



**TC02367**

**Appeal number: TC/12/04656**

*National Insurance; class 2 contributions; failure to pay; whether failure to pay attributable to ignorance or error; whether ignorance or error due to failure to exercise due care and diligence; Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001, regulation 6; Appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CATHERINE THACKER**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE J GORDON REID Q.C., FCI Arb.  
EILEEN A SUMPTER, W.S.**

**Sitting in public at George House, Edinburgh on 12 October 2012**

**The Appellant in person**

**Mr Steve Duke, Officer of HMRC, for the Respondents**

## DECISION

### Introduction

1. This is an unfortunate case. The Appellant (Mrs Thacker), a self-employed  
5 earner since at least 1989, has failed to pay Class 2 National Insurance contributions.  
Having reached the age of 60 years, she discovered that her weekly state retirement  
pension was not as much as she expected. Her failure to pay these contributions is the  
reason. She now wishes to pay such contributions with a view to enhancing her  
weekly pension. HMRC have decided that any Class 2 contributions now paid in  
10 respect of the period between 1989 and 2004 should be treated as not having been  
paid for the purposes of any contributory benefit such as the retirement pension. This  
is because HMRC, while they accept that Mrs Thacker's failure to pay was  
attributable to her ignorance or error, contend that such ignorance or error was due to  
a failure on her part to exercise due care and diligence.
- 15 2. Mrs Thacker engaged in correspondence with HMRC, and they provided a  
number of lengthy and clear letters explaining the legal background and why they  
considered that her failure was due to her lack of due care and diligence.  
Mrs Thacker appeals to this Tribunal.
3. A Hearing took place at Edinburgh on 12 October 2012. Mrs Thacker  
20 represented herself (assisted by her husband, Phillip). She gave evidence.  
Mr Steve Duke, an HMRC Official, appeared on behalf of the Respondents. He led  
the evidence of Lisa Storey, a senior HMRC official with very considerable  
experience in and knowledge of the law and practice relating to the administration and  
collection of Class 2 National Insurance contributions. A bundle of documents and  
25 some authorities were produced. There was no dispute about the authenticity of the  
documents. Mrs Thacker did not take issue with the law as set forth by HMRC in the  
correspondence and in their Statement of Case.

### Legal Framework

#### *Basic Structure*

- 30 4. Every self-employed person is liable to pay Class 2 National Insurance  
contributions each week in which they are self-employed (Social Security Act 1975  
s7(1), Social Security Contributions and Benefits Act 1993 s11(1)). This is a weekly  
flat rate specified by regulations from time to time. For example in the tax year  
1989/90 it was £4.25; in the tax year 1992/1993 it was £5.35.
- 35 5. Such a person is required to give notification of their self-employment as soon  
as it starts (Social Security (Contributions) Regulations 1979 (SI 1979 No 591)),  
Regulation 53A, and Social Security (Contributions) Regulations 2001 (SI 2001 No  
1004). Regulation 53A applied from 11 April 1993 (SI 1993/260). Regulation 87  
applied from 6 April 2001 and was subsequently amended in 2009 by the Social  
40 Security (Contributions) (Amendment No. 3) Regulations 2009/600, Regulation 5  
with effect from 6 April 2009.

6. The 1979 Regulations as originally enacted required a person liable to Class 2 contributions, to apply to the Secretary of State (ie the DSS) for a contribution card (Regulation 51). In 1989, the application had to be made to the Department of Social Security (DSS).

5 7. In 1989 the application was carried out by completing and sending a form CF11 to the DSS. The form offered two ways of paying the contributions. The first was by stamping a contribution card, which was sent out by the DSS on receipt of form CF11; the stamps could be purchased at the post office; at the end of each tax year, the card was handed in to the local office of the DSS and a replacement card issued.  
10 The second method was by direct debit.

8. That system changed in 1996. From April 1996 a joint registration form was introduced, known as CWF1. That enabled a self-employed person to register with the DSS and HMRC (at that time, the Inland Revenue) at the same time. Before that date, separate registration with the Inland Revenue and the DSS was required.

15 *Time Limits and consequences of failing to meet them*

9. The National Insurance Scheme is essentially a pay-as-you-go scheme. Regulations specify periods within which contributions have to be made. This is necessary to prevent persons delaying payment until an event which triggers an entitlement to benefit (eg sickness or retirement) occurs.

