TC01485

Appeal number: TC/2010/06036

National Insurance ("NI") contributions – married woman's election – effective date of revocation or lapse – relevant to assessing home responsibilities protection ("HRP") – on the facts, held that Appellant had not revoked her election as she claimed in 1978-79 – nor was primary class 1 NI contribution of 50p shown on her contribution record for that year incorrect – accordingly her married woman's election under the "two year rule" lapsed at the end of the 1980-81 tax year and she was liable to pay reduced rate NI from 1975-76 up to 1980-81 – HRP to be assessed on this basis – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

PAMELA ANN TARR **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (NICs) **Respondents**

TRIBUNAL: **KEVIN POOLE (TRIBUNAL JUDGE)**
RICHARD CORKE FCA

Sitting in public in Bristol on 10 August 2011

Stuart Tarr, husband for the Appellant

Lisa Storey, Higher Officer HMRC for the Respondents

DECISION

Introduction

1. This appeal concerns a dispute about the Appellant's National Insurance contributions ("NICs") record.

2. In the course of an appeal before the Social Entitlement Chamber as to the level of retirement pension payable to the Appellant, it became apparent that there was a dispute about the amount of "home responsibilities protection" ("HRP") to which she was entitled. Broadly, HRP is intended to provide credits towards benefit entitlements when the individual in question is precluded from regular employment by bringing up children or carrying out other home responsibilities during the relevant year.

3. The availability of HRP for any particular year depends on a number of factors, including (in the case of married women) the existence of a married woman's election to pay NICs at a reduced rate.

4. The Social Entitlement Chamber is the proper forum for appeals concerning pension entitlement generally, but where that entitlement depends on an individual's NICs record, this Tribunal is the proper forum for determination of that part of any dispute.

5. The appeal before the Social Entitlement Chamber was therefore adjourned to enable the disagreement about the Appellant's NICs record to be resolved through this Tribunal.

Issue to be resolved in this appeal

6. This appeal, in formal terms, is an appeal against a decision issued by HMRC to the Appellant on 16 March 2010. The decision is that:

> "you were not liable to pay Class 1 National Insurance contributions in the period from 7 September 1970 to 5 April 1975 and in the period from 6 April 1975 to 5 April 1981 you were liable to pay reduced rate National Insurance contributions."

7. The Appellant accepts this decision insofar as it relates to the period from 7 September 1970 to 5 April 1975. However she disputes it, at least in part, insofar as it relates to the period from 6 April 1975 to 5 April 1981.

Legislative background

Introduction

8. From its commencement, the system of national insurance was based on the concept of benefits being built up in exchange for compulsory contributions. Thus entitlement to a state pension depends upon the individual's contribution history.

9. There have been refinements and exceptions to this basic concept specifically to deal with married couples and home responsibilities.

Married women's elections

10. First, a married woman was permitted to make a "married woman's election" ("MWE").

11. The effect of this election (which was available to married women generally) was that she paid a much reduced rate of insurance contributions on her earnings but those contributions did not count towards her entitlement to certain benefits, including state retirement pension. The idea of this system was that many married women would obtain sufficient entitlements to benefits by reference to their husbands' NICs and therefore would not necessarily wish or need to pay the much higher NICs required to build up a full entitlement on their own account.

12. A married woman could make and revoke her MWE at will. She therefore had a choice as to whether to make higher contributions and build up her own benefit entitlement or make lower contributions and rely on her husband's contribution record for benefits.

13. The savings (particularly for the lower paid) were potentially significant. By way of example, in 1970 an employed married woman's full rate NICs would be 15/- (75p) per week whereas if she made a married woman's election, her insurance contribution would be 8d (around 3p) per week. These contribution rates were fixed and did not depend upon the amount of the contributor's earnings. The reduced rate of contribution gave her entitlement only to limited benefits, mainly for industrial injuries.

14. Strictly speaking, the smaller contribution was not a "National Insurance" contribution and therefore the election made by a married woman before 6 April 1975 (the date of a major reconstruction of national insurance as a whole) was an election not to pay NICs at all.

15. From April 1975, following a major reorganisation of the National Insurance system, NICs became earnings-related and were collected with PAYE. As part of the reorganisation, any existing married women's elections were carried across in a slightly different form: rather than being an election to pay no NICs at all, they were deemed to continue in the form of an election to pay NICs at a reduced rate, to reflect the reorganisation of the National Insurance system generally and in particular the replacement of fixed rate contributions by earnings-related contributions.

16. From 11 May 1977, it was no longer possible for new MWE's to be made, but pre-existing elections were preserved, along with the right to revoke them. Provision was also made for any existing election to lapse if the woman had no earnings attracting primary class 1 NICs (and was not a self-employed earner) in any two consecutive tax years from 1978-79 onwards.

