Neutral Citation: [2024] UKFTT 945 (TC)

Case Number: TC09326

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/11384

INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS (NIC) *– company failed to pay tax and NIC – whether the director received relevant payments knowing that the company had wilfully failed to deduct and pay PAYE – no - Regulation 72, Income Tax (Pay As You Earn) Regulations 2003 – whether the director knew that the company had wilfully failed to deduct and pay primary NIC – no - Regulation 86, Social Security (Contributions) Regulations. Appeal allowed.*

Heard on: 17 September 2024
Judgment date: 24 October 2024

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
TRIBUNAL MEMBER LESLIE HOWARD

Between

MICHAEL BURNE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant represented himself.

For the Respondents: Victoria Halfpenny, Litigator of HM Revenue and Customs' Solicitor's Office.

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely. The remote platform used was the Teams video hearing system. The documents which were referred to comprised of a Hearing bundle of 912 pages and a skeleton argument for the Appellant, Michael Burne ("MB").

2. The bundle contained witness statements of MB, William Brewis("WB"), HMRC Officer Naresh Gunamal ("NG") who had adopted the witness statement of a former HMRC Officer Laure Tchana (LT"). LT had carried out the initial compliance check but had subsequently left HMRC and NG took over responsibility for the matter in January 2024.

3. MB, WB and NG gave evidence and were cross examined. and were credible witnesses. The tribunal noted that NG was not the original HMRC Officer assigned to the case and was not always able to explain the reasoning behind some of LT's decision making processes when asked to do so.

4. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

5. MB appealed against:

(a) a Notice dated 1 March 2022 issued to direct the employer, Carbon Managed Services Limited ("the company"), under Regulation 72(5) Condition B of the Income Tax (Pay as You Earn) Regulations 2003, ("the Regulations"), to transfer liability for PAYE from the company to MB for the 2019/20 tax year;

(b) a Section 8 notice that was issued to MB for unpaid primary class 1 National Insurance Contributions under Regulation 86 of the Social Security (Contributions) Regulations 2001 and Section 8(1)(c) of the Social Security (Transfer of Functions) Act 1999 ("Section 8 notice"). in the sum of £3,859.14; and

(c) a discovery assessment issued under Section 29 of the Taxes Management Act 1970 in the sum of £18,550.

BACKGROUND

6. Carbon Managed Services Limited ("the company"), which provided support services on an outsourced basis for an incorporated legal firm CPL Group Limited ("the legal firm"), was incorporated on 24 September 2013, placed into administration on 12 December 2019 and put into compulsory liquidation on 30 January 2020.

7. MB was one of two directors of the company from the date of incorporation until the date of administration on 12 December 2019 and was a major shareholder. MB was also the CEO of the company's parent company Flourish Holdings Limited ("Flourish"), which also went into administration on 12 December 2019. Flourish was also the parent company of the legal firm. Flourish, the company and the legal firm comprised the group of companies ("the Group")

8. On 5 March 2021, a compliance check was opened in respect of MB's directorship of the company as the Real Time information ("RTI") for the tax year 2019/20 from the company, showed a 'spike' (an out of the ordinary movement) of relevant payments in (December 2019) month 9 ("M9").

9. Information was requested pertaining to MB's PAYE tax and primary class 1 NIC in order to ascertain whether the correct PAYE deductions, for the period 6 April 2019 to 5 April 2020, had been made.

10. HMRC received a letter dated 27 April 2021, but emailed on 30 April 2021, from MB's agents, EST Accountants ("EST") who had been appointed on 25 March 2021. A copy of MB's Service Agreement dated January 2016 was attached together with a copy of his P11 and payroll summaries.

11. On 13 May 2021, HMRC provided a response and requested bank statements evidencing payments received by MB from the company, prior to a re-evaluation of how the PAYE operated within the company.

12. On 14 June 2021, EST confirmed the bank statement evidence of the payments received by MB from the company and that the P11 showed the total income of £77,956.94 for the year. An explanation of the breakdown of this figure was provided.

13. On 17 June 2021, HMRC wrote to MB, clarifying that:

a. based on his agent's statements on his behalf, he had been paid an income from his employer but no tax or NIC had been deducted from some payments received,

b. the Insolvency Practitioner had made available a copy of the company bank statements, and

c. HMRC were unable to reconcile payments made from the company to MB as they had still not received evidence of payments which had been requested on several occasions. Copies of the MB's personal bank statements showing all payments from the company to him for the period ending 05 April 2019 and 05 April 2020 tax years were again requested together with an explanation of what the payments were for.

14. On 5 August 2021, EST emailed to HMRC a letter dated 30 July 2021, in response to the letter of 17 June 2021, together with copies of MB's personal bank statements for the period 19 April 2019 to 19 April 2020. The letter stated:

- "Month 8 and 9 payments were not under our client's control as an administration order had been made and the administrators had taken control of Carbon Managed Services' (the company's) bank accounts and all payments. An administration order is only made where there is an expectation of the business continuing as a going concern."

- "The accounts for the year ended 31 March 2019 were finalised on 27 September 2019 at which time the salary was accrued in the accounts with the intention of processing the accounting entries for the salary and the repayment of the director's loan in December 2019."

15. On 1 October 2021, HMRC issued a letter setting out their position and the reasons why they believed there had been a wilful failure by the company to deduct tax from MB's relevant payments and stating that MB knew about such a failure and, in effect, the failure to operate PAYE correctly. The liability (tax and NIC and interest up to 4 November 2021) amounted to £23,497.40.

16. On 1 March 2022, a Direction was made, under Regulation 72(5) Condition B of PAYE Regulations 2003, that the company was not liable to pay the outstanding PAYE amounts in

respect of the tax year 2019/20. This Direction meant that MB became liable to pay the income tax amounts due to HMRC.

17. On 1 March 2022, a Section 8 notice was issued to MB for unpaid primary class 1 NIC under Regulation 86 of the Social Security (Contributions) Regulations 2001 and Section 8(1) (c) of the Social Security (Transfer of Functions) Act 1999.On the same date an assessment for the unpaid tax, under Section 29 Taxes Management Act 1970, was issued to MB in relation to the tax year 2019/20.

18. On 22 March 2022, MB's agent appealed against all three decisions and provided their grounds.

19. On 1 April 2022, HMRC replied to the appeal, setting out their position and confirming that their view remained the same.

20. HMRC accepted a review request from MB, in which they explicitly stated, "we request that all information we have provided to date is reviewed by a HMRC officer not involved in this case to enable them to review the decision as we have reached an impasse".

21. On 12 May 2022, HMRC concluded a review of their decisions and found that an incorrect amount of PAYE tax had originally been used in the Regulation 72(5) Direction and subsequent tax assessment issued under Section 29 TMA 1970, as certain amounts of tax had not been accounted for. The Direction under Regulation 72(5) Condition B was to be varied to the income tax now amounting to £18,550. The amount of the Section 8 notice for unpaid NIC was upheld and remained at £3,859.14.

