[2016] UKFTT 231 (TC)

TC05006

Appeal number: TC/2014/03837

NATIONAL INSURANCE CONTRIBUTIONS – whether married woman's election for exemption and the reduced rate effective – whether NICs paid - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS CHERRY ELLEN MORGAN **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER DAVID EARLE

Sitting in public at the Royal Courts of Justice, Strand, London on 7 December 2015

The Appellant, Mrs Cherry Ellen Morgan

Ms Linda Gordon, an officer of the Respondents, for the Respondents ("HMRC")

DECISION

1. The appellant appealed against a decision made by HMRC on 14 May 2014 under section 8 of the Social Security (Transfer of Functions etc) Act 1999 (the "**decision**") that:

(1) the appellant was not liable to pay flat-rate Class 1 (employed persons) national insurance contributions ("**NICs**") as a married woman in the period from 17 April 1972 to 5 April 1975,

(2) the appellant was liable to pay earnings related NICs at the married woman's reduced rate in the period from 6 April 1975 to 2 November 1979, and

(3) the amount of NICs paid by the appellant in those periods and later periods until 2007/08 is as shown in a schedule to the decision letter.

2. For a number of years, from the time when the national insurance system was first introduced in 1948, a married woman was able to make an election not to pay flat-rate NICs (a "**married woman's election**"). When the NICs regime was overhauled in 1975 and earnings related NICs were introduced, a married woman was instead able to elect to pay such NICs at a reduced rate (a "**reduced rate election**"). The rules went through a number of changes over the years in question and, as the effect of these rules is central to this appeal, we have set them out in some detail below.

3. In summary HMRC's view, on which they have based their decision, is as follows:

(1) The records they hold demonstrate that the appellant elected not to pay flat-rate NICs as an employed married woman with effect from 17 April 1972 by submitting an application to a Department of Social Security ("**DSS**") local office in Aldershot. This remained effective until 5 April 1975.

(2) Under the NICs rules in place at the time, this election was deemed to continue on an on-going basis without any further action required by the appellant. When the NICs system was overhauled in 1975, the election in effect continued as a reduced rate election. In any event, the records show that the appellant reaffirmed her choice by submitting a reduced rate election to the DSS again at Aldershot which was effective from 6 April 1976.

(3) The reduced rate election remained in place until 2 November 1979, the date on which Mrs Morgan obtained a divorce from her then husband.

(4) HMRC's records show that the appellant paid no flat-rate NICs in the period from 17 April 1972 to 5 April 1975 and paid reduced rate earnings related NICs from 6 April 1975 to 2 November 1979 which accords with the above position.

(5) The appellant argues that she paid NICs in the later years which are not shown on the schedule to the decision letter but HMRC can find no trace of such NICs and the appellant has provided no evidence in support of this.

4. In outline, the appellant's position is that she did not make a married woman's election with effect from 17 April 1972 or a reduced rate election with effect from 6 April 1976 or at all. HMRC's records are wholly inadequate and unsubstantiated such that they cannot be relied on as evidence that the appellant made such elections. HMRC's interpretation of the law as to the making of such elections and the deemed continuation of such an election is incorrect. On that basis full NICs were due from the appellant in the period from 17 April 1972 until 2 November 1979 and should have been deducted and accounted for by the appellant's employer. The appellant also contends that she paid NICs in the later years which are not shown in the schedule to the decision letter as further explained below.

5. Both parties' submissions are set out in further detail below.

Facts

6. Some of the key facts in this case are disputed. The main issue is the validity and accuracy of the NICs records which HMRC have produced, in particular, as regards a document referred to as the RF1. HMRC assert this is the permanent NICs record for the appellant for the relevant periods from 1972 to 1979.

7. We have formed our view of the facts from the documents and information provided by each party and the evidence given by the appellant and by Mr Greenshields of HMRC.

8. The appellant's national insurance number and date of birth is as set out on the RF1. We have not set these details out here for confidentiality reasons. The appellant's maiden surname is Kemp. Her forenames are Cherry Ellen. Through marriage the appellant has had the surnames of Case, Sheldon, Dooley and Jarrett and she is now Mrs Morgan.