17. From 6 April 1977 to 5 July 1979 (which is the relevant period for the purposes of this appeal), any revocation of an MWE took effect at the end of the tax year in which it was notified to the Secretary of State.

18. The legislative history of the provisions relating to the making, continuation, revocation and lapse of MWE's is extensively set out in the Special Commissioner's decision in the case of *Gutteridge v HMRC* [2006] STC(SCD) p 315 and we do not propose to repeat it here. Suffice it to say that:

> (1) under Regulation 92(1)(d) of the Social Security (Contributions) Regulations 1975 as in force at the time, it was provided that any revocation of an MWE under Regulation 91(5) of those Regulations would take effect "at the end of the year in which the notice of revocation is given" (and "year" for this purpose meant a tax year); and
>
> (2) under Regulation 92(1)(c) of the same Regulations, it was provided that an existing MWE would lapse at "the end of any two consecutive years which began on or after 6th April 1978 and in which the woman who made the election has no earnings in respect of which any primary Class 1 contributions are payable in those years and in which that woman is not at any time a self-employed earner"

Home responsibilities protection

19. Second, from April 1978 a new concept of HRP was introduced. Its purpose was effectively to give individuals credits towards benefit entitlement (including state pension) while they were prevented from having regular employment by reason of home responsibilities – especially for children or disabled or elderly people.

20. From commencement of HRP in April 1978 up to date, one of the qualifications conferring an entitlement to HRP is, broadly, being in receipt of child benefit throughout the year (we are concerned here with tax years, i.e. from 6 April to the following 5 April). There is however an exception, in the following situation (as provided by Regulation 2(4)(a) of the Social Security Pensions (Home Responsibilities and Miscellaneous Amendments) Regulations 1978:

> "if the person in question is a woman who has made or is treated as having made an election in accordance with [the MWE provisions] and that election had effect at the beginning of that year".

Interaction of MWE and HRP

21. In order to determine whether HRP can apply in relation to any particular tax year, it is therefore important to establish the status of a married woman's MWE at the start of that tax year. If a valid MWE is still in force, HRP cannot apply for that year.

22. The appeal before us is therefore predominantly concerned with the date on which the Appellant's MWE was effectively revoked or lapsed.

The Facts

Uncontentious history

23. The Appellant was born on 17 April 1948 and entered into the National Insurance system with effect from her 15th birthday on 17 April 1963. She had a very nearly full contribution record over the next few years, up until her marriage on 5 September 1970.

24. With effect from the Monday following her marriage (7 September 1970), she made an election not to pay NICs and notified it to the Secretary of State.

25. The Appellant had children in 1972 and 1975. She did not work after having her first child until sometime in the tax year 1974-75, when she worked for a few months as a nursing auxiliary on the night shift in a hospital in Devon. She applied for a National Insurance contribution card in May 1974, presumably at around the time she started work, and at that time repeated her married woman's election to pay no NICs; she paid only the reduced rate insurance contributions.

26. With effect from 6 April 1975 when the National Insurance system was completely reconstructed, the Appellant's pre-existing married woman's election took effect as an election to pay NICs at the reduced rate applicable to married women.

Facts surrounding the Appellant's alleged revocation of her MWE

27. The crucial events took place in late 1978 or early 1979. The Appellant maintains that she revoked her MWE at that time; that there was therefore no valid MWE in place at the start of the 1979-80 tax year; and that she should therefore not be disqualified from receiving HRP for that year and the following year.

28. HMRC maintain that no notice of revocation of her MWE was received, and that accordingly her MWE remained in force until it lapsed at the end of the 1980-81 tax year under the "two year" rule referred to at [16] and [20] above.

29. The burden lies on the Appellant to demonstrate, on a balance of probabilities, that her assertion is correct.

<u>Evidence on behalf of the Appellant</u>

30. The Appellant said she took up a part time job at Debenhams in Bristol, working Saturdays only, after seeing the job advertised in the paper. She applied mainly in order to get out of the house, meet people and make friends. Her youngest child was only 3. She thought she had started work during the January sales in early 1979. She only worked there for a few months.

31. When she went for the interview, she and her husband had already discussed her MWE and agreed that she should go back to paying full rate NICs. Her NICs liability would be nil or very low anyway, due to her small earnings. They could not really work out why she had made the election in the first place.