22. On 29 September 2022, MB notified an appeal to the tribunal.

POINTS AT ISSUE

23. The substantive issue before this tribunal ("the tribunal") is to determine whether there was a wilful failure on the part of MB to make deductions of PAYE tax and pay NIC from payments received by him for the company for tax year 2019/20 and whether he knew this.

24. Accordingly, the tribunal is to determine whether HMRC's decision to issue a Direction under Regulation 72(5) that the company is not liable to pay the excess tax is correct and to determine whether HMRC's Section 8 notice for unpaid NIC and Section 29 TMA 1970 Discovery Assessment for income tax, are valid.

BURDEN OF PROOF

25. The burden of proof is on HMRC to demonstrate that the decision to make and issue a Direction pursuant to Regulation 72(5) Condition B of the Income Tax (Pay as You Earn) Regulations 2003 was valid. Once demonstrated, the onus shifts to MB to demonstrate that he did not receive relevant payments knowing that the employer wilfully failed to deduct the correct amount of tax.

26. The burden of proof is on HMRC to demonstrate that the decision to make and issue a Section 8 Notice for unpaid NIC is valid and to demonstrate that the relevant conditions for a discovery assessment are met.

STANDARD OF PROOF

27. The standard of proof is the ordinary civil standard, on the balance of probabilities.

LEGISLATION AND AUTHORITIES

28. Section 8(1)(c) of the Social Security Contributions (Transfer of Functions) Act 1999

29. Regulation 4 of the Income Tax (Pay As You Earn) Regulations 2003

30. Paragraph 21(1) of the Income Tax (Pay As You Earn) Regulations 2003

31. Regulation 72(4) of the Income Tax (Pay As You Earn) Regulations 2003

32. Regulation 72(5) of the Income Tax (Pay As You Earn) Regulations 2003

33. Regulation 81 of the Income Tax (Pay As You Earn) Regulations 2003

34. Regulation 86(1) of the Income Tax (Pay As You Earn) Regulations 2003

35. Regulation 86 of the Social Security (Contributions) Regulations 2001

36. Section 29 of the Taxes Management Act 1970

37. Section 34 of the Taxes Management Act 1970

38. R v Sheppard and Anor [1980] 3 All ER 899

39. Stephen West v HMRC [2018] UKUT 0100 (TCC)

40. Jermone Anderson v HMRC [2018] UKUT 0159 (TCC)

EVIDENCE AND FACTS

41. MB, who is a solicitor, decided in January 2010 to create an alternative business structure legal firm and incorporated the legal firm. Accountancy and related advice were provided by Emyr Evans, chartered accountant, with the accountancy firm Watts Gregory. Watts Gregory provided services in relation to the preparation of management and annual statutory accounts, operation and management of payroll including submissions of returns regarding PAYE and NIC to HMRC, provision of payslips to employees, and preparation of corporation tax returns.

42. In 2015, MB sought advice from Emyr Evans regarding the use of a second company, to provide outsourced services to law firms and lawyers including the legal firm. This was created and named Carbon Managed Services Ltd ("the company").

43. In 2018 a holding company was created, [Flourish Holdings Ltd], Flourish, and it acquired shares in the legal firm and the company, creating the Group.

44. The Group raised capital to continue to fund its normal operations and invest in future growth plans and at various stages Group subsidiaries had intercompany loans as part of regular financial management.

45. Flourish lent money to the company to enable it to meet its obligations including those to suppliers, staff and HMRC. The company was able to meet these obligations, including those to HMRC until November 2019, notwithstanding that the company's statutory accounts showed it had, for at least two years, negative reserves.

46. In April 2018, Rob Heaton, the company's operation manager took over the running of the company's internal finance team, which allowed the company to reduce its reliance on support from Watts Gregory. From this time onwards, Mr Heaton prepared regular cash flow forecasts for MB and also confirmed payroll instructions with the payroll team at Watts Gregory each month.

47. In or around June 2018, MB discussed with Emyr Evans that MB could reduce his monthly salary by the company making loans to MB, by means of a director's loan, each month to compensate for the loss of salary. MB understood that he would, accordingly, owe the company money but the intention was, that if the company did well, it would then be able to issue a higher salary or bonus to MB in the future.

48. When that happened, PAYE and NIC would be payable in the usual way on income when received. MB would then be able to use the income to repay the director's loan. Mr Evans explained that a loan repayment of this kind would be what he called a bookkeeping entry, and so no further money would be paid to MB when the loan repayment happened but instead his indebtedness to the company would reduce.

49. Mr Evans explained to MB that as the loan from the company would not bear interest MB would be deemed to have had a potentially taxable 'benefit in kind' as an employee unless this was repaid within 9 months of the company's financial year end. If so, then no such benefit would arise under tax law. MB was advised that many companies operated loan arrangements like this, and it was standard practice.

50. Mr Evans suggested to MB that performance of the business should be considered when preparing the accounts for 2019 which were finalised on 27 September 2019. At that time a decision could be taken on whether the company would pay a bonus to MB or not. Any bonus would then be declared in December and the deductions for PAYE and NIC would be made then. The net amount could be used to pay MB or if he wished to repay the director's loan.

51. Asked what would happen if the company did not pay MB any further salary bonus, Mr Evans explained that if MB could not repay the loan from his own funds, then he would have to declare a benefit in kind in his personal tax return.

52. The reduction in MB's monthly salary did not accord to the provisions of his service agreement which EST had submitted to HMRC during the enquiry, but MB stated that this had been amended and referred to emails submitted as part of his witness statement which confirmed his instructions to and discussions with Mr Evans and his firm clarifying these revised arrangements of his lower monthly salary.

53. During 2017, the company decided to seek some additional funding to grow its business, and a loan was provided by a third-party company, A & R James Assets Ltd ("the lender"). The lender was introduced by a lawyer at the legal firm, Jon Hill ("JH"). The company borrowed £250,000 at 10% interest per annum with security of the loan granted over MB and his then colleague's shares in what would ultimately be Flourish, the holding company which controlled the Group. The date for the repayment of the principal loan and accrued interest was 31 March 2019.

54. In January 2019, Mr Evans, who in October 2018 had advised MB that he expected a strong profit for the company and that it would be able to repay the lender on time, was appointed as the company's finance director, on a consultancy basis. At that time, he advised MB that the company would not be able to pay all the principal loan and interest to the lender when it became due in March 2019.

55. Approaches were made to the lender to offer to refinance or extend the loan but requests for a meeting were declined until a meeting took place on 1 March 2019. In mid-March 2019 MB

presented a paper on the development of the business and some options to refinance the lender's debt.

56. The lender did not wish to extend fresh terms but agreed that the company should find an alternative funding source and although inviting the company to make a part payment, would not amend or extend the loan terms to support this.

