respective entities to manage their budgets. It was clear that NSL could not manage its budget since it handed the contract back in 2016.

(12) Mr Noble explained the difference between the services provided by SWAST and those provided by NSL. SWAST provide ambulance services which in normal circumstances take patients to hospital where they are treated as inpatients since these are emergencies arising from an accident or incident which result in the necessity to get them to hospital as quickly as possible. Patient transport services do not deal with acute situations but, generally speaking, take patients to hospital where they are treated as outpatients or they might take patients who had been treated in hospital to, for example a care home. The services operated much like a taxi service which could be pre-booked. Ambulances take patients only to hospital. A patient who has been taken to hospital by ambulance who is then discharged has responsibility of getting themselves home.

(13) When NSL gave back their contract in 2016, SWAST was in no position to take back the provision of providing patient transport services. They had insufficient vehicles. Since they did not take over the services, there was no need for them to take over any of the NSL employees. However they are always on the lookout for good employees who usually cut their teeth on providing patient transport services before being trained up to provide ambulance services, so they may well have recruited former employees of NSL to train to become ambulance drivers.

(14) NSL and SWAST did not share any premises. Clearly if a patient transport services driver brought a patient to hospital and then needed to use the facilities at the hospital, then they did so. But this was the sole extent of drivers sharing hospital facilities. Mr Noble thought that the only employee which SWAST and NSL had in common was the appellant who was paid separately by the two employers. SWAST and NSL did not share any vehicles or equipment. SWAST owned the ambulances but Mr Noble was not sure whether NSL leased or owned their vehicles. However, the vehicles owned by SWAST were used exclusively by SWAST which was responsible for their maintenance and upkeep. SWAST did not provide services to NSL, and vice versa, and so there were no invoices or charges made by one organisation to the other. SWAST undertakes services solely for the NHS, whilst NSL in addition to providing services to the NHS, also provided services to many other organisations, for example schools and care organisations.

(15) In an email from BDO, accountants, to Mr Noble dated 16 June 2020, BDO describe NSL as follows (which description was not challenged by the appellant)

> "NSL is an independent company, based in Shropshire, which was appointed to deliver patient transport services (PTS) in Somerset, Devon, and Cornwall from 1st October 2013. Clinical Commissioning Groups commission the bulk of non-emergency patient transport, such as that provided by NSL. The contract for NSL is paid by the CCG and not SWAST. The two organisations operate independently of each other and have no board members in common.
>
> ("NSL Care Services was established during the nineties as Patient First and forms part of the wider NSL Group of companies, who employ over 5000 people in the UK. We are an expert outsourced service provider in Health and Care services providing innovative passenger transport solutions. We provide safe comfortable and efficient transfers between destinations, whether that be a hospital, school, independent or private clinic, psychiatric hospital or other medical agency. NSL Care Services has a wealth of experience of contract implementation and service transition. We have welcomed TUPE colleagues into our business and transferred equipment, assets and property on numerous occasions.)"

(16) Mr Noble also emphasised the difference in services provided by ambulances on the one hand and patient transport services on the other. Ambulances deal with emergencies whilst patient transport services deal with non emergency's.

(17) SWAST is an NHS foundation trust which is run by a board of directors but also has governors which includes staff and members of the public. To Mr Noble's knowledge, the members of the board and the governors were not involved with running NSL. They were not directors of NSL. And vice

(18) The payroll system used by NHS trusts, known as "ESR", is used only by NHS trusts and was not used by NSL. The only time when SWAST and NSL exchanged payroll information was when, in 2013, the contract for the provision of patient transport services was transferred from SWAST to NSL.

(19) SWAST and NSL did not share offices nor addresses.

(20) In Mr Noble's view, in order to have aggregated earnings of an employee who worked for both SWAST and NSL, NSL would have to have agreed to share its payroll system with SWAST and there would need to have been an electronic interface between the ESR system and the payroll system used by NSL. Whilst this might have been possible, it would have been very expensive (Mr Noble estimated the cost of being £15,000). Aggregating earnings, therefore, in respect of one employee would have involved a lot of work and there were also confidentiality issues under GDPR which would need to have been considered.

(21) Before SWAST lost the contract to provide patient transport services, and was providing both those and ambulance services, management of the two services was separate even though the employees were all paid by SWAST. The services were always invoiced separately.