9. The appellant was married to Mr Case on 16 March 1968. We do not know precisely when she was divorced from Mr Case.

10. The appellant was married to Mr Sheldon on 15 April 1972. The decree nisi for a divorce from Mr Sheldon was issued on 14 November 1975. The date of the decree absolute for the divorce is disputed.

11. The appellant states that the decree absolute was issued sometime in January 1976. She states she remembers this as it was around the time of her birthday (in January). The decree absolute produced to the tribunal was issued by Kingston County Court and shows a date of 7 May 1976 although there was another date which had been crossed out (and could not be read). The date of 7 May 1976 accords with the information on the form RF1 referred to at length below. The appellant thought that the date of 7 May 1976 shown in the decree absolute is a mistake. She noted that a decree nisi would usually become absolute six weeks after it was issued. In her view it would not have been possible for her to marry again on 15 May 1976 (see 13) if she had only received her decree absolute ending this marriage on 7 May 1976.

12. In the absence of any further explanation as to why the date shown on a decree absolute issued by Kingston County Court is not correct, we have concluded that the appellant's marriage to Mr Sheldon ended on 7 May 1976.

13. The appellant was married to Mr Dooley on 15 May 1976. The appellant was divorced from Mr Dooley on 2 November 1979.

14. The appellant was married to Mr Jarratt on 24 January 1980.

15. The appellant was a student from September 1953 until Easter after her sixteenth birthday in 1965. Before 6 April 1975 a person was required to register for national insurance at a Youth Employment office. The appellant registered for NICs on 31 July 1964 at the Ealing office (code number 1-48). At that time she was given her national insurance number.

16. The appellant lived at an address in Allenby Road, Southall until she married on 16 March 1968. She then lived at an address in Framfield Road, Hanwell until she joined the Army (WRAC) in 1969. The Army tax deduction sheets relating to the appellant show her address as the Allenby Road address for the tax year 1971/72. The appellant later lived at an address in Abbey Court, Heathcote Road, Camberley.

17. The employer's deduction cards produced to the tribunal show that:

(1) In the years 1965 to 1969 the appellant was employed by Lyons Maid Limited, Twyford Laboratories Limited and Glaxo Group.

(2) In 1969 the appellant was employed by the Army (WRAC). That employment is shown as ending on 6 July 1971.

(3) In 1971/72 the appellant was employed by Reckitt & Coleman and the Animal Virus Research Institute. The appellant left employment with the Animal Virus Research Institute on 3 September 1971.

(4) The employment with Reckitt & Coleman continued in 1972/73. There are two cards produced by Reckitt & Coleman relating to the appellant:

(a) One is in the name of Case which shows pay of £31, income tax of £4.40 and employee's graduated insurance contributions of 0.64. This states that the employee left employment with Reckitt & Coleman on 15 April 1972.

(b) The second is in the name of Sheldon which shows pay of £700.31, income tax deducted of £70.05 and employee's graduated NICs of £16.61. The leaving date from the employment is shown as 11 January 1973.

18. The appellant was employed by the Ministry of Defence ("**MoD**") (M.V.E.E., Chobham Lane, Chertsey, Surrey) at some point in the tax year 1972/73. A tax certificate produced by the MoD for that year shows the date of contracting out as 15 January. This employment continued until 1983. The appellant does not recollect any break in her employment with the MoD as seems to be shown on the RF1 (see 36 and 37).

19. The appellant gave evidence that whilst working for the MoD she had a position of responsibility working in a high security environment and was subject to the Official Secrets Act 1920 (as amended and in place at the time). The appellant was subject to vetting procedures when she joined the MoD and it was one of the terms of her employment that she had to report any change in her personal circumstances to her employer with supporting information. Any contravention of these requirements would be a serious matter potentially involving dismissal and prosecution.