57. MB gave evidence that Mr Evans left the business in April 2019 and that it had subsequently come to light that he was working with the lenders and others to mount a hostile takeover bid for the Group.

58. Following Mr Evans' departure, new accountants, EST, were appointed and in October 2019 all accounts for the group companies were finalised. At this time MB was not aware that EST had also prepared a payroll to include a bonus payment to him. When he was told this, he explained his understanding of Mr Evans's advice that this should be reviewed in December at the same time as the accounts were filed.

59. As a consequence of this, EST corrected the payroll, removing the bonus payment, so that the decision could be taken in December and MBs director's loan account, accordingly, remained overdrawn as a result.

60. MB stated that this was not to avoid payment of PAYE or NIC as he had no idea that the director's loan was anything other than a loan.

61. On 29 November 2019, Flourish was successful in receiving an indication of interest to invest £1 million of capital from the Bank of Wales and a written confirmation of this was received with the detailed terms to be negotiated. The bank at this stage valued the Group at £10 million and made repayment to the lender more certain.

62. On 2 December 2019, without discussion or warning a demand for immediate repayment was received from the lender which MB became aware of at 8.19pm. The letter demanded repayment of the loan and interest amounting to over £300,000 by noon on the next day, 03 December 2019.

63. An urgently convened board meeting of Flourish took place on the morning of 03 December to brief the non-executive directors, and the Flourish company chairman wrote to a director of the lender requesting an urgent meeting to discuss the future. The lender declined to meet or discuss matters with the chairman until 11 December 2019.

64. On 5 December 2019, the company was served with an application for administration made by the lender as its creditor. This was, therefore, a creditors' administration, distinct from a directors' administration.

65. Throughout the discussions with the lender, MB had been requested to keep the lender's representative JH, who was a lawyer in the legal firm, updated on the position on replacement funding and growth plans. Accordingly, MB was unclear as to why the lender did not know what was happening including an understanding to repay the debt in full by the end of January 2020.

66. On many occasions throughout the period from April to December 2019, MB asked to speak to the lender, but JH advised it was not necessary or to wait until the terms were in place.

67. MB gave evidence that he subsequently discovered that JH in conjunction with others and the lender planned to take control of the Group, by calling up the loan and enforcing the lender's security over the shares in Flourish.

68. This attempt was defeated by (1) Flourish assigning the legal firm's indebtedness to Flourish to the legal firm; (2) Flourish being placed in a directors' administration and then liquidation; and (3) the legal firm terminating its 'outsourcing' agreement with the company. The legal firm, now known at the CLP Group Limited, is now owned by Bamboo Group Holdings Limited.

69. On 12 December 2019, the creditors' administration was listed in London and the court made the order to place the company into administration at the lender's request.

70. MB gave evidence, which was not contradicted by HMRC, referring to the powers of Administrators under the Insolvency Act 1989 in relation to a creditors' administration that, whereas MB remained as a director, he was not authorised to give instructions to suppliers, staff and particularly to the firm's accountants and bank. All these parties could only be advised by the administrator.

71. Accordingly, from 12 December 2019, MB gave evidence that he could not give instructions regarding the company because he was told he was not permitted to do so. He did not speak to EST who operated the payroll. He did not authorise the December payroll or salary and bonus payments to be run by EST or the sharing of payroll information with HMRC.

72. It is not known who submitted the payroll for M9. An RTI in relation to M9 was received by HMRC on 19 December 2019 and NG's evidence was that it would likely have been prepared shortly before this, although it could have been prepared some time before that date.

73. MB stated that the only person who could have ascertained who submitted the payroll was HMRC who failed to do so by requesting this information from the administrator or liquidator.

74. MB did not know how the December payroll came to be processed and submitted or who approved it. He stated that it is clear that the record submitted to HMRC did not reflect the reality of the situation as the administrator had no funds to make bonus or salary payments and thereby create PAYE and NIC obligations. MB does not know if the administrator or liquidator corrected the position with HMRC.

75. MB says he was not consulted by anyone about the declaration of a bonus or salary to him and furthermore he did not receive such a sum, nor did he knowingly make repayment of his director's loan account, and he did not approve the December payroll.

76. Prior to the making of the administration order on 12 December 2019, MB expected to take a bonus in December 2019 and the company, with financial support from within the Group, would pay PAYE and NIC in the normal way. This is because the funds were available to do so.

77. MB stated that at no stage did he ever consider that he had received income or that the company was not paying tax or national insurance when due because Mr Evans advice was clear that the tax liability occurred only if and when a bonus or salary was declared and paid.

78. In early December 2019, MB expected to be paid a bonus, in the normal way later that month as had been advised by Mr Evans. MB expected that that would create, at that time and in the normal way, PAYE and NIC charge that would be paid the following month as had always been the case.

79. The tribunal were referred to a schedule of the company's RTI returns which showed gross monthly pay amounts payable to MB of £3,750 in the tax year 2019-2020. In month 7, October, a payment of £49,539.39 had been notified but when this was discovered by MB and he had explained that this was premature, as any such payment should be considered or made in December rather than October, it had been reversed.

80. Income tax and NIC had not been paid on any distributions for the months of M7 to M9, being October to December inclusive with the payment dates being the 25th day of the following month.

81. MB stated that he has no recollection of the payment of tax due for Month 7 not being made when due in the normal course of events. Payments of PAYE and NIC were based on payroll processed by EST and were the standard duties of the finance team that reported to the head of finance and operations, Rob Heaton. At the time payment for M7 was due, there were sufficient cash resources within the Group for payment to have been made when due.

82. On further review, MB was given an updated cashflow by Rob Heaton by email on 2nd December 2019 that showed that the tax due for M7 had not been paid but payment was in the cash flow presented by him with that email for payment that week.

83. MB did not know that payment had not been made in November in relation to the October PAYE and NIC liabilities and he was no longer a director on 25 December when the November M8 payment was due.

84. MB stated that it was completely contrary to his financial interest for the company to be placed in administration, including the loss of £115,000 of his pension which he invested in the company as preference shares to provide working capital. MB stated that it was only the administration of the company and the events following thereon that prevented the Group from providing funds to the company to meet its PAYE and NIC obligations.

85. WB gave evidence that he had limited involvement with payroll in October as this was delegated to Rob Heaton. WB reviewed the monthly cash flow statements but not the daily bank balance figures or statements and when the error in the October payroll had been noted by analysis of the cashflow statement, it was rectified immediately.

86. WB had ceased to be a director on 6 December 2019. WB confirmed that he had not submitted the December payroll.

87. NG gave evidence adopting the witness statement of HMRC officer LT based on the intervention by LT and the evidence prepared by her. It became evident during cross examination that a number of factors required to be taken into account in deciding whether to transfer liability from a company to an individual.

88. In doing so, NG confirmed that LT could have possibly carried out further enquiries or considered matters differently, but he did not know the precise reasoning of LT.