20 10. Since 6 April 1983, for Class 2 contributions to count towards the basic State retirement pension, they must be paid by the end of the sixth year following the year in which liability for that contribution arises. If they are not so paid, then the contribution is treated as *not* paid towards basic State retirement pension. If they *are* paid before the end of that sixth year, the Class 2 contribution is treated as paid on the  
25 date made (Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001 regulation 4(3)); these provisions were formerly enacted in regulations 38(1A)(a) and 38(2) of the Social Security (Contributions) Regulations 1979. Regulation 38(2) provided for a two year time limit. The time limit changed over the years but as no payments have been made the  
30 changes do not matter.

*Relief from Consequences*

11. Regulation 6 of the Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001, as amended, provides *inter alia* that

35 (1) In the case of a contribution paid by or in respect of a person after the due date, where-

(a) the contribution is paid after the time when it would, under regulation 4 or 5 above, have been treated as paid for the purpose of entitlement to contributory benefit; and

(b) it is shown to the satisfaction of an officer of the Inland Revenue that *the failure to pay the contribution before that time is attributable to ignorance or error* on the part of that person or the person making the payment *and that that ignorance or error was not due to any failure on the part of such person to exercise due care and diligence*

an officer of the Inland Revenue may direct that, for the purposes of those regulations, the contribution shall be treated as paid on such earlier day as the officer considers appropriate in the circumstances, and those regulations shall have effect subject to any such direction.

10 *Available Guidance*

12. Various Departmental leaflets have been available to the public for many years from the Department of Social Security and other offices. These have been available in a variety of forms over the years since at least 1989. These generally describe the National Insurance Scheme. Some make specific reference to Class 2 contributions.

15 13. Leaflet FB30 dated April 1989, and entitled *Self Employed - A guide to your National Insurance Contributions and Social Security benefits* notes at page 4 that *as a self-employed person you pay a fixed amount of Class 2 contributions no matter how much you earn a week unless you have applied for a certificate of exception.... When you start work as a self-employed person, tell your local Social Security office (and the tax office), and ask for form CF 11 to complete.* The leaflet also notes that  
20 payment can be made by direct debit or by weekly NI stamps. It refers to other leaflets such as NI 41 for more information. It also points out that there are strict time limits within which contributions have to be paid to count for benefits

14. Leaflet NI 41 entitled *National Insurance for Self Employed People* (issued by  
25 the Department of Health and Social Security), which was available from April 1988 states *inter alia* that Class 2 contributions have to be paid weekly. It refers to the effect of non-payment and refers to another leaflet which deals with that topic in more detail (leaflet NI 48). A later version of this leaflet was produced in 1991 (NP 18) and again includes information on *inter alia* liability to pay Class 2 contributions (pages  
30 8-11) and time limits and their consequences

15. NI 48, (issued by the DSS) dated August 1989, entitled *National Insurance - Unpaid and late paid contributions* (also issued by the DHSS), again notes the requirement to pay Class 2 contributions by the self-employed, and the consequences of failure to pay by the due date.

35 16. For the tax year to 5 April 1990 and subsequently the Inland Revenue provided Notes to help taxpayers understand their tax assessment. These notes include clear references to Class 2 contributions, the liability on the part of self-employed persons to pay them, their connection with contributory benefits such as the retirement pension, and the consequences of failure to pay such contributions timeously.

40 17. From tax year 1996/1997, self-assessment returns contained Notes with information about Class 2 contributions. The Notes record that self-employed people

are generally liable for the flat-rate Class 2 contributions and refer to and give contact details for the National Insurance Contributions Office (NICO) for further information about registration. The Inland Revenue ran two publicity campaigns about Class 2 contributions, one of which was in January and February 2001. The later one was in 5 2005.

## **Facts**

18. Mrs Thacker has been self-employed since at least 26 November 1989. That precise date comes from HMRC records which we accept as accurate on this point. Since then, she has carried on business in Haddington, East Lothian, under the name 10 Bathroom World (Lothian) providing what she described as a retail bathroom and fitting service. She has a number of employees. She is registered for VAT. She has not hitherto had any difficulties in relation to the payment of income or other direct tax. Nor has she had any significant problems with the administration of and accounting for VAT. Indeed, HMRC did not suggest otherwise.