20. The appellant did not pay flat-rate NICs in the period from 17 April 1972 until 5 April 1975 and paid earnings related NICs at the reduced rate in the period from 6 April 1975 until 2 November 1979. We accept that this is the position according to HMRC's records and note that the deductions sheets produced by the MoD relating to the appellant support this in that they show that the appellant paid reduced rate employee's earnings related NICs for the periods 1975/76 to 1978/79. The appellant confirmed the records she had relating to her NICs position had been lost when she had moved from the UK to live in Spain some time ago.

DSS procedures – evidence of Mr Greenshields

21. Mr Greenshields, an officer of HMRC, gave evidence for HMRC. Mr Greenshields was employed by the DSS (and later HMRC) from July 1965 to October 1967 and from February 1975 until the present time. He worked in Records Branch of the DSS until 1987 and his subsequent roles within the DSS and HMRC have all been related to NICs. In all of his jobs he has been involved in the training of new officers and providing written instructions to colleagues to adhere to correct working procedures. He spent two years as a specialist instruction writer in Records Branch.

22. During the period in question Mr Greenshields did not deal with the NICs record of the appellant. He was asked by HMRC, in the light of his experience, to given evidence on the general administrative procedures which existed at the relevant time in bringing NICs to account, the maintenance of NICs records and the associated practices which existed both locally and within Newcastle Central Office.

23. As Mr Greenshields was not involved personally in any way in the appellant's NICs affairs, we do not regard him as a witness of fact as to the events which took place in the relevant period in relation to the appellant's NICs affairs, the validity of the form RF1 produced to the tribunal and whether the entries on it were made correctly. It is for the tribunal to assess the validity of the form RF1 and the entries made on it on the basis of all the available evidence and information (as set out below). Mr Greenshields' evidence on the practices and procedures of the DSS in place at that the time and, on the meaning the entries in the form RF1 would usually have, is relevant to that assessment.

24. We accept the following evidence from Mr Greenshields as to how NICs procedures were intended to operate at the relevant time:

(1) When a person registered for NICs as an employee, the DSS would create a person's permanent NICs record card, such as the RF1 produced in evidence

in this case. This was sent to Records Branch at Newcastle upon Tyne where the NICs records were stored. On receipt a corresponding computer record would be created to enable any graduated contributions paid to be recorded.

(2) A person would be required to give their personal stamp card (NICs card) to their employer to enable Class 1 (employed rate) contributions to be paid on their behalf. Each time earnings were paid the employer would be obliged to deduct the employee's share of the contributions and affix a Class 1 stamp to the person's card. Both the employer and the employee contributed to the cost of the card.

(3) At the beginning of March each year the employer would be required to surrender the person's expired NICs card to the local DSS office for exchange. After issuing a new card the expired card would be retained and sent to Records Branch where it was matched from the national insurance number to the appropriate RF1.

(4) The clerk would count the number of stamps and record the total in the appropriate columns in the contributions section of the RF1. If there was a shortfall in the number of contributions during a year the clerk would issue a statement of account which gave the person the chance either to query their record, if they thought it was wrong, or to make good the deficiency.

(5) The form RF1 was used to record notes which affected the liability of the person and changes to identity and in status. Such notes could be recorded in columns o to u or in the Notes boxes, wherever space permitted.

(6) Benefit enquiries were recorded in the RF1 in relation to benefit claims which had been made at the local DSS office. They were recorded on the date of receipt in Records Branch in columns l, m and n. Benefits claims were subject to managerial checks and to audit by a team of independent officers.

(7) The details and amendments recorded on the RF1 were obtained as a result of information which had been supplied by the person either to the local DSS office, who passed it on to Records Branch, or to the employer who then transcribed it to the NICs card. There was no other source of information.

(8) The process of bringing contributions to account was subject to managerial checks by the Records Branch section supervisor as well as audit by a team of independent officers from Finance Division.

(9) In 1975, when major changes were made to the way NICs were paid and accounted for, the system for recording NICs became computerised. NICs were then paid in tax years from 6 April in one year to 5 April in the next. At the end of each tax year the Inland Revenue submitted an end of year return on a tax deduction card to Newcastle upon Tyne. The NICs contribution information shown was input electronically to the person's NICs record. The end of year return was microfilmed and stored in an archival area.