89. NG stated it was possible that LT could have requested the identity of who submitted the December payroll from the administrator/liquidator and NG could not confirm whether the provisions relating to directors' loans have been considered by HMRC when considering this case.

90. Reference was made to a letter from EST to HMRC of 7th December 2021, referred to in NG's witness statement, which said that the information provided 'had no relevance to our

[HMRC's] enquiry". NG was unable to confirm what issues referred to in that letter had been considered as not relevant nor did he know the reasons why such a judgement had been made.

91. Similarly, NG stated that the fact that there had been a creditors' administration could have been a factor taken into account, but this would only be a factor in looking at the whole matter and that LT had either not done so or given it little weight.

92. NG agreed that the company had, at least until M7 regularly paid its PAYE and NIC liabilities notwithstanding that it statutory accounts showed it having negative reserves.

93. Accordingly, NG conceded that the statement in his witness statement that:

> "the increase in pay month 9 of 2019/20 greatly exceeded the company's available reserves (the negative reserves shown are the latest company accounts ended 31 March 2019 as £1,129,073 and the accounts ended 31 March 2018 of negative reserves of £502,567) there was therefore was little likelihood that the PAYE debt could have been paid in full by the employer",

was misleading, if not incorrect.

94. NG stated that the evidence pointing to a wilful failure to declare was that a large amount appeared to have been paid to MB and no tax had been paid and there were suspicious circumstances.

95. NG was referred to his witness statement in relation to the alleged inability to reconcile the payments made by the company shown in the company's bank statement with MB's bank statements. MB explained this was because he had not received the payment shown in the RTI in December of £47,950. 69 as this was in relation to his director's loan. HMRC had used the figures submitted on the RTI return which corresponded with the salary declared on MBs personal tax return as the basis for assessment.

MB'S SUBMISSIONS

96. MB's grounds of appeal were as follows:

> 1. HMRC's Officer had not provided any explanations or reasoning for the decision that MB had failed to deduct enough tax.
>
> 2. That the decision had been pre-determined, and that information and explanations had not been considered.
>
> 3. There had been no basis for the decision that MB acted in a wilful or deliberate manner.
>
> 4. Events outside of MB's control resulted in the company not making the required payments to HMRC.

97. MB contends that HMRC have refused to consider the subject of this appeal in the light of relevant law, evidence provided and HMRC guidance on director's loans. In particular, HMRC have assumed at an early stage that the decision to pay a bonus salary in M9 was taken at a time that MB must have known that the consequent tax liability would not be met. This critical assumption, amongst others, is not in accordance with the facts which make this clear from the information provided.

98. MB was in receipt of a director's loan payment from the company each month from July 2018 to November 2019 which is not a "relevant payment" under the legislation that is the subject of this matter.

99. A variation to MB's service contract was put in place in July 2018 following advice from the company accountant. As a matter of law, this variation was valid and acted upon by the company and MB.

100. Accounting and bank entries make clear director's loans were made on the face of all the relevant documents as shown in the company bank statement dated 27/07/2018.

101. An examination of MB's director's loan received each month, falls for consideration under the relevant HMRC rules.

102. In this matter, HMRC Guidance on director's loans was never considered by HMRC and is not referred to in the witness evidence that has been provided.

103. At all times until the events of October 2019 and following, the company was (and all Group companies were) able to pay tax and did pay the tax calculated by its accountants, itself or with support as it was part of a Group of companies.

104. HMRC's assumption that the company's poor balance sheet meant that tax and national insurance would not be paid is false – as evidenced by its four years of trading until December 2019. Seeing the company in isolation is not accurate since it was part of a Group of companies prior to the hostile takeover attempt and administration of the company and the consequent administration of its parent company.

105. HMRC made it clear in their letter to MB dated 1 October 2021 that if the tax and NIC had been paid on the salary "declared" in Month 9 then "there would have been no issues surrounding this decision". That is the crux of this matter.

106. This letter repeats the assertion by HMRC of a "key fact" that when the salary bonus decision was made MB was already aware, prior to the significant intervening event of the company's administration, that the resulting tax liabilities would remain unpaid.

107. HMRC further assumes that the decision and subsequent conduct of MB was financially beneficial to him. These assumptions are plainly not true and are made based on speculation, opinion and without supporting evidence. Despite these "key facts" it appears that no evidence that MB provided was considered on its merits.

108. The administration of the company was a significant intervening event in any event but particularly when considering the application of Condition B. What brought it about and its consequences cannot be ignored in this case, as HMRC appear to have done.

109. Prior to the administration order made in the respect of the company – and after which the administrator was responsible – the Group of which MB was the CEO had decided to pay him a salary bonus payment in December 2019 and deduct the relevant PAYE and NIC and intended to pay them. The decision was taken with the knowledge and expectation that these deductions could be paid to HMRC when due. This was because the company was part of a Group of companies and had the required funds to meet the liabilities as they had been every month for the previous four years.

110. HMRC has made much of the administration of the company and other Group companies. However, it has ignored the evidence. That evidence was that MB did not seek or want an administration of the company which would be expected to be and proved to be substantially to his detriment. Other actions that flowed from the lender's behaviour in seeking to force the company into administration have been characterised, wrongly, by HMRC as part of a wilful and deceitful approach taken by the company and MB.

111. As regards the consequent administration of the company's parent, this was a solvent liquidation with all its liabilities met and was forced upon its directors to defend the hostile approach that resulted from an investment offer and to protect the regulated solicitor's business and clients of the legal firm.

112. Once the company was in administration all financial decisions fell to the administrator under Insolvency rules. HMRC has not considered these rules in the context of the evidence provided.

113. Any decision made prior to the administration to make a payment after the administration, fell to the administrator to determine whether to make it or not. MB was immediately and specifically removed from having any part in financial decision making or control of the company.

114. HMRC has produced no evidence that it has sought clarification on how the company came to submit the M9 payroll and has ignored the evidence that it was not submitted or authorised by MB. As a matter of Insolvency Law, MB cannot have approved that payroll, instructed its submission or any payments to be made under it. Nor did he as a matter of fact.

115. If HMRC maintains that the M9 payroll is valid as submitted for or on behalf of the administrator for the company, then its recourse is to the company or the administrator for payments due.

116. As a result of the facts and evidence in this appeal the authorities relied upon by HMRC are not relevant judicial precedents since they deal with companies and their directors authorising payments to the director with knowledge that tax and national insurance could not be paid *and (emphasis added)* where the director(s) sought the ensuing administration. That is not the case here as the evidence shows.

117. In this case a creditor sought a "surprise" administration for their own purposes having colluded with staff members. Following the Administration Order on 11 December 2019 and prior to the submission of a payroll without MB's knowledge or involvement on 19 December 2019, all authority to make and enact financial decisions was expressly removed from MB by the administrator under the Insolvency Rules.

118. Even then, it would be reasonable to expect tax liabilities to have been met in light of the Court Administration Order (which can only be made if there is a reasonable prospect for the company to continue trading) and the witness statements made to the Court said that the company would be funded to do that. All of this material has been provided which has been discounted or ignored by HMRC.