15 19. Since 1989, her business accounts and personal income tax returns have been prepared and submitted on her behalf by professional accountants. The first was Wallace Dempster, a chartered accountant who carried on business in the East Lothian area. He prepared and submitted her accounts and returns between about 1989 and 1997. He is retired. For about the last 15 years, Mrs Thacker's accounts 20 and returns have been prepared and submitted on her behalf by Dickson and Co CA, East Linton.

20. As at 1989 and subsequently Mrs Thacker was aware of the general nature of the National Insurance Scheme and that self-employed persons had to pay flat rate contributions by stamping a card or by direct debit. If, as she claimed, she and her 25 accountant completed and submitted form CF 11 to the DSS notifying them that she was a self-employed earner, she made no enquiries whatsoever, when she received no response from that or any other department about Class 2 contributions. She was aware that she had not received a card for stamping. She was aware that Class 2 contributions were not being debited from any of her bank accounts. Whether her 30 accountants (or either of them) were aware that she was not stamping a national insurance card relating to Class 2 contributions or that she was not paying such contributions by direct debit is unclear.

21. When Mrs Thacker attained the age of 60 years, she became eligible to receive the State retirement pension. She was disappointed with the weekly amount she 35 received and made enquiries. These enquiries led to her eventual registration as a self-employed earner for National Insurance purposes in August 2009. This, in turn, led HMRC to send her a demand for payment of unpaid Class 2 contributions.

22. On 4 August 2009 HMRC demanded £4,671.05 from Mrs Thacker. This related to outstanding Class 2 contributions between 26 November 1989 and 10 April 2004.

40 23. Mrs Thacker did not pay this amount. Accordingly, the arrears from 26 November 1989 to 5 April 2003 were waived as the obligation to pay them had

prescribed (HMRC appeared to operate a six year [English] limitation period rather than the conventional five year period of prescription generally applicable in Scotland).

24. By letter dated 13 October 2009 to HMRC, Mrs Thacker's accountant asserted that the reason why Mrs Thacker had not received Class 2 contribution *bills* was due to an administrative failure in HMRC's offices. He recorded that he was *well aware of the difference and necessity to pay Class 2 contributions*. He pointed out that *Class 2 contributions are not allowable for tax purposes and accordingly an accountant has little interest in how those are paid. Many clients pay these from a personal account to which we, as accountants, may have no access.*

25. On or about 27 October 2009, HMRC demanded £753.10 from Mrs Thacker. This related to the period between 6 April 2003 and 25 April 2009, although this was not explained at the time. Mrs Thacker's accountant complained about this by letter dated 11 November 2009. An explanation was given by HMRC in their letter dated 27 November 2009.

26. Mrs Thacker did not pay this sum until 4 March 2011. By that stage the arrears for the period 6 April 2003 to 10 April 2004 had been waived. It was too late to pay Class 2 contributions to count for retirement pension for the tax year 2003/2004. The late payment was not attributable to ignorance or error on the part of Mrs Thacker. The sum of £121.90 attributable to that period remains unallocated on the Appellant's national insurance account. HMRC have offered to refund that sum but the Appellant has not yet accepted that offer.

27. By letter to HMRC dated 28 June 2011, the Appellant enclosed copies of various documents. These were a contracting-out application dated 14 July 1991 relating to the Plumbing and Mechanical Services (UK) Industry Pension Scheme, a contracting-out certificate dated 18 December 1997 and a letter to HMRC from her local Citizens Advice Bureau dated 27 August 2010. Further correspondence ensued in the course of which the Appellant produced, a copy of an Inland Revenue Construction Industry approval dated 14 July 1999 together with an extract from leaflet IR 116, a copy of an application for an Occupational Scheme dated 3 June 1991 which notes her status as a sole proprietor. These documents were intended to show in some way that HMRC ought to have appreciated that she should be paying Class 2 contributions and should have demanded payment for them from her. She also produced an Inland Revenue approval of her application for a Subcontractors Tax Certificate (CIS 6) dating from 1999. An accompanying leaflet notes that the Inland Revenue states that it will check that tax and NI contributions have been paid before issuing the Certificate. However this relates to Class 4 contributions not Class 2.