**THE ISSUES**

5. There are two issues which we have to determine. The first is whether HMRC's decision that the appellant's NIC's paid in 2014/2015 of £26.93, as set out in their decision notice dated 27 December 2018, is correct, or whether the appellant has provided satisfactory evidence to us to displace that amount. The second is whether the appellant's earnings from NSL and SWAST should have been aggregated thus increasing his earnings for NIC purposes. As can

be seen from Regulation 15, aggregation has two elements. Firstly NSL and SWAST must have carried on business in association with each other. If so, then secondly, the earnings must be aggregated unless it is not reasonably practicable to do so. We shall refer to these as the "business association" and "reasonably practicable" issues.

6. We are also mindful of the fact that the appellant has brought a number of complaints against the DWP, the Independent Case Examiner, and, we believe, HMRC. The former complaints are now being looked at by the Parliamentary and Health Service Ombudsman having been referred to the Ombudsman by an MP. Clearly these complaints are outside our jurisdiction, but with respect to the appellant and his representative, many of the submissions that were made in this appeal relate to those complaints rather than to the issues which we have to consider in this appeal. We have therefore dealt only with those submissions which are relevant to the issues in this appeal and have disregarded submissions which relate to those complaints.

7. Finally there is the question of our jurisdiction. It is not at all clear to us, nor is it clear to the parties that if we were to find that the appellant's earnings for 2014/2015 should have been aggregated by his employers, what, if any, power we have to direct those employers to now undertake that aggregation. Without having thought it into the corners, we do not think we do have such power. It seems to us likely that this is a matter for judicial review. Having discussed this with the parties, it was agreed that we would come to a decision in principle regarding aggregation, and once we had come to that decision, leave it up to the parties to consider the implications of that decision. We were told by the appellant's representative that the Ombudsman was awaiting the decision of this tribunal before considering the appellant's complaints further. We were also told that the DWP have confirmed that in the event that the appellant is successful in this appeal, they will review his case.

**SUBMISSIONS**

8. HMRC submit as follows: the burden of proving that the amount set out in the notice of decision is incorrect rests with the appellant, as too does the burden of proving that the earnings from his two employments should have been aggregated; the standard of proof is the balance of probabilities; the amounts set out in the decision notice were based on figures provided by the appellants to his employers; earnings of separate employments need to be considered separately; the appellant's earnings for NIC purposes was correctly calculated as was the amount of NIC set out in the decision notice; even if the appellant does have rolled up holiday pay, that cannot be taken into account for calculating liability to NICs since that liability arises at the point when earnings actually paid; the relevant provision which deals with aggregation is Regulation 15(1)(a); the appellant must show that the employers were carrying on business in association with each other; there is no statutory definition of "business in association"; the case of *Stephen Tracey v HMRC* [2013] UKFTT 273 provides some pointers; in that case there was a common thread running through the businesses, the businesses employed a similar cohort of people, they were owned and run by persons in the same small group, and for a period of time that shared a common administrator; tested against these criteria, NSL and SWAST were not carrying on business in association with each other; although both are involved in patient transport; the ambulance services take critically ill patients to hospital whereas the patient transport services move patients not just to a hospital but from hospital to other destinations, for example care homes, and deal with outpatients rather than emergencies; simply because they both are ultimately funded by the CCG does not mean they are associated; nor are they associated simply because, as asserted by the appellant, they are "emanations of the state"; there is no evidence that NSL and SWAST employed the same individuals drawn from the

same pool; whilst some employees might have worked for both, this was a small number of people; the evidence shows that the businesses were owned and run by wholly different people, and there is no evidence that the two employers shared administrative staff; simply carrying on business in the same locality does not make businesses associated; the branding on NSL ambulances stating that NSL is "working in partnership with the NHS" is not evidence of a legal or operational partnership as is made clear by the NHS branding criteria; the fact that NSL and SWAST were not in competition following the tendering process in 2013 does not mean that they are associated; on the not reasonably practicable issue, the evidence of Mr Noble is that it was not reasonably practicable to aggregate the earnings from the two employments; the two employers operated separate and distinct payroll systems and the cost of getting these two systems to talk to each other electronically was prohibitive; HMRC's guidance that when considering whether it was reasonably practicable, employers should consider the effects of aggregation on an employee's entitlement to benefits was guidance and therefore not binding; there is only an obligation to consider whether aggregation is reasonably practicable where businesses are being carried on in association; there were no shared premises; the employers did not share costs; the only member of staff which they had in common was the appellant; employers had separate equipment; SWAST services to the NHS whereas NSL provided services to a wide variety of private sector and public sector organisations.