119. Neither the company nor MB wilfully failed to operate payroll prior to the company's administration, indeed at all times until the non-payment of Month 7 PAYE in November 2019 (by a ring-leader of the hostile takeover attempt without the directors' authority or knowledge at the time), it operated payroll correctly on amounts paid as salary to MB and other employees with the benefit of professional advice.

120. MB received director's loans from the company following an agreed variation of his service contract in July 2018. At all times, the loan payments were separated out for accounting and banking purposes, not hidden or disguised.

121. As part of a Group of companies that had received an offer of investment, the Group decided to make a payment to MB that would be subject to deductions when made. It is standard practice to make decisions about bonus and salary changes well in advance of the approved changes actually being implemented and paid.

122. The company Payroll section incorrectly and without authority sought to process a payment in October 2019 to HMRC and this was reversed immediately it was discovered by the company and before the end of the same month. The decision had always been to make the actual payment in December 2019 in line with original accountant's advice and but for an external lender's actions leading to an administration order (after which such a decision could only be made by the administrator) the payment would have been made and the deductions paid by the company, funded by the wider Group if required.

123. Respectfully, that is what this case is all about. Neither the company nor its directors ever wilfully failed to operate payroll correctly and are not responsible for decisions taken after a creditor (not the director) obtained an administration order which fundamentally changed the status quo.

124. HMRC have:

(a) failed to even consider, never mind established, who submitted the M9 payroll which is crucial in establishing an ability to operate Condition B since it must be shown that the company or MB were wilful in their failure to operate payroll correctly;

(b) ignored the differences inherent in a creditors' as opposed to a directors' Administration; and

(c) therefore, relied upon case law that is about directors' Administrations where deliberate acts were taken with knowledge that deductions could not be made or paid when due but which cannot apply to the facts and evidence in this appeal. Yet HMRC make clear that if the deductions were made and paid from the December 2019 payroll "there would have been no issues surrounding this decision".

125. Since MB did not make such a decision and had no power to do so this is a moot point but is crucial to the question of intention and conduct and so the conditions required to operate Condition B are not met.

126. MB refers to *Jerome Anderson v HMRC* [2018] UKUT 0159 (TCC) which considered the meaning of "discover" in section 29 of the Taxes Management Act 1970 and to the subjective and objective tests. The judgement at paragraphs 25 and 29 consider the subjective and objective tests in relation to an HMRC Officer making a discovery assessment.

127. MB says in relation to the objective test concerning an officer's decision to make a discovery assessment, which is an administrative decision, "as regards the requirement for the action to be "reasonable", should be expressed as a requirement that the officer's belief is one which "a reasonable officer could form".

128. MB says that LT's discovery assessment decision was not reasonable. LT ignored the fact that the administration of the company was brought by and initiated by a creditor and that as from

12 December 2019, the administrator was responsible for the company and not the directors. LT ignored who controlled the company at the relevant time.

129. MB says that the relevant time in relation to the failure to pay PAYE and NIC started on 19 December 2019 based on the following extract from HMRC's letter to MB dated 17 June 2021:

> "You knew no deductions were being made on some payments received from Carbon Managed Services Ltd (the company) and were in a position (as key employee) to arrange payments of your income in this manner. Treating monies previously drawn without operation of PAYE was not the only course of action open to you. Recognising that the company had insufficient profits to vote a dividend (as in previous years) you had a number of options, including (a) leaving the monies in an overdrawn director's loan account, (b) repaying monies previously drawn, or (c) seeking to declare a salary in respect of the amounts drawn. You chose (c) the option that was most financially beneficial to you, as the other two options would have meant having to repay the monies previously drawn to the company. Having chosen *(c) had you then paid [MB's emphasis added*] the resulting NIC and PAYE Tax liability to HMRC then there would have been no issues surrounding this decision. But you did not, the Tax and NIC on the salary declared for you went unpaid. Furthermore, the available information points to you knowing that the company did not have the means to pay when the salary decision was made – whether that was later when the Return was actually submitted to HMRC declaring the salary."

130. MB says that no reasonable case officer would have failed to establish who submitted the RTI on 19 December 2019, one week after the creditors administration on 12 December 2019 when the latter was notified to the case officer. Instead, LT deemed this to be irrelevant.

131. MB says that a reasonable case officer would want to know who the deciding mind was when deciding to transfer the liability from a company to an individual, but LT did not do so.

132. Similarly, a reasonable case officer would have considered whether MB's evidence of his director's loan and its operation was valid, but this was not considered. MB says that the relevant evidence was ignored because it did not "fit the narrative" that had been decided.

133. Accordingly, LT's belief is not one which a reasonable officer could form, and that the discovery assessment is not valid.

134. MB says that there has been no evidence shown of his 'wilful' failure to deduct tax and pay NIC which was known by him. He believes he has been smeared by a negative response and unsubstantiated innuendo. LT failed to consider the relevant evidence in particular the consequences of a creditors' administration and relied on evidence not always received from MB.

135. MB says that but for the creditors' administration, a correct payroll would have been submitted and the company with support from other companies in the Group would have paid the deductions which were due to HMRC, as had been the historic case.

136. Whoever submitted the payroll for M9 it was not MB, and the responsibility was with the administrator and not him.

137. In terms of the Insolvency Act 1989, the company did not wilfully fail to declare its liabilities to HMRC because this was the responsibility of the administrator and HMRC cannot impugn knowledge to MB. The appointment of the creditors' administrator was a fundamental shift in responsibility and liability.

138. MB says he had no financial benefit in the company being subject to administration, he lost £115,000 of his pension which he had invested in the company. He is unaware of the current status of his loan to the company.

139. MB distinguishes the facts in this case and those in *Stephen West v HMRC* [2018] UKUT 100 (TCC) as in the latter the tribunal were considering a directors' administration where Mr West put his company, Astral, into liquidation because he was concerned about the state of its business. In contrast, MB did not wish the company to go into administration or liquidation and it was the subject of a creditors' administration.

140. MB says that he can find no definition of "wilful" and notes that the Taxes Management Act does not say simply 'failure to deduct' and that 'wilful' must imply some form of intention. In this case the company and MB did not know that circumstances were going to change, with the consequent disruption to the usual practice of the company meeting its obligations to HMRC by receiving financial support to do so from within the Group.

141. MB submit that wilfulness means behaviour which is related to an act not simply a failure to do something but requires consideration of intention and refers to *R v Shepphard* as a guide.

142. To the extent that there was a failure to deduct it was not wilful on behalf of the company and its directors, including MB.

HMRC'S SUBMISSIONS

143. The direction notice issued on 1 March 2022 under Regulation 72 (5) Condition B of PAYE Regulations 2003 explained that the employer (the company) did not deduct enough tax from relevant payments made to MB. That Direction was correct.