32. At the interview, she has a feeling that Debenhams raised the question of her MWE, but she claims that whoever raised it, it was certainly discussed. She says she did not hand over any certificate to them to notify them of her MWE or its revocation, and does not recall any forms being involved, but they did say they would deduct NICs at the full rate and she must have given them her NI number. They seemed very efficient at the time, and she relied on them to do whatever was necessary to notify her revocation of her MWE. She did not herself contact the Department of Health and Social Security ("DHSS") about her MWE.

33. After a couple of weeks or so at Debenhams, it became clear to her that they were in fact very disorganised, but she did not check that they had actioned her request to change back to full rate NICs.

34. The Appellant also argues that certain errors have been shown in HMRC's correspondence and, more critically, on the form RF1 (in particular, an incorrect recording of Mr Tarr's NI number) which records the Appellant's earlier MWE elections and other important detail of her NICs record. The existence of these errors, it is said, lends support to the proposition that the failure to record the Appellant's revocation of her MWE is just another error on HMRC's part.

HMRC's view

35. HMRC are not of course in a position to provide any direct evidence about what happened when the Appellant joined Debenhams. However, they say the key fact is that they have no record of ever receiving any notice revoking the Appellant's MWE. They point out that the Appellant does not actually claim to have sent one, she says Debenhams should have dealt with it on her behalf (which they say would never have been appropriate).

36. They also point out that the Appellant's story has changed.

37. Initially she said she had not been employed during 1978-79, and her case was put on the basis that she should have been informed of her right to revoke her MWE so that she could benefit from HHR.

38. When she wrote to HMRC on 9 October 2007 in response to HMRC's letter dated 27 September 2007 (in which they informed her that their records showed she had an MWE until 5 April 1981 and therefore could not qualify for HRP for 1978-79, 1979-80 and 1980-81), she said:

> "I was not informed of my right to change my election to pay full-rate national insurance contributions so that I could benefit from Home Responsibilities Protection when it was introduced from 1 April 1978; I wish to do so now, so that I can benefit from HRP for each of the tax years 1978-79, 1979-80 and 1980-81 when I was not in paid employment with home responsibilities for the care of children."

39. When she spoke to HMRC by telephone on 24 October 2007, she said she had not worked at all during 1978-79 as she was caring for her children; in her letter dated

28 December 2007, she accepted she had worked part time for Debenhams in 1978-79, but said:

> "... it was not explained to me at the time HRP was introduced, either by the Department of Health and Social Security or subsequently by my employer Debenhams, of my right to change my election not to pay full rate NI contributions or that I would lose my entitlement to HRP if I continued to hold a Married Woman's Reduced Rate (MWRR) election. Had I known this information, and not been misdirected, then of course I would have changed my election at the time, particularly since my part time Saturday earnings were almost certainly below the lower earnings limit and would have attracted no or very little liability for full rate Class 1 NI contributions."

40. Her argument then changed to claim that she may have revoked her MWE. When she wrote to HMRC on 28 January 2009, she said:

> "... I cannot say with absolute certainty to agree with your position *[sic]* that I did not return a completed form CF9 to change my election from the right to pay MWRRE contributions to the right to pay full rate national insurance contributions during the early 1970s prior to the changes being introduced in 1978. Moreover, as my husband at that time was the manager of a Department of Employment unemployment benefit office, with a full understanding of what the changes in the regulations would mean, I think it is very unlikely that I would not have returned form CF9 to change my election on his advice. Moreover I cannot see why, when I was not in paid employment with two very young children to care for in the 1970s, I would not have returned form CF9 in order to benefit from the changes proposed."

41. Eventually, it changed again, to a claim that she definitely had revoked her MWE. When her husband wrote to HMRC on her behalf on 22 February 2010, he said that their position "remains as previously documented, namely that:

> My wife <u>did</u> change her previous election to pay Married Woman's Reduced Rate contributions on taking up employment with Debenham's in order to take advantage of the introduction of HRP from April 1978. She did <u>not</u> hand a Certificate of Reduced Rate Liability CF9 to Debenhams but asked them instead to deduct full rate NI contributions believing that, because she earned such a little amount, she would not be required to pay full rate contributions."

42. Given the way that her story has changed, they say, how can we rely on the latest version as accurate?

43. HMRC's records include a year-end employer's return from Debenhams in respect of the Appellant, showing that she left their employment on 31 March 1979. The Appellant doubted this date, but was not in a position to dispute it and we find it is accurate, as is the other information the return contains. As shown by the year end return, her total pay from Debenhams for the year to 5 April 1979 was £312.60, from which income tax of £1.40 was deducted. NICs totalling £3.91 were also paid, of

which the Appellant paid 50p by deduction from her pay. We find that it was the discovery of this form in HMRC's records that first suggested the Appellant had been employed by Debenhams, when she had previously claimed she had not been employed during 1978-79.