9. The appellant submitted as follows: the notice of decision dated 27 December 2018 was not issued by a flesh and blood officer which it should have been; the appellant employers had a mandatory duty to aggregate his earnings for the year 2014/2015 and if they had done so, more NICs would have been paid and the appellant would have been entitled to a larger employment support allowance; the two employers were carrying on business in association in that they were both paid by the CCG, they were both emanations of the state, and they were not in competition once the tendering process in 2013 had ended; NSL had become an emanation of the state when it was awarded the contract to provide patient transport services in 2013; an entity providing services to a government department becomes an organ of the state, especially if the contract has been awarded through a public tendering process; when considering the not reasonably practicable test, HMRCs National Insurance Manual indicates that the onus is on the employer to show that aggregation is not reasonably practicable; it is not a once and for all decision; the employer needs to take into account the costs, resources, and the effects on running the business; cost is a material pointer but not decisive; the context is important and the employer needs to be aware of the effect on the National Insurance Fund and the benefit or pension entitlement of the employee; it would have been relatively easy for SWAST to ask NSL for the payroll information which would have enabled the former to aggregate the appellant's earnings; there was no justification for the sum of £15,000 which had been given to the tribunal as the cost of getting the two payrolls to talk, electronically, to each other; the CCG provides the funds for both employers and awarded them the contracts in the first place; it also administered the contracts; the Care Quality Commission expects organisations such as NSL and SWAST to operate in partnership with each other to achieve a common end; that common end is to provide patient transport; evidence of this partnership can be seen from the branding used by NSL on its ambulances that it was "working in partnership with the NHS"; Mr Noble was incorrect when he said that patient transport services did not conduct any work within the A&E department; the appellant could take a patient into A&E as an ambulance driver and collect that same patient later if they were discharged in his capacity as a driver for patient transport services; whilst on hospital premise he would be allowed to share facilities for example rest rooms and toilets; a report published on 1 December 2020 by the Chartered Institute of Payroll Professionals suggests that employers commonly fail to aggregate earnings when it is reasonably practicable to do so; he understands that the issue of holiday pay is the subject of a case which will be heard by the Supreme Court in November

2021, although he is not certain whether it deals with the point regarding rolled up holiday pay which is relevant in this appeal.

**DISCUSSION**

10. We consider first the appellant's submission that the notice of decision is invalid since there is no evidence that it was given by a flesh and blood HMRC officer. We think this is an unmeritorious submission. The decision notice dated 27 December 2018 is signed by a named officer (Ms S Anderson). The notice states that it is "my decision". This is powerful evidence that officer Anderson made the decision set out in the decision notice which therefore falls within the ambit of section 8 SSC Act 1999. In our view the decision notice is valid under that section.

11. We are with HMRC, too, on the rolled up holiday pay point to the extent that it is in issue in this appeal. We appreciate that this might be a matter which will be dealt with by the Supreme Court later this year (although we are not certain of this) but on the face of the legislation, it seems to us that NICs are calculated on the basis of pay which is actually paid rather than to which an employee might be entitled. And since any rolled up holiday pay has not actually been paid to the appellant, it has, correctly, been left out of account when identifying the appellant's entitlement to employment support allowance.

12. Nor has the appellant provided any, let alone any convincing numerical, evidence that the amounts set out in the decision notice are incorrect. HMRC correctly say that it is for the appellant to "disprove" those amounts which the appellant has not done. In our view this is hardly surprising given that until the aggregation point has been resolved, it is not possible for the appellant to provide such numerical evidence as he is not certain of the legal basis for that evidence. If we decide that the earnings from the employment should be aggregated, then it may be possible for him to provide evidence of the combined earnings which can then be used to discharge his burden of proving that the amounts set out in the decision notice are incorrect. But until that point has been decided, he is not able to do so.