28. By letter dated 20 October 2011, Wallace Dempster wrote to the National Insurance Contributions and Employers Office. He stated *inter alia* that his recollection of the position in November 1989 was that *Mrs Thacker, an employee of my company at the time, and myself spent time completing all the application forms*

*required to satisfy both of the departments (sc the DSS and the Inland Revenue) involved as we were very aware of the importance of both forms.*

29. By letter dated 25 November 2011 to Mrs Thacker, HMRC set out in detail their views and issued the following decision:-

- 5           1     Your failure to pay class 2 National Insurance contributions for the period from 26 November 1989 to 10 April 2004 within the prescribed period was attributable to your ignorance or error, however, that ignorance or error was due to a failure on your part to exercise due care and diligence
- 10           2     Accordingly you are not entitled to pay class 2 National Insurance contributions for any period from 26 November 1989 to 10 April 2004.

30. Mrs Thacker appealed against that decision. She contacted Haddington Citizens Advice Bureau who wrote to HMRC on her behalf. Thereafter, HMRC rejected her Appeal by letter dated 4 January 2012. There was further correspondence and a suggestion that Mrs Thacker had appealed to this Tribunal. There was no record of such an appeal at that stage (January/February 2012).

31. Thereafter, HMRC noticed an error in their decision dated 25 November 2011 and wrote to Mrs Thacker about it on about 14 March 2012 (the date on the letter was wrong [9 February 2012] and should probably have been 14 March 2012). They pointed out that Mrs Thacker was *allowed* to pay Class 2 National Insurance contributions for any period prior to 10 April 2004, but that any such payments outside the prescribed time limits would not count towards future benefits. Enclosed with the letter was a further decision, dated 14 March 2012, in the following terms:-

That the decision issued on 26 November 2011 is varied as follows:-

- 25           1     That from 26 November 1989 to 10 April 2004 you are liable to pay Class 2 National Insurance contributions.
- 2     That from 26 November 1989 to 10 April 2004 you have not paid Class 2 National Insurance contributions.
- 30           3     Your failure to pay Class 2 National Insurance contributions for the period 26 November 1989 to 10 April 2004 within the prescribed periods was attributable to your ignorance or error, however that ignorance or error was due to a failure on your part to exercise due care and diligence.
- 4     Accordingly any Class 2 contributions paid for that period will be treated as not having been paid for the purposes of any contributory benefit.

It is this decision which is the subject of appeal to this Tribunal.

35 32. Mrs Thacker currently receives a State retirement pension of about £36 per week. If her Appeal is successful, she considers that the arrears of contributions which she proposes to pay will, if treated as paid for the purposes of entitlement to

contributory benefit, increase her retirement pension by about £30 per week. No precise figures are available.

## Discussion

5 33. There is really little dispute on the facts or the law. Mr Duke drew our attention to a number of cases which have discussed ignorance and/or error and lack of due care and diligence.

10 34. We were referred to *Walsh v Secy of State for Social Security* 28/4/94 Owen J, failure to pay Class 2 contributions due to the failure to exercise due care and diligence), *Adojutelegan v Clark* SCD SpC 430J Avery Jones 21/9/04 (SC3063/04) (proposal to pay Class 3 contributions late for purposes of qualifying for a retirement pension), *HMRC v Thompson* 2005 EWHC 3388 (Ch) 8/11/05 *Patten J* (failure to pay Class 2 contributions), *Rose v HMRC* 4/12/06 Sp Com Dr David Williams(failure to pay Class 3 contributions).

15 35. From these cases, the following emerges:- (1) The primary liability to pay Class 2 contributions lies with the self-employed earner; (2) there is no corresponding duty on HMRC or any other government department to ensure that payments are made; it is not for them to *chase up* potential contributors; (3) there are two tests to be satisfied; the first is that the failure to pay the contribution timeously is attributable to ignorance or error; demonstrating that the failure to pay is  
20 attributable to ignorance or error is a relatively onerous requirement; the second is that the ignorance or error must not be due to any failure to exercise due care and diligence; (4) the onus therefore lies on an appellant to show where appropriate that that ignorance or error was not due to any failure on his part to exercise due care and diligence; (5) the exercise of due care and diligence normally will result in payment  
25 on the due date, absent a good excuse for not doing so; financial, personal or organisational difficulties will not, in themselves, amount to such an excuse; (6) ignorance of the law and, in particular, the detail and effect of the regulations and the consequences of non-payment are not such an excuse; (7) the exercise of due care and diligence involves the positive step of making enquiries; thus doing nothing is  
30 not the exercise of due care and diligence.