44. The NICs were stated in this form to be paid by reference to "Contribution Table B", which denoted NICs paid at the rate applicable to married women who had made an election to pay at the reduced rate. HMRC point out that an employer would only deduct NICs at a reduced rate if they have authority to do so – otherwise they are responsible for the shortfall. They infer that the Appellant must have given to Debenhams the appropriate certificate to authorise them to apply the reduced rate.

Our findings on the issue of revocation of the MWE

45. The Appellant acknowledges that her recollection of her employment with Debenhams was "initially hazy". It is said however by her husband that "our recollection has however strengthened as we have retraced my wife's steps at that time, though memory cannot with absolute certainty be perfect."

46. Having seen and heard the Appellant (and, to some extent, her husband) give evidence and having considered the other evidence put before us, we prefer HMRC's version of events. It is fair to say that the Appellant fell some way short of persuading us that her more recent memory of events was more accurate than her earlier haziness; and given that she had no memory at all of working at Debenhams until prompted by the year end return extracted from HMRC's records, we find it implausible that she should subsequently remember with such certainty that she specifically asked Debenhams to action the revocation of her election at her job interview. We also note that the process for dealing with such revocation required her to submit the form herself to her local DHSS office and if her husband was, as she says, expert in such matters then we find it surprising that she neither followed the normal process nor checked that the revocation had been processed.

47. In the light of the above, we find as a fact that the Appellant did not revoke her MWE at or around the time she started working at Debenhams (or at any other time).

48. We therefore hold that the Appellant's MWE did not terminate upon notice of its revocation being given. Instead, it terminated by lapse at the end of the tax year 1980-81 by reason of the two year rule.

The decision to remove and then reinstate NICs

49. The Appellant also claims that HMRC took a perfectly valid and binding decision in October 2007 when they initially removed the record of 50p of contributions from the Appellant's record for the year 1978-79 (arising from her Debenhams employment). They should not, she says, now be permitted to resile from that decision which, she says, was taken with full knowledge of all relevant facts.

50. If that decision had not been changed then her MWE would be regarded as lapsing at an earlier date. We are told that the effect would be that her HRP would

apply from 1978-79. We struggle to see how this could be the case, given that the MWE would only lapse after two years of "no primary class 1 NICs" beginning with 1978-79; in our view this would, if there had been no Debenhams employment, have been at the end of the 1979-80 tax year. However, this appeal is concerned only with the question of when the Appellant's liability to reduced rate primary class 1 NICs ended, so we do not have to resolve this question.

51. The question is whether HMRC should be permitted to change their initial decision to ignore the 50p of primary class 1 NICs which the Appellant paid during 1978-79.

52. First, there was some suggestion that the 50p liability might have been a mistake. Various suggestions have been made as to how such a mistake might have arisen. But there are equally plausible suggestions as to how a liability of that amount could have arisen, and therefore we see no evidence to persuade us, on a balance of probabilities, that the 50p liability was a mistake. We find that it arose and was charged properly.

53. Second, the Appellant argues that HMRC have not put forward any proper legal basis for changing a decision which had been properly reached with knowledge of all relevant facts. There is some confusion as to whether HMRC did indeed have all relevant facts in their possession at the time the initial decision was taken, in particular the fact that the Appellant had been working part time at Debenhams rather than unemployed throughout the year whilst caring for her children as she initially maintained.

54. We find that HMRC, when they took their initial decision, were relying on the Appellant's statement that she had not been employed during the year in question. Thus we see no difficulty with HMRC revising their initial view once the full facts became known.

55. We should say for the sake of completeness, however, that even if the initial decision had been issued by HMRC with full knowledge of the Appellant's employment with Debenhams, it would have been clearly wrong in law and therefore subject to later correction. It is conceivable that if no reasonable public authority would have corrected the decision as HMRC did, then its decision to make the correction might perhaps be challenged on general public law grounds, but we see no basis for such a challenge before this Tribunal (or indeed at all).

Conclusion

56. It follows that we find the Appellant's MWE to have lapsed at the end of the 1980-81 tax year, and we therefore agree with the technical legal basis of HMRC's decision dated 16 March 2010. We see no basis to change that view as a result of HMRC's actions in reaching and communicating an initially incorrect decision which was subsequently corrected.

57. We therefore uphold HMRC's decision dated 16 March 2010, and agree that the Appellant was not liable to pay class 1 National Insurance contributions in the period

from 7 September 1970 to 5 April 1975 and that in the period from 6 April 1975 to 5 April 1981 she was liable to pay reduced rate National Insurance contributions.

58. 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.

KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 4 OCTOBER 2011