TC02157

Appeal number: TC/2011/02619

INCOME TAX – pension contributions paid by an individual of dual Swiss/British nationality, being a UK resident, into a Swiss national pension scheme out of UK taxed income – whether the contributions are eligible for UK tax relief – if so, in what year(s) - whether, alternatively, the Swiss pension received is not liable to UK tax in the hands of the UK resident recipient – held the contributions not eligible for UK tax relief and the pension is liable to UK tax – but held (provisionally, with leave to HMRC to make submissions to the contrary) that this liability is only as to 90% of its actual amount, in accordance with s.575(2) ITEPA – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ELIANE HASELDINE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
JULIAN STAFFORD

Sitting in public in Colchester on 2 April 2012

The Appellant appeared in person with Mr Patrick Haseldine

Miss Karen Weare, Higher Officer, HMRC Presenting Officer, for the Respondent

DECISION

Introduction – the Issues

1. The appellant, Mrs Eliane Haseldine, appeals against a decision communicated to her in a letter ("the Decision Letter") dated 15 December 2010, being the decision of Officer P Mason, Officer of the Commissioners ("HMRC") at their Personal Tax Compliance Office at Birmingham, that relief claimed by Mrs Haseldine in her self-assessment tax return for the year ended 5 April 2009 in the amount of £8,580 was not allowable.

2. The Tribunal held a preliminary hearing at Colchester on 15 November 2011 and made case management directions, the first of which defined the issues to be determined at the appeal as follows:

> 1. Whether the payments of £8,580 (or any of them) made by the Appellant as voluntary contributions in relation to her Swiss personal Old Age and Survivors Insurance (OASI) pension between May 1995 and June 2009 are eligible to UK income tax relief;
>
> 2. If or to the extent that such payments are so eligible, the respective year or years of assessment in respect of which such relief is due; and
>
> 3. Whether the income of the Appellant derived from her OASI pension and declared in her self-assessment income tax return for the year of assessment 2008/2009 (£3,493.02) is liable to UK tax.

The Facts

3. In October 2011, Mrs Haseldine and Miss Weare, for HMRC, agreed a Statement of Facts. The material agreed facts are as follows:

> Mrs Haseldine (née Riess) was born on 13 January 1944 in Switzerland and grew up there.
>
> Between 1962 and 1967 she was employed in Switzerland, when mandatory contributions into the OASI scheme were deducted from her gross pay.
>
> Between 1967 and 1969 she was employed in France, when mandatory contributions into the *Caisse Nationale d'Assurance Vieillesse* (CNAV) scheme were deducted from her gross pay.
>
> In 1968 in Paris she married Patrick Haseldine, a British diplomat.
>
> Between 1969 and 2011, she has lived and worked in the UK (except for two periods: 1975-1977 and 1978-1982), when mandatory National Insurance contributions were deducted from her gross pay.
>
> Between 1975 and 1977, Mrs Haseldine accompanied her husband on a diplomatic posting to Paris.

Between 1978 and 1982, she accompanied her husband on a diplomatic positing to Freetown, Sierra Leone.

Between 1968 and 1993, Mrs Haseldine was not employed in Switzerland, and made no contributions to the OASI pension.

Between 27 May 1995 and 8 June 2009, Mrs Haseldine voluntarily made contributions annually to OASI totalling CHF 15,443.30 (equivalent to £8,579.61) from her UK after-tax income.

In 2009, Mrs Haseldine was in receipt of employment income from Mild Professional Homes Ltd. and was a partner (with Mr Haseldine) in the Haseldine Ceramics Partnership.

In 2009, Mrs Haseldine received UK, French and Swiss state pensions.

Mrs Haseldine's tax return for the year 2008-2009 was filed online on 2 November 2009.

In that tax return Mrs Haseldine claimed relief for payments into a retirement annuity contract in the amount of £8,580 (representing the voluntary contributions made to OASI between 27 May 1995 and 8 June 2009 (see: above). The relevant 'box' on the return was marked: 'payments to an overseas pension scheme which are eligible for tax relief and were not deducted from your pay'.

On 20 April 2010 Officer Phil Mason opened an enquiry into Mrs Haseldine's 2009 tax return.

The enquiry was closed on 15 December 2010 disallowing the claim.

Mrs Haseldine appealed that decision on 12 January 2011.

She was offered and accepted an HMRC review.

Officer D McKinley of HMRC concluded the review on 8 March 2011.

Mrs Haseldine then appealed to the Tribunal.

Mrs Haseldine lives in Essex.

4. In addition to the Statement of Agreed Facts, we received witness statements from Mrs Haseldine and Mr Haseldine and oral evidence from both of them. We also had a bundle of documents before us.