144. LT, on behalf of HMRC, found that MB had received salary payments knowing that the employer (the company) wilfully failed to deduct enough tax.

145. The officer directed by notice, that the employer did not have to pay amounts under deducted and that MB was to pay the amounts due.

146. A Section 29 discovery tax assessment and Section 8 notice for the amounts of tax and NIC due were respectively issued, which HMRC contend are also both valid and correct.

147. Turning to MB's grounds of appeal set out in the Notice of Appeal:

Ground 1

148. HMRC disagree with MB's assertion that LT has not provided any explanations or reasoning for the decision that MB had failed to deduct enough tax. It is a matter of fact that the employer (the company) did not deduct the correct amount of tax and NIC on payments made to the MB. As a director, employee and shareholder of the company, MB was aware of this.

149. In a letter dated 1 October 2021 issued to MB, a breakdown of his salary payments for the tax year 2019/20 and the amounts of tax and NIC unpaid were clearly set out. The payroll had not been operated in accordance with Regulation 21(1) of the PAYE Regulations and from communications issued to MB, in particular in letters dated 17 June 2021, 10 January 2022 and 1 April 2022, the officer did provide sufficient explanations for the decision.

Ground 2

150. HMRC disagree with MB's assertion that the decisions made by LT have been pre-determined and that information and explanations have not been considered. All of MB's

comments and his agent's explanations regarding the circumstances of the failure to make the correct deductions from MB's salary, have been considered and responded to in comprehensive communications, even prior to the issuing of the notices.

Ground 3

151. Turning to "there had been no basis for the decision that MB acted in a wilful or deliberate manner." For an employer to be relieved of this liability, HMRC must consider Regulation 72 of the Regulations. Under Regulation 72(1) of the Regulations, the regulation applies if it appears that the deductible amount (of tax and NIC) exceeds the amount actually deducted, and condition A or B is met. HMRC contend that Condition A is not applicable with regards reasonable care and/or error made in good faith as the evidence presented, strongly supports Condition B.

152. Regulation 72 (4) Condition B, states that if HMRC are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments, then recovery can be made from the employee and a Direction can be issued under Regulation 72(5) in which "The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue".

153. Regulation 86 of the Social Security (Contributions) Regulations 2001 parallels the tax regulation above for primary (employee's) Class 1 NIC. Regulation 86 (1)(a)(ii) allows recovery of primary Class 1 NIC from the employee when "it is shown to the satisfaction of an officer of the Board that the earner knows that the secondary contributor [the employer] has wilfully failed to pay the primary contribution which the secondary contributor was liable to pay on behalf of the earner and has not recovered that primary contribution from the earner".

154. Section 8 (1) (c) of the Social Security Contributions (Transfer of Functions, Etc.) Act 1999 provides for an officer of the Board 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."

155. The legislation is also specific when it states that for Directions and decisions to be made that it has to be shown (as above, 72(4)) …. "the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments".

156. HMRCs' view is that the failure to deduct tax and NIC was wilful and aver that there has been a failure to operate PAYE in accordance with the Regulations and deduct and pay over the necessary remittance.

157. MB was one of two former directors of the company and held the role from its incorporation until the date of administration on 12 December 2019. As a director and 50% shareholder, MB would have had a detailed knowledge and control of company operations, including its finances. MB was also a director and majority shareholder of Flourish Holdings Limited, which controlled the company.

158. MB's salary from the company was £3,750 per month until month 7 of the 2019/20 tax year where it increased to £49,539.34. This was paid on 25 October 2019, before the date of administration of the company. This was then amended at the end of October 2019 to £3,750, followed by another payment of £3,750 and then in month 9, (25 December 2019) a further salary payment was made of £47,956.94 causing the PAYE & NIC liabilities to increase significantly. Normal salary payments were made on the 25th of the month, although this is after the date of administration (12/12/19).

159. In the tax year 2019/20, PAYE remittances were paid in full up to September 2019, a partial payment of £1,932.86 was received in October 2019 and no further payments were made from November 2019 onwards.

160. The company bank statements show that round sum payments described as Director's loans, salary, and FT (fund transfer) were paid to MB in the tax year 2019-20. The relevant payments received by MB as per the company bank statements could not be reconciled with the RTI submissions or MB's personal bank statements.

161. HMRC, therefore, used the figure submitted on the RTI return which corresponded with the salary figure declared on MB's personal tax return as the basis for the Direction and assessment.

162. The tax and NIC due by the company, particularly on the spike in pay at M9 of tax year 2019/20, greatly exceeded the company's available reserves. HMRC aver that there was little likelihood that the PAYE debt could have been paid in full by the employer (the company) given that it was placed into administration seven days earlier and into creditors voluntary liquidation just one month later.

163. MB was the employee and the employer, he knew the company account had negative reserves and, therefore, made the decision knowing that tax and NIC would remain unpaid. When payments were credited to the loan account as salary, these do not amount to a deduction. The Liquidator Progress Report dated 31 March 2021 shows an outstanding Director's loan account amounting to £24,000, which remains unpaid.

164. In MB's agent's letter dated 30 July 2021; it clearly states that at all material times the company believed it was in full compliance with its obligations to HMRC.

165. With regards to salary payments made in months November (M8) and December (M9), it is claimed that these were not under MB's control as the administration order had been made and the administrators had taken control of the company's bank accounts and all payments of salary.

166. The agent states that the intention was that the director's loan account be processed via payroll within 9 months of the year end and all PAYE and NIC to be paid in full when due. The agent contends that MB had no idea that the company would be placed into administration and that this was a result of a hostile takeover.

167. The agent has stated that the additional salary paid in December 2019 had been accrued in the financial statements for the year ended 31 March 2019 and processed via the payroll within 9 months of the year end. In HMRC's view, the loan was paid to the director in anticipation of salary payments which is inconsistent with his Director's Service Agreement with the company of January 2016.

168. In their letter of 27 April 2021, the agent states that the salary increase in December 2019 occurred as MB had been underpaid salary in the previous 8 months and for the 2018/19 tax year. It is HMRC's case that this further demonstrates that PAYE was not operated correctly. Whether these payments were arrears of salary or payments made in anticipation of salary due after the date of administration, it is clear that the amount of the payments increased substantially and that PAYE and NIC were not deducted correctly.

169. The agent also states in its letter of 30 July 2021, that MB 'had no recollection of the payment of tax due for month 7 (paid 25 October 2019) not being made when due'. However, as CEO of

the Group, Director of the company and major shareholder, MB was aware and in a position of control, in regards the operation of the payroll.

170. HMRC contend that there is sufficient evidence to demonstrate the wilful failure by the employer, and that MB as an employee was aware of the same.

171. Despite there being a payroll provider and accountant, MB as a director, employee, and shareholder of the company, signed off the company financial accounts and was a signatory on the company bank accounts. The agent indicates in its letter of 27 April 2021, that MB was responsible for financial matters along with the board for all matters relating to the company. As a limited company, the employer had the legal obligation to ensure that correct records were maintained and that PAYE operated fully in respect of employees' salary/wages. This obligation endures even if someone else is charged with and paid for, doing the work (such as an agent or payroll bureau).