(10) The RF1 continued to be used for a number of years as a back-up document to the computer record and certain notes, which could not be accommodated electronically, continued to be recorded clerically.

(11) The details and amendments recorded on the computer based record were obtained as a result of information which had been supplied by the person either to the local DSS office, who passed it on to Records Branch, or to the employer who transcribed it to the end of year return. There was no other source of information.

(12) As well as supervisory checks both at local office and at Records Branch, the processes for dealing with elections and for recording contributions was subject to audit to help maintain the integrity of the records. In addition a team of National Insurance inspectors was employed at each local DSS office. One of their tasks was to make regular visits to survey the wages records of employers in their area to ensure they were being compliant and paying the correct rate of contributions for each employee. Employers were well aware that if they found to be non compliant or deducting the wrong rate of contributions, they could be held liable to pay both their own and the employee's arrears.

(13) Form RF1 was intended only for internal use and any deletions and amendments were made as a result of superseded information being received. Correction fluids such as Snopake and Tippex were strictly forbidden.

(14) Mr Greenshields estimated that the risk of error in NICs records at the time was relatively low being in the range of 5% to 10%.

25. We note that the appellant's view, as regards her employment with the MoD, is that it would not be possible for DSS inspectors to visit the MoD and inspect their wages records as the MoD would not allow non vetted inspectors to view private details of personnel working on "official secrets". We can see nothing in the Official Secrets legislation or the NICs rules at the relevant time which supports the appellant's assertion. No evidence has been presented which indicates that the MoD was not subject to the same NICs rules and procedures as other employers. The tax and NICs deduction sheets prepared by the MoD relating to the appellant indicate that the MoD were subject to the same NICs responsibilities as any other employer.

26. Based on the evidence of Mr Greenshields, the legislation and NICs guidance in place at the time, the procedure for making a married woman's election was as follows:

(1) To make a married woman's election the person had to complete a form CF9 which was attached to leaflet MPNI1 "National Insurance for Married Women".

(2) The leaflet set out the options available and the effect those options had on benefit entitlement. The leaflet included the following statements and explanations:

(a) When a woman married she was required to inform the local DSS office within 13 weeks and should take or send a marriage certificate and contribution card to the office.

(b) It was necessary to notify an election not to pay flat-rate contributions by providing a form CF9 and taking or sending it to the

local DSS office as soon as possible after marriage. Until this was done and a certificate was affixed to the woman's NICs, the employer would have to stamp the card at the full rate.

(c) At paragraph 8: "Once your choice is recorded it remains in force, even if you change your class of insurance, until you cancel it by recording a different choice".

(d) At paragraph 9: "You can change your recorded choice at any time by completing form CF9".

(3) CF9 itself included a declaration confirming that the woman had read the leaflet or had had it explained to her.

(4) Where the choice was made not to pay flat-rate NICs, the CF9 was submitted to the local DSS office who issued a special married woman's NICs card. This gave the employer the authority to deduct a weekly exempt rate contribution. Without this authority the employer was obliged to deduct a Class 1 (employed person) contribution. When the reduced rate election was introduced the authority for the employer would be in the form of a tear off portion from the NICs card for the relevant year or a reduced rate certificate.

(5) In such circumstances, where there was a reduced rate election in place, if a year end return was received from an employer bearing full rate NICs it should have been rejected by computer program. The procedure was for a compatability check report to be sent to the local DSS office requiring them to investigate why full rate contributions were being paid during a period of reduced rate liability.

(6) The local office would then notify Records Branch of the election details. Once the RF1 has been updated to note the making of the election the CF9 was kept for a period of 6 years in the local office and then destroyed in accordance with DSS guidelines on the retention of documents.

(7) The RF1 was regarded by the DSS as the permanent record of the NICs contribution position.