5. From the evidence we find the following additional facts.

6. Mrs Haseldine is of dual British/Swiss nationality. She has been resident for tax purposes in the UK since 1969.

7. In 1994 she was invited by the Swiss authorities to join the voluntary OASI scheme for Swiss citizens resident abroad. She was required to join before her 51st birthday (13 January 1995) and she was informed, among other things, that her contributions would be based on gross income and that she would be obliged to pay both employer's and employee's contributions.

8. Mr Haseldine joined the diplomatic service in 1971 and was dismissed from it on 2 August 1989. He provided the Tribunal with an extensive résumé of his disputes with the Foreign and Commonwealth Office ("FCO") and his campaigns in relation to the activities of the South African apartheid regime. His dismissal of course very seriously reduced his prospective pension entitlement from the FCO and is part of the background to Mrs Haseldine's decision to make voluntary contributions from 1995 onwards to enhance her OASI pension. Mr Haseldine explained that he, as the person who was submitting Mrs Haseldine's self-assessment returns, was responsible for the fact (which he said had been a mistake) that no claim to relief on the contributions paid by her to OASI had been made before Mrs Haseldine's 2009 tax return was submitted.

9. Mrs Haseldine's pension income returned in her 2009 tax return was, in detail: UK state pension £3,025; CNAV (France) £884.76; OASI (Switzerland) £3,493.02.

10. The figure for the CNAV pension includes 10% (a child supplement) which is not taxable in France.

11. Mr Haseldine has calculated that of Mrs Haseldine's OASI pension, 15.5% is attributable to the mandatory (compulsory) contributions that she has made to OASI, and the balance (84.5%) to the voluntary contributions which she has made to OASI.

12. Mrs Haseldine states that Swiss citizens living in Switzerland, who pay voluntary contributions to OASI from earnings in Switzerland receive tax relief in Switzerland for those contributions.

The submissions

13. Mrs Haseldine starts from the proposition that it is anomalous that she should declare as taxable income in the UK her full OASI pension receipts and yet that she should be denied UK tax relief for the voluntary contributions paid out of UK after-tax earnings which have given rise to a large proportion of her OASI pension receipts.

14. She argues that the voluntary contributions she has made to OASI were assessed by reference to her taxable earnings in the UK and paid out of her after-tax UK earnings and that therefore they should attract UK tax relief. She cites article 18(3) of the UK/Switzerland Double Taxation Agreement ("DTA") (see: under the heading 'Law' below).

15. She draws a distinction between mandatory contributions to OASI, which she sees as equivalent to national insurance contributions paid in the UK, and the voluntary contributions in issue, which, albeit made to a state-run pension scheme (OASI) she sees as equivalent to contributions paid to a private personal pensions scheme.

16. If the DTA does not apply to give her the UK tax relief she seeks for her voluntary contributions to OASI, because the OASI scheme is not accepted by HMRC (as the competent authority of the UK) as generally corresponding to a pension scheme recognised as such for tax purposes by the UK, Mrs Haseldine argues that the income produced by the voluntary contributions she has made to OASI ought not to be subject to UK tax.

17. She seeks UK tax relief on £8,580 voluntary contributions to the OASI scheme as per her 2009 tax return. She states in the Grounds for appeal in her Notice of Appeal that 'because I have been honest enough to declare my Swiss pension for tax purposes to HMRC, I believe I am entitled to the full amount of tax relief' – i.e. relief on 14 years' contributions. Alternatively, on the basis that the income received from the OASI scheme to the extent funded by her voluntary contributions does not attract UK tax, she seeks exemption from UK tax for her past and future income from the OASI scheme to the extent so funded, and a consequential refund of UK tax overpaid, which she calculates as £2,077.17.

18. Miss Weare, for HMRC, contends that there is no basis in UK tax law to allow relief for Mrs Haseldine's voluntary contributions to the OASI scheme.

19. In particular, she argues that the voluntary contributions do not rank as payments made out of foreign emoluments attracting UK tax relief ("Corresponding Relief") under section 192 Income and Corporation Taxes Act 1988 ("ICTA") up to the year 2003/2004 and under section 355 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") for later years. In brief, her reasons are that Mrs Haseldine is not domiciled outside the UK and, even if she were, the voluntary contributions to the OASI scheme are not payments made out of earnings from an employment with a foreign employer.

20. She also contends that Mrs Haseldine cannot claim relief for her voluntary contributions to the OASI scheme under Schedule 33, Finance Act 2004 – Migrant Member Relief – which replaced Corresponding Relief. This is because Mrs Haseldine is not a 'relevant migrant member' within paragraph 4 of Schedule 33, and, in any event, the OASI scheme is not a 'qualifying overseas pension scheme' within paragraph 5 of Schedule 33 (on account of its not being in the list of notified schemes held for the purposes of paragraph 5 of Schedule 33).