172. Whilst it was the company's obligation to do these things, a company, as such, does not act on its own. As a director of the company, MB had a responsibility to ensure that the company complied with its statutory obligations amongst which was the operation of PAYE.

173. The agent states in the letter dated 27 April 2021, that the management account was viewed regularly by MB. He would, therefore, have been fully aware that money drawn had not suffered tax deductions. As MB benefitted significantly from the failure to make the necessary payments to HMRC, he failed to meet the company's obligations.

174. Given the fact that MB was aware of all drawings including personal ones from the company, it is HMRC's position that it is clearly evident that he was fully aware there was a wilful failure to make the deductions. Additionally, the fact that salary decision was made prior to administration and was declared just 7 days within administration through the company, supports HMRC's case that MB knew that the company would be unable to satisfy the resulting tax and NIC liability, in other words, make the required deductions.

175. Additionally, the decision to move the debt which was owed to Flourish (both companies subsequently going into administration on 12 December 2019), shows that debts were being moved between the businesses at a crucial time, only two days before the company went into administration. This demonstrates that MB was significantly in control.

176. As director and shareholder, MB would have been aware of the fact the company was to be imminently placed into administration. Consequently, the timing of the larger than normal salary payment in December and the reallocation of debts between the companies immediately before going into administration, indicates on the balance of probabilities that he knew of the company's wilful failure to make the required payroll decisions and pay PAYE tax and NIC.

Ground 4

177. With regards to the ground of appeal "Events outside of MB's control resulted in the company not making the required payments to HMRC." This has been covered within ground 3 above.

Discovery Tax Assessment

178. Section 29(1) TMA 1970 provides that where an officer of HMRC discovers a loss of tax they may make an assessment to make good the loss of tax, subject to certain conditions.

179. In *Jerome Anderson v HMRC*, the Upper Tribunal set out two tests, which must be met for the condition of Section 29(1) to be satisfied: a subjective test and an objective test. They set out the subjective test in the following terms at [28]:

> ''Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows: "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax. That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not."

180. At [30], the objective test was set out as follows:

> ''The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable," this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable''.

181. In summary, therefore, HMRC say that there are two questions to be asked:

> a. did the officer believe that there was an insufficiency of tax; and
>
> b. was the belief one which a reasonable officer could form?

182. The tax assessment was raised for the tax year 2019/20 following LT having discovered an additional income tax due that was not deducted for the PAYE. The date of discovery was 3 February 2022, that being the date when the Board Authorising Officer found that MB received relevant payments knowing that his employer, the company, had 'wilfully failed to deduct the amount of tax which should have been deducted from those payments'.

183. Section 29(4) TMA 1970 provides as follows:

> "the first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf."

184. HMRC submit that the wilful behaviour points directly to deliberate behaviour and at the very least careless.

185. As is relevant, Section 29(5) TMA 1970 provides as follows:

> "(5) the second condition is that at the time when an officer of the board.
>
> a. Ceased to be entitled to give notice of his intention to enquiry into the taxpayer's.
>
> return under section 8 or 8A of this act in respect of the relevant year of assessment;
>
> …

> b. …The officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

186. On the facts, HMRC content that had the compliance check not been opened in respect of the MB's directorship of the company for the tax year 2019/10, LT would not have known that there was a loss of additional income tax.

187. As the assessment was raised on 1 March 2022, this was within the normal time limits (4 years of the end of the tax year to which it relates), under Section 34 of TMA 1970, therefore, concluding that the tax assessment was valid.

188. HMRC refer to *Stephen West v HMRC* at [64] where the Upper Tribunal said:

> "……For a person wilfully to effect a particular legal outcome, it is not necessary for that person to be cognisant of the legal consequences of his or her actions. It is necessary only for that person intentionally or deliberately to put in train the various actions (or knowingly to fail to do so in the case of omissions) that in the event have the material consequences in law".

Conclusion

189. HMRC respectfully invites the tribunal to find that, for the reasons set out above, the decision to issue a Direction pursuant to Regulation 72(5) of the Regulations is appropriate and that HMRC were correct to issue MB a Section 8 notice for unpaid primary class 1 NIC under Regulation 86 of the Social Security (Contributions) Regulations 2022 and Section 8(1) (c) ,of the Social Security (Transfer of Functions) Act 1999 and a discovery assessment issued under Section 29 of the Taxes Management Act 1970.

190. The tribunal is asked to grant HMRC permission to vary the Section 29 discovery assessment to £18,550 and the Section 8 Notice to remain the same, in the sum of £3,859.14.

191. HMRC respectfully request that the appeal is dismissed.

THE TRIBUNAL'S DECISION

192. The company failed to pay PAYE and NIC. LT, HMRC's officer who had left HMRC by the time of the tribunal hearing and was not able to attend, investigated the circumstances. LT concluded that the "salary" was declared just prior to administration through the company and that MB knew the company would be unable to satisfy the resulting tax and NIC liability.

193. LT considered that the additional salary "paid" in December 2019, which had been accrued for in the financial statements for the year ended 31 March 2019,finalised on 27 September 2019, and processed via the payroll within 9 months of the year end suggested that the increased salary in month 9 of 2019/20 tax year "was just a paper exercise to clear monies drawn from the company without operation of PAYE"

194. LT suspicions were aroused by the appearance on the RTI of a "payment" of £49, 539.34 paid on 25th October (although this was amended at the end of October 2019 to £3,750 and a further "salary payment, of £47,956.94 payable on 25 December 2019, when no PAYE nor NIC had been fully paid from October 2019 (for September's liabilities) onwards.

195. £3,750 was the amount paid to MB as his monthly salary amounting to an annual total of £45,000. LT noted that MB's salary in his Director's Service Agreement dated January 2016 submitted by MBs agents to HMRC, provided for £80,000 and, therefore, there had been an

underpayment of the payment of PAYE and NIC. LT also considered that the addition of a further "salary payment, of £47,956.94 payable on 25 December 2019 was also in excess of the amount in his agreement.

196. LT formed the view that MB behaved in a way which was most financially beneficial to him by receiving the payment accrued in the company accounts to March 2019 and payable in December 2019 in circumstances when she believed that MB knew the company did not have the means to pay when the salary decision was made. MB, therefore, knew that there was little likelihood that the PAYE debt and NIC could have been paid in full by the company given that it was placed into administration seven days earlier and into a creditors' liquidation one month later.

197. LT considered that MB was an employee of the company and a director of the employer and knew the company had negative reserves. He had a responsibility to ensure that the company complied with its statutory obligations amongst which was the operation of PAYE. MB was a responsible director and someone who viewed management accounts regularly would have been fully aware that money drawn had not suffered tax deductions.