35 36. *Adojutelegan* holds that the Tribunal's jurisdiction is fully appellate (paragraph 5) with which we agree, while in *Walsh* the court appeared to think the jurisdiction was supervisory. In the present Appeal the material before HMRC was sufficient to entitle them to conclude that her ignorance or error was due to her failure  
to exercise due care and diligence. Mrs Thacker took no positive steps to make enquiries about Class 2 or any other class contributions either by herself or through her accountants. Neither appeared to have done so.

40 37. It is clear, and it is not disputed that, having regard to her status as a self-employed person, and the nature of her business and its turnover over the years since 1989, Mrs Thacker ought to have paid Class 2 contributions each week either by direct debit or by stamping the appropriate national insurance card and handing it in to the DSS each year. It is also clear that her failure to do so was not a deliberate act on



her part in the sense that she was intentionally seeking to avoid making such payments. Her failure was plainly attributable to ignorance or error (except in relation to the period 2003/2004). It does not matter which, although we incline to the view that it was error rather than ignorance.

5 38. Mrs Thacker was not ignorant or at least cannot be regarded as ignorant about the existence of the National Insurance Scheme. She had professional advisers preparing her accounts and income tax returns. Any reasonably competent accountant would have been aware of the National Insurance Scheme and the obligation on self-employed earners to pay Class 2 contributions.

10 39. Mrs Thacker asserts that in 1989 she completed and submitted with the assistance of her accountant, form CF11. The letter from her accountant to some extent supports that assertion, but even if we accept that evidence, it does not help her. If anything, it makes matters worse. It shows she was aware of the need to register with the DSS or DHSS. It shows that she was aware of the need to pay Class 2  
15 National Insurance contributions because she was or was about to become a self-employed earner. When she received no response to her notification, she did nothing. She must have known that she was not paying Class 2 contributions. She was not stamping a card and returning it each year for a new one. Her accountants were not doing so on her behalf. There would be no regular direct debits paid through her bank  
20 account. Had she exercised due care and diligence, she would have made appropriate enquiries either with the Inland Revenue, the DSS, or DHSS, or instructed her accountant to do so on her behalf.

40. All the documents which Mrs Thacker produced about her dealings with the Inland Revenue and various occupational pension schemes are, unfortunately for her,  
25 to no avail. They do not relate to Class 2 contributions. They do not amount to notification of her liability to pay Class 2 contributions in accordance with the statutory provisions.

41. It may seem surprising, that the omission to pay Class 2 contributions was not picked up by Mrs Thacker's accountants. Such accountants would, one would think,  
30 be aware that Class 2 contributions were payable even if Mrs Thacker was unaware. The sums payable are not large, but the fact of non-payment, we think, should have been apparent from any reasonable examination of Mrs Thacker's books and records. If the assumption was that she was paying by direct debit, the presence or absence of such debits from her bank statements ought to have been apparent. If the assumption  
35 was that she was paying by stamping a national insurance card each week, the cost of each weekly stamp ought to have featured somewhere in her records. However, these accountants did not attend or give evidence and one of them has pointed out that accountants have little interest in how Class 2 contributions are paid and that some clients pay through personal accounts to which accountants may have no access to  
40 those accounts. Beyond these assertions, which may or may not be well founded, they have had no opportunity to explain themselves. Mrs Thacker may give them that opportunity in the light of our decision.

42. It is clear on the evidence that Mrs Thacker made no enquiries either by herself or through her accountant. She or perhaps her accountant should have done so. Her ignorance or error was due to her failure to make enquiries, which is a failure to exercise due care and diligence. On the evidence before us, we therefore reach essentially the same conclusion as HMRC. We are not satisfied that the Appellant's failure to pay Class 2 contributions was not the result of her failure to exercise due care and diligence. The only exception to that relates to the year 2003/2004 (see paragraph 26 above). In relation to that year, Mrs Thacker does not pass the first of the two tests specified in regulation 6(1)(b) of the 2001 Regulations.

10 **Result**

43. The Appeal must therefore be dismissed. We do this with some regret as, on the evidence, we are prepared to accept that Mrs Thacker has worked hard to maintain her business, and paid all other relevant taxes. It is unfortunate that her basic retirement pension will be at a lower level than it would otherwise have been, particularly as she apparently has the funds to make up the shortfall. We understand that some voluntary Class 3 contributions could be made but this is a more expensive exercise.

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**J GORDON REID Q.C., FCI Arb.  
TRIBUNAL JUDGE**

**RELEASE DATE: 12 November 2012**

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