21. She referred the Tribunal to section 611 ICTA (definition of 'retirement benefits scheme') for the proposition that such a scheme for the purposes of Chapter 1 of Part XIV ICTA does not include any national scheme providing relevant benefits (broadly, retirement pension benefits).

22. She submitted that the DTA does not entitle Mrs Haseldine to relief for the voluntary contributions made to the OASI scheme because the OASI scheme is not accepted by HMRC (the competent authority of the host state, the UK) as generally corresponding to a pension scheme recognised as such for tax purposes by the UK. This is because a national scheme is excluded from the definition of 'retirement benefits scheme' in section 611 ICTA – see above.

23. She contended that the voluntary contributions made by Mrs Haseldine to the OASI scheme are of the same nature as voluntary national insurance contributions made in the UK, which are not eligible for tax relief.

24. She submitted that if (contrary to her submissions) the voluntary contributions made to the OASI scheme by Mrs Haseldine were eligible for UK tax relief, that relief would be due in the respective year(s) of payment of the voluntary contributions.

25. She submitted that all the Swiss pension received by Mrs Haseldine (from the OASI scheme), including that part of it funded by the voluntary contributions paid by her, is taxable in the UK on the basis of Mrs Haseldine being domiciled and resident in the UK at all relevant times. The general rule for the UK taxation of foreign pensions is contained in sections 573 and 575 ITEPA.

The Law and our Decision

26. Article 18 of the DTA as effective at all relevant times is (so far as relevant) in the following terms:

> (1) … pensions and other similar remuneration paid to an individual who is a resident of a Contracting State, shall be taxable only in that State.
>
> (2) …
>
> (3) Contributions made by or on behalf of an individual who exercises employment or self-employment in a Contracting State ('the host state') to a pension scheme that is recognised for tax purposes in the other Contracting State ('the home state') shall, for the purposes of:
>
> a. determining the individual's tax payable in the host state; and
>
> b. …
>
> be treated in that State in the same way and subject to the same conditions and limitations as contributions made to a pension scheme that is recognised for tax purposes in the host state, to the extent that they are not so treated by the host state.
>
> (4) Paragraph 3 applies only if the following conditions are met:
>
> a. The individual is subject to the legislation of the home state in accordance with the Agreement on the Free Movement of Persons signed on 21 June 1999, between the Swiss Confederation on one side and the European Community and its Member States on the other side; and
>
> b. The individual was not a resident of the host state, and was participating in the pension scheme (or in another similar pension scheme for which the first-mentioned pension scheme was substituted) immediately before he began to exercise employment or self-employment in the host state; and
>
> c. The pension scheme is accepted by the competent authority of the host state as generally corresponding to a pension scheme recognised as such for tax purposes by that State.

(5) For the purposes of paragraphs 2, 3 and 4:

a. The term 'a pension scheme' means an arrangement in which the individual participates in order to secure retirement benefits payable in respect of the employment or self-employment referred to in paragraph 3;

b. A pension scheme is recognised for tax purposes in a Contracting State if the contributions to the scheme would qualify for tax relief in that State and if payments made to the scheme by the individual's employer are not deemed in that State to be taxable income of the individual.

27. Applying article 18 of the DTA to the facts in issue, pension income is taxable in the State in which the payee is resident – in this case, the UK – see art. 18(1).

28. Contributions by an individual employed or self-employed in one State – the 'host state', here, the UK – are to be deductible for tax purposes in that State (notwithstanding domestic legislation to the contrary) provided that (a) the pension scheme is 'recognised for tax purposes' in the 'home state', here, Switzerland; and (b) a like deduction is allowed in the 'host state' (the UK) for contributions made to a pension scheme that is 'recognised for tax purposes' in the 'host state' (the UK). This is the effect of art. 18(3). Art. 18(5)(b) provides that a pension scheme is 'recognised for tax purposes' in a Contracting State if (*inter alia*) the contributions would qualify for tax relief in that State. Art. 18(3) is thus in the nature of an anti-discrimination provision.

29. Art. 18(4) limits the application of art. 18(3) to cases where the 3 conditions stated therein are met. It seems that Mrs Haseldine has fulfilled the first 2 conditions. The third condition, which is in issue, is that the [Swiss] pension scheme in question must be 'accepted by the competent authority of the 'host state' [the UK] as generally corresponding to a pension scheme recognised as such for tax purposes by that State.

30. Considering first this (third) condition, there is no evidence before the Tribunal that the OASI scheme has been accepted by HMRC, as the competent authority of the UK, as 'host state', as generally corresponding to a pension scheme recognised as such for tax purposes by the UK. Indeed, Miss Weare told us that the OASI scheme had not been so accepted by HMRC.