198. LT believed that MB benefited significantly from the failure to make the necessary payments to HMRC and failed to meet the company's obligations.

199. LT considered that the M9 salary payment, being explained as underpaid salary in the previous 8 months the 2018/19 tax year, demonstrated that PAYE was not operated correctly. HMRC believed that the amount of MB's payments increased substantially and that PAYE and NIC were not deducted correctly.

200. LT also considered that the decision to reassign the debt due by the legal firm to Flourish to the legal firm, showed that debts were being moved between the businesses at a crucial time only two days before Flourish, went into administration, being a directors' administration, on 12 December 2019.

201. LT believed that as a director and shareholder MB would have been aware of the fact that the company was to be imminently placed in administration and consequently the timing of the larger than normal salary payment in December and the reallocation of debts between the companies immediately before going on to administration indicated on the balance of probabilities that he knew of the company's wilful failure to make the required payroll decisions and pay PAYE and NIC.

202. During the tribunal hearing, NG was asked if he could explain the reasoning for LT's decision-making as set out above. NG, to a certain extent understandably, was not always able to do so but explained the general approach of an HMRC officer considering whether it was appropriate to transfer the liability of unpaid PAYE and NIC to an individual.

203. NG was asked if he would have considered elements of evidence that had been provided by MB to HMRC differently and conceded that he might do but the overall process required assimilating all the relevant information and taking a balanced view.

204. The tribunal considered the evidence which had been provided to HMRC and elicited and received explanations as to its veracity.

205. The tribunal considered that there had been a combination of circumstances relating to the Group and MB, which benefited from being considered at a tribunal hearing such as the reason why the debts had been reassigned by Flourish to the legal services company as part of a plan to

protect the legal services company from being acquired by the lender who having called up its loan then had security over shares in Flourish which would give them control. It was for this reason that Flourish had been placed in a directors' administration, which MB instigated, as a director and did know about.

206. This was in contrast to the creditors' administration of the company of which the tribunal was satisfied MB had no advanced knowledge, based on the evidence provided, and which had two consequences.

207. The first consequence was that the processing of a payroll return to HMRC by means of an RTI on 19 December 2019 was not made by MB nor was it processed by MB or authorised by him in anticipation of the company being placed in administration which was on 12 December 2019.

208. The second consequence was that because of the creditors' administration, and from 12 December 2019 onwards, MB had no standing in the company and other than remaining a director had no authority to direct or control the actings of the company. This rested with the lender's appointed administrator.

209. MB stated that he was not aware that a payroll and RTI had been authorised and submitted to HMRC on 19 December 2019 and the tribunal was satisfied, on the evidence, that this would have been most likely submitted to HMRC only a few days before that event.

210. The position was that it is unknown who submitted that return but having done so it established a liability for PAYE and NIC which was not paid.

211. MB had received loan payments of £3,000 per month and HMRC reported that the company administrators stated that the outstanding loan was only £24,000 in the accounts of the company.

212. Accordingly, the payment to MB in M9 was credited to his loan account within the required 9 months to avoid a benefit in kind disclosure/charge but the tribunal were satisfied that MB did not know this prior to 12 December 2019. The credit would have been, as MB's accountant had explained, a book entry and no actual payment would have been made to MB.

213. It did however create a liability for PAYE and NIC.

214. The tribunal were persuaded by MB's submission that it was not in his interests for the company to be placed in administration and that he and his board had taken significant steps to avoid this by providing finance from other sources and reasonably believed that the lender would accept this, which it did not. Also, the company's administration meant the loss of £115,000 MB had invested from his pension in preference shares in the company.

215. Whereas these circumstances including the conspiracy amongst JH, employees of the company (acting in breach of their employment contracts) in conjunction with the company's former accountant of 10 years, Rob Heaton and the lender to seize control of the Group, might be considered as suspicious from the point of view of failing to pay PAYE and NIC, the tribunal were satisfied of its veracity.

216. The tribunal held that there was sufficient evidence to confirm the method of payment of a reduced salary and a directors loan paid at £3,000 per month, on the basis that if the company performed well, the company would declare a bonus to MB, on which PAYE and NIC would be paid, with the option to extinguish the loan, and that this was planned to be done within 9 months of the year end of March, that is to say in December, to avoid a charge to a benefit in kind. The

tribunal noted that MB's service agreement submitted to HMRC did not reflect those arrangements but were satisfied that there was sufficient evidence to indicate it had been amended. It was unclear why this had not been drawn more specifically to HMRC's attention.

217. Taking this into account the entries as shown on the RTI were not suspicious, and payment would have been made but for the administration on 12 December 2019. This was despite the company having negative reserves as it was shown in evidence that the company had traditionally had negative reserves but had always paid its PAYE and NIC liabilities.

218. The reason for this was because of support from other companies within the Group and NG conceded that LT's reasoning that MB had wilfully failed to deduct in the knowledge of the company had negative reserves appeared to be misconceived, if not incorrect.

219. It transpired that Flourish would not have been able to provide that support as it was placed was in a directors' administration for reasons, which the tribunal accepted, were taken to protect the legal firm and its responsibilities under the Solicitors Regulatory Authority for its clients. This included finding an alternative outsource firm to deal with its business administration, following the creditors' administration of the company.

220. Consequently, that administration was not considered to be indicative of MB's failures to deduct and pay PAYE and NIC as the reasons for that administration were not driven by a wish or action to denude the company of financial Group support.

221. Taking all these factors into account the tribunal held that MB had not received relevant payments knowing that the company wilfully failed to deduct the amount of tax which should have been deducted from those payments.

222. Accordingly, Condition B of Regulation 72 (4) has not been met and recovery cannot be made from the employee. There was a failure to deduct and PAYE but the tribunal were persuaded that the actions which led to this were not engineered by nor in the knowledge of nor anticipated by MB, although it was unsatisfactory that it was unknown who had prepared the payroll and RTI submitted to HMRC on 19 December 2019.

223. The tribunal held that MB was not aware of the fact the company was to be placed imminently administration and was not responsible for the declaration and return to HMRC of a larger than normal salary payment in December.

224. MB was responsible for the reallocation of debts within the Group but the reasons for this, to protect the legal firm from 'the hostile takeover' attempt, were plausible and were not a reflection on transfers within the Group designed to avoid tax and NIC liabilities.

225. For the same reasons the tribunal considered and held that MB did not know that the company had wilfully failed to pay the primary NIC contributions.

226. The tribunal having considered all the evidence were not persuaded that the objective test in relation to the issuance of a Discovery Assessment was met and that, albeit the various interconnected circumstances appeared suspicious and almost extraordinary, HMRC's officer's belief was not reasonable.

227. Accordingly, the tribunal held that the contentions and evidence put forward by MB were credible and persuasive and had not been correctly considered by HMRC or, to the extent that it did, did not, incorrectly, believe them.

228. For the reasons stated, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

229. 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: 24th OCTOBER 2024