13. So the focus in this appeal is on the aggregation provisions in Regulation 15, and in particular whether, in 2014/2015, NSL and SWAST were carrying on business in association with each other. If we decide that they were not, then we do not need to consider the second point as to whether it was reasonably practicable for payments from those employers to be aggregated.

14. In our judgment, the businesses carried on by NSL and SWAST were not carried on in association with each other. We say this for a number of reasons.

15. There is no statutory definition of the concept of carrying on business in association but in our view it requires a multifactorial analysis. The appellant submits that both NSL and SWAST were emanations of the state carrying on business in partnership, something encouraged by the CQC. This partnership is evidenced by the branding on the NSL ambulances. And that once NSL and SWAST ceased to be in competition following the tendering process, they were operating businesses in association. We do not accept these submissions. In the first place we do not really understand the relevance of both employers being emanations of the state. If the appellant is saying that any entity which is an emanation of the state is automatically carrying on business in association with another entity which is also an emanation of the state, we reject that submission. It seems clear to us that, for example, the Ministry of Defence and the Ministry of Justice are both, under the appellant's definition, emanations of the state. But we find it very difficult to accept that simply because of this they

are carrying on business in association with each other. Nor do we accept the appellant's assertion that any organisation which carries out services for such a government department is automatically carrying on a business in association with another organisation which provides services either to that same government department (or indeed to a different department). One has to drill down to a more fundamental level of detail and consider precisely what services are being provided by the relevant organisations and the relationship at both a legal and operational level between those organisations. For example, in this case it seems to us there was a clear distinction in the services which are being provided by the two employers. SWAST provides ambulance services which transport critically ill patients to hospital. It is an emergency service. This is very different from the service being provided by NSL which is that of non emergency patient transport, the focus of which is on transporting outpatients to and from hospital. These are complimentary services which are carried out in the same geographical area. Whilst both services are required to provide a coherent and comprehensive service to patients, that is not enough to say that the providers of those services are carrying on business in association. To take another example. Let us say that there were two providers of ambulance service in the same geographical area, both providing emergency services to NHS hospital trusts. In our view simply providing the same service in the same geographical area would not automatically mean that the providers were carrying on business in association. One needs to consider the relationship between the two providers whilst accepting that the nature of the services being provided is relevant to the analysis. It is, however, very far from being conclusive.

16. It is here that the criteria set out in *Tracey,* as well as those set out in HMRC's National Insurance Manual provide a helpful steer.

17. The criteria in *Tracey* formed the template against which Ms Lunt tested Mr Noble's evidence, and having undertaken that analysis, submitted that our conclusion must be that the businesses were not in carried on in association. We agree that those criteria are helpful (but obviously not binding on us). We also agree that the checklist set out in the National Insurance Manual which Mr Noble went through when giving his evidence (although the checklist was that set out in the appendix to the First-tier tribunal decision in Louise Willmott rather than that referred to in the extract from the National Insurance Manual which was part of the authorities bundle in this appeal) is also helpful.

18. Mr Noble's evidence, which we accept, is that there were no shared premises. We accept that ambulance drivers and drivers of patient transport vehicles might use rooms at a hospital at the same time, but NSL and SWAST did not share the same office, or keep their vehicles at the same premises. Each operated separately, maintaining their own vehicles, and paying for all outgoings in respect of those vehicles. They also ran separate payrolls and paid their employees separately. Indeed one of the issues in this case regarding the not reasonably practicable issue is that the ESR payroll system used by SWAST has difficulty in electronically communicating with other payroll systems. There is no evidence that NSL had outsourced its payroll to Plymouth as SWAST had done. The two employers were wholly independent of each other when it came to their premises, their vehicles, and their financial administration.

19. As far as employees were concerned, it is not wholly clear to us how many individuals were in the same position as the appellant in 2014/2015 i.e. having a contract (albeit a zero hours contract) with both employers. The suggestion is that this was only the appellant. But even if there had been more individuals than this who had employments with both, this is a small minority. As the unchallenged evidence of the email from BDO referred to at [4(15)] indicates, NSL employed more than 5,000 people in the UK very few of whom (indeed perhaps only the appellant) also had an employment relationship with SWAST.