31. Further, since, by art. 18(5)(b) for a pension scheme to be recognised for tax purposes in a State, the contributions to the scheme must qualify for tax relief in that State, it follows that the national scheme in the UK which provides retirement pension benefits in return for national insurance contributions is not a pension scheme recognised for tax purposes in the UK. National insurance contributions do not qualify in the UK for tax relief.

32. Even on the basis that the OASI scheme is 'recognised for tax purposes' in Switzerland – which Mrs Haseldine asserts and which we accept for the purposes of

argument – art. 18(3) does not apply in her case for the additional reason that she had not been able to establish that she has suffered discrimination by reason of her voluntary contributions to the OASI scheme not being eligible for tax relief in the UK. The OASI scheme is a national scheme and contributions to the UK national scheme are not eligible for UK tax relief.

33. In argument, Mrs Haseldine placed great emphasis on the fact that the contributions for which she was claiming relief were voluntary contributions. She seemed to accept that no relief would be available for mandatory contributions, but asserted that voluntary contributions were different in a relevant sense. We cannot accept that. Voluntary contributions to the OASI scheme seem to us to enhance the pension entitlement of the contributor under the OASI scheme in a similar way to the way in which voluntary national insurance contributions enhance the pension entitlement of a contributor in the UK. Voluntary national insurance contributions do not attract tax relief in the UK.

34. For these reasons we conclude that the DTA does not apply to confer on Mrs Haseldine the relief which she claims. Nor, in our judgment, do the other domestic provisions which HMRC have considered, for the reasons given by Mrs Weare.

35. We therefore determine the first identified issue by deciding that none of the payments of £8,580 (in aggregate) made by Mrs Haseldine as voluntary contributions in relation to her OASI pension between May 1995 and June 2009 is eligible to UK income tax relief.

36. That being so, we need not decide the second issue. But we will say that we are inclined to agree with HMRC that if Mrs Haseldine's contributions to the OASI scheme were eligible for tax relief in the UK, such eligibility would relate to the respective year(s) in which the contributions were made. There would be no entitlement to relief for £8,580 in a lump sum in 2009 simply because claims had not been made in earlier years when the contributions had been made.

37. We also agree with HMRC that Mrs Haseldine's income from her OASI pension is taxable in the UK notwithstanding that the contributions do not attract UK tax relief. There is no applicable principle of symmetry in the construction of the legislation which allows us to disapply a charge on pension income on the basis that no relief is available for the relevant contributions.

38. Section 573 ITEPA relevantly provides as follows:

> '(1) This section applies to any pension paid by or on behalf of a person who is outside the United Kingdom to a person who is resident in the United Kingdom.
>
> (2) But this section does not apply to a pension if any provision of Chapters 5 to 14 of this Part [Part 9, ITEPA] applies to it.'

39. Section 575 ITEPA relevantly provides (with effect from 6 April 2005, and so, in relation to the year ended 5 April 2009) as follows:

> '(1) If section 573 applies, the taxable income for a tax year is the full amount of the pension income arising in the tax year, but subject to subsections (2) and (3).
>
> (2) The full amount of the pension income arising in the tax year is to be calculated on the basis that the pension is 90% of its actual amount, unless as a result of subsection (3) the pension income is charged in accordance with section 832 of ITTOIA 2005 [Income Tax (Trading and Other Income) Act 2005] (relevant foreign income charged on the remittance basis).
>
> (3) That pension income is treated as relevant foreign income for the purposes of Chapters 2 and 3 of Part 8 of that Act (relevant foreign income: remittance basis and deductions and reliefs).'

40. Dealing first with section 573 ITEPA, there is no evidence that any of Chapters 5 to 14 of Part 9 ITEPA apply to Mrs Haseldine's OASI pension. Therefore by section 575 ITEPA 90% of the actual amount of her OASI pension constitutes her taxable pension income for a tax year. There is no evidence that section 575(3) ITEPA has any impact in this case because Mrs Haseldine has not claimed that she is not domiciled in the UK.

41. In the result it appears that 90% (and not 100%) of the actual amount of Mrs Haseldine's OASI pension income constitutes her taxable pension income for a tax year.

42. This point was not expressly argued before us. Our preliminary decision on the third issue (see: paragraph 2 above) is that £3,143.72 (and not £3,493.02) is liable to income tax in respect of Mrs Haseldine's OASI pension in the year of assessment 2008/2009.

43. We give leave to HMRC by a written application to the Tribunal which must be made within 42 days of the release of this Decision (and a copy served on Mrs Haseldine) to make submissions as to why the full amount of Mrs Haseldine's OASI pension (and not 90% of that amount) is chargeable to UK tax in the year of assessment 2008/2009.

44. If such an application is made, the Tribunal will make appropriate further case management directions. If, however, it is not made, then our preliminary decision, as stated at paragraph 42 above will become, without more, our final decision on the third issue identified.

45. On this basis the appeal is allowed in part.

46. 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 findings of this decision notice.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2012