RF1 produced to the tribunal and HMRC's and the appellant's evidence

27. The bundles of documents provided to the tribunal include a copy of the RF1, which HMRC believe to be that of the appellant. An original of this was shown to the tribunal at the hearing. Below is a summary of the information shown on this RF1, together with the comments of the appellant and Mr Greenshields. Some of the comments are submissions rather than evidence as such but we have included all comments here for ease of reference. Our conclusions on the validity of the form RF1 and the entries made on it are set out in the discussion.

Front page of RF1

28. By the heading "surname", the names "Kemp", "Case" and "Sheldon" are shown, all of which are crossed out.

29. By the heading "Christian names" the names "Cherry Hellen" are shown and after that "Miss" (crossed out) and then "Mrs". The appellant noted that her middle name is Ellen and not "Hellen".

30. A number is shown on the form which is the appellant's national insurance number (which is not repeated here for reasons of confidentiality).

31. There is a list of 5 addresses, with the initial four shown as crossed out (but still legible). Two of the addresses correspond to those of the appellant in Southall and Camberley as set out in 16. The appellant did not dispute that she lived at one of the other addresses but said that she did not live at the remaining two and that one of those addresses does not exist. Mr Greenshields' view is that the addresses would have been provided by the appellant or the employer as those were the parties who, in line with procedures at the time, HMRC relied on for the provision of such information.

32. The "date of birth" shown on the form is that of the appellant (which is not stated here for reasons of confidentiality).

33. There are two boxes together as follows:

(1) "Marriage", by which two dates are shown: "16/3/68" and "24/1/80". These entries are stated to be not verified. These dates correspond to the dates of the marriage of the appellant to Mr Case and Mr Jarratt respectively.

(2) Under the heading "spouse" is the name "Anthony Peter Sheldon" (with the middle name of "George" crossed out). There is a space for a national insurance number but none is shown. The appellant was married to Mr Sheldon.

34. The appellant noted that the above boxes show no national insurance number for the appellant's spouse and the form indicates that Mr Sheldon is still her spouse although they divorced in 1976. She asserted that if a married woman's election was made, the marriage and the spouse's national insurance number would need to have been verified. If an election had been made it should surely have appeared in this section of the form. The appellant queried this with Mr Greenshields. He said that spouse details would usually be included on the RF1 only if widows' benefits were claimed. The full details may be recorded on the CF9, including the spouse's national insurance number, if known at the time. It was not thought necessary to include that on the RF1 once the CF9 details had been checked. We accept Mr Greenshields' evidence in this respect.

35. The appellant noted that at the time of her marriage in 1976 her husband was also employed by the MoD at Cheadle Hulme. If she had made a reduced rate election in 1976, under the Official Secrets Act, it would have been made through the MoD (see 47 also). All of the details of her and her spouse would have been passed to Cheadle Hulme and on to the DSS and so would appear on the RF1.

36. In a section "Note 1 (Seafarer's Ds.A.No)" there are the following notes:

"ID divorced date n/k

Remarried 15/4/72 (v)

Divorced 7/5/76 (NV)

Civil servant from 2/6/75 to 17/8/75

Civil servant from 23/8/75"

37. The remarriage date of 15/4/72 and divorce date of 7/6/76 shown in 36 corresponds to the dates of the appellant's marriage to and divorce from Mr Sheldon. The reference to employment as a civil servant appears to be to the appellant's employment with the MoD. The appellant commented that there was no break of 5 days in her service with the MoD as the above notes seemed to indicate. She noted that Mr Greenshields seeks to justify this by stating in a letter of 17 February 2015 that a possible reason for the gap could be if the appellant was involved in industrial action at the time. The appellant stated that it was not possible to be involved in industrial action whilst working for the MoD as such action was prohibited.

38. Next to "Note 1" under "Note II" there is stated "Remarried 15/5/76 (NV)". This corresponds to the date on which the appellant married Mr Dooley. There are some further entries which it is difficult to read. Amongst the legible parts is a reference to "(Dooley)", "Divorced 2.11.79 (NV) and "remarried 24/1/80 (NV) to Kemp". As noted Mr Dooley was married to the appellant. The divorce date corresponds to the date when the appellant was divorced from Mr Dooley. The other remarriage date corresponds to the date she married Mr Jarratt.