20. It is also clear from that email that NSL provided "safe comfortable and efficient transfers between destinations whether that be a hospital, school, independent or private clinic, psychiatric hospital or other medical agency". This is a very different service from that provided by SWAST which was an emergency ambulance service.

21. It is only common sense that NSL and SWAST, both of whom provided the service of transporting patients, would look to recruit drivers from a pool of individuals who were local to the area in which that driving was required. And that is not an indicator of a business association.

22. NSL and SWAST had no administrative staff in common, and were, constitutionally, very different organisations. NSL was a private limited company which, admittedly, working in the public sector, was obliged to comply with public sector service standards. SWAST, on the other hand, was, and is an NHS Foundation Trust which brings with it a raft of regulatory requirements with which it must comply irrespective of the contracts which it enters into. We accept the evidence of Mr Noble that SWAST was governed by a board which included directors as well as governors, and that that none of these individuals were involved with running NSL. Nor were any of the individuals running NSL part of the board of SWAST. Constitutionally as well as operationally they were completely separate. They prepared their own accounts independently of each other and ran their own payrolls independently of each other.

23. The appellant submits that he could come on the same day, drive a patient to hospital in an ambulance and so provide emergency services, and later the same day drive the same patient to a different destination, thereby providing patient transport services. And this is an indication of association. We do not think this is sufficiently weighty when measured against the factors set out above, to establish a business association. It is simply an example of the appellant carrying out his duties as an employee in his two separate employments. That, of itself, is no indication of business association.

24. Nor is the fact that the CCG ultimately provides the funding for both NSL and SWAST. Nor that it granted the contract in the first place, nor that it monitors the contracts. Whilst the CCG provides the funding, it is up to the two employers to then decide how to spend that money against its internal budget which it no doubt used when competing for the contracts. There is no restriction on an employer as to how it spends the money paid to it by the CCG (subject to regulatory and contractual provisions). The fact that the contracts were granted by the CCG in the first place does not indicate a business association. Indeed to the contrary. Prior to the tendering process in April 2013, SWAST carried on both businesses. In October 2013 the patient transport services business was awarded to NSL. This is an indication that the businesses were separated at that point and from then on conducted by different organisations. It is unsurprising that the CCG, and indeed the CQC, monitors the ongoing compliance with the contract that was awarded to the two organisations. It no doubt has a statutory duty let alone a contractual duty, to do so. Such monitoring is no indication of business association. The appellant has also submitted that the organisations might have been in competition before the contract was awarded to NSL in 2013 but thereafter they were operating in partnership. We think this point has little force. Firstly, as submitted by HMRC, whether or not the employers were in competition is not decisive when considering business association. Secondly, as we have said above, the services provided by NSL of patient transport were necessary parts of the services which needed to be provided to patients. As, too, were the emergency ambulance services provided by SWAST. The CCG required both services to be provided. Whether or not they were in competition is largely irrelevant. We also agree with HMRC's submission that the

branding on the NSL ambulances that NSL is working in partnership with the NHS does not reflect an underlying business partnership given that the NHS gives permission for a commissioning NHS organisation to apply its logo to a third party provider vehicle which is commissioned by the NHS to deliver patient transport services.

25. So, for the foregoing reasons, it is our view that NSL and SWAST were not carrying on business in association with each other. And so there was no obligation on them to aggregate the appellant's earnings in 2014/2015 pursuant to the provisions of Regulation 15. In light of this there is no need for us to give a view on the not reasonably practicable issue since that is only relevant if we had found that there was a business association.

## DECISION

26. We dismiss this appeal.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

27. 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

**NIGEL POPPLEWELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 15 SEPTEMBER 2021**

## Appendix

**Social Security Contributions and Benefits Act 1992**

1 Outline of contributory system

(1) The funds required—

(a) for paying such benefits under this Act or any other Act as are payable out of the National Insurance Fund and not out of other public money; and

(b) for the making of payments under section 162 of the Administration Act towards the cost of the National Health Service,

shall be provided by means of contributions payable to the Inland Revenue by earners, employers and others, together with the additions under subsection (5) below and amounts payable under section 2 of the Social Security Act 1993

(2) Contributions under this Part of this Act shall be of the following … classes—

(a) Class 1, earnings-related, payable under section 6 below, being—

(i) primary Class 1 contributions from employed earners; and

(ii) secondary Class 1 contributions from employers and other persons paying earnings…..

5 Earnings limits and thresholds for Class 1 contributions

(1) For the purposes of this Act there shall for every tax year be—

(a) the following for primary Class 1 contributions—

(i) a lower earnings limit,

(ii) a primary threshold, and

(iii) an upper earnings limit; and

(b) a secondary threshold for secondary Class 1 contributions.

Those limits and thresholds shall be the amounts specified for that year by regulations ….

6 Liability for Class 1 contributions

(1) Where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment—

(a) a primary Class 1 contribution shall be payable in accordance with this section and section 8 below if the amount paid exceeds the current primary threshold (or the prescribed equivalent); and

(b) a secondary Class 1 contribution shall be payable in accordance with this section and section 9 below if the amount paid exceeds the current secondary threshold (or the prescribed equivalent).

(2) No primary or secondary Class 1 contribution shall be payable in respect of earnings if a Class 1B contribution is payable in respect of them.

(3) Except as may be prescribed, no primary Class 1 contribution shall be payable in respect of earnings paid to or for the benefit of an employed earner after he attains pensionable age, but without prejudice to any liability to pay secondary Class 1 contributions in respect of any such earnings.

(4) The primary and secondary Class 1 contributions referred to in subsection (1) above are payable as follows-

(a) the primary contribution shall be the liability of the earner; and

(b) the secondary contribution shall be the liability of the secondary contributor;

but nothing in this subsection shall prejudice the provisions of paragraphs 3 to 3B of Schedule 1 to this Act.

(5) Except as provided by this Act, the primary and secondary Class 1 contributions in respect of earnings paid to or for the benefit of an earner in respect of any one employment of his shall be payable without regard to any other such payment of earnings in respect of any other employment of his…..

**Social Security Contributions (Transfer of Functions, Etc) Act 1999 ("SSC Act 1999")**

8 Decisions by officers of Board

(1) Subject to the provisions of this Part, it shall be for an officer of the Board—

(a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,

(b) to decide whether a person is or was employed in employed earner's employment for the purposes of Part V of the Social Security Contributions and Benefits Act 1992 (industrial injuries),

(c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,

(d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,

(e) to decide whether contributions of a particular class have been paid in respect of any period…..

13 General provisions as to aggregation

Where on one or more occasions the whole or any part of a person's earnings in respect of employed earner's employment is not paid weekly (whether or not it is treated for the purpose of earnings-related contributions as paid weekly), paragraph 1 of Schedule 1 to the Act (Class 1 contributions where more than one employment) shall have effect as if for the references to "week" there were substituted references to "earnings period".

14 Aggregation of earnings paid in respect of separate employed earner's employments under the same employer

For the purpose of earnings-related contributions, where an earner is concurrently employed in more than one employed earner's employment under the same employer, the earnings paid to or for the benefit of the earner in respect of those employments shall not be aggregated if such aggregation is not reasonably practicable because the earnings in the respective employment are separately calculated.

15 Aggregation of earnings paid in respect of different employed earner's employments by different persons and apportionment of contribution liability

(1) Subject to regulation 7, for the purposes of determining whether earnings-related contributions are payable in respect of earnings paid to or for the benefit of an earner in a given earnings period, and, if so, the amount of contributions, where in that period earnings in respect of different employed earner's employments are paid to or for the benefit of the earner—

(a) by different secondary contributors who in respect of those employments carry on business in association with each other;

(b) by different employers, one of whom is, by virtue of Schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978, treated as the secondary contributor in respect of each of those employments; or

(c) by different persons, in respect of work performed for those persons by the earner in those employments and in respect of those earnings, some other person is, by virtue of that Schedule, treated as the secondary contributor,

the earnings paid in respect of each of the employments referred to in this paragraph shall, unless in a case falling under sub-paragraph (a) it is not reasonably practicable to do so, be aggregated and treated as a single payment of earnings in respect of one such employment.

(2) Where, under paragraph (1), earnings are aggregated, liability for the secondary contributions payable in respect of those earnings shall, in a case falling within paragraph (1)(a), be apportioned between the secondary contributors in such proportions as they shall agree amongst themselves, or, in default of agreement, in the proportions which the earnings paid by each bearer to the total amount of the aggregated earnings.