39. On Note II there is also a stamp dated 21 August 1964. Mr Greenshields stated that this date stamp indicated that a corresponding NICs computer record was created for the appellant on that date.

40. The appellant noted that the entries on the RF1 set out in 33, 36 and 38 appear to be ad hoc, a number of them are stated to be not verified and this is inconsistent with them being entered formally as regards any married woman's or reduced rate election. The reference to Kemp (noted in 38) is another error. The appellant reverted to Kemp when she separated from Mr Dooley and he left the MoD. The name of Mr Jarratt her later husband does not appear on the form at all.

41. Below the above information are columns for:

(a) "Contributions" with headings underneath of "a" to "k",

(b) "Benefits" with headings underneath of "l" to "n", and

(c) "Permanent Notes" with headings underneath of "o-t" and "u".

42. Under the "Contributions" heading there is a list of years of "64/65" to "71/72" with figures in the columns adjacent showing contributions credited and paid. For the year "72/73" no contributions are shown. For the year "73/74" and "74/75" figures are listed under an "exempt contributions" heading.

43. Mr Greenshields gave evidence that the entries described in 42 meant that:

(1) The relevant person made full NICs contributions for each of the years from 1964/65 to 1971/72.

(2) The person made no NICs contributions for the year 1972/73.

(3) The person made exempt contribution for the years 1973/74 and 1974/75. Exempt rate contributions were not usually recorded because they did not count for contributory benefits. An exception was that contributions were recorded if the person was contracted out of the graduated pension scheme. This entry shows therefore that the person was contracted out. The entry in the "Permanent Notes" section of "NPE 5373" supports this in that it means non participating employment, as in contracted out employment.

44. Also under the "Contributions" heading in j (headed "Contribution record issued") there are notes against the years 1966/67 and 1971/72 which Mr Greenshields gave evidence meant that statements of contributions made were issued to the person for 1966/67 on 19 May 1967 and for 1971/72 on 3 May 1972.

Second page of RF1

45. Also under the "Contributions" heading under the Notes section in "k" there are a number of notes which, to the extent legible, read as follows:

> By the date "72/73" "Q Run" and "Re-Marr"
>
> By another date "72/73" "**MN1/NP17/4/72 (NI Only)**" (bold added)
>
> Undated entries:
>
> "Divorced 7/5/76 (NV)
>
> Remarried 15/5/76 (NV)
>
> **MW/NP 6/4/76 (706)** (bold added)
>
> RD 400 6/4/78
>
> Divorced (Dooley) 2.11/79 (NV)
>
> Remarried 24.1.80 (NV)"
>
> A couple of further entries which were not very legible.

46. Again the divorce and remarriage dates correspond with those of the appellant. Mr Greenshields gave evidence that:

(1) The first entry highlighted in 45 means "Married Woman Employed Not Paying contributions from 17 April 1972". He noted that against the same year in the "Benefits" section there is a reference to a benefit claim involving the Aldershot office as it includes the reference "706" which relates to that office (see also 48).

(2) The second highlighted entry means "Married Woman Employed Not Paying contributions from 6 April 1976". Again the reference to "706" is to the Aldershot office.

(3) Mr Greenshields took the above to mean that the person had made a married woman's election with effect from 17 April 1972 and a reduced rate election with effect from 6 April 1976, in each case, at or through the Aldershot office of the DSS.

(4) When questioned Mr Greenshields stated that the reason the alleged election did not appear with the marriage dates and spouse information on the front page of the RF1 is that the entries are made on the lines for the year. The appellant noted that there are also date entries on the first page of the RF1.

47. The appellant disputed the validity of the entries which Mr Greenshields said demonstrated a married woman's election had been made as highlighted in bold in 45. In outline:

(1) The appellant accepted that the two entries were not ambiguous or unclear but argued that they were wholly incorrect.

(2) The appellant was not in employment at the time the election is alleged to have been made with effect from 17 April 1972. She had a break in her employment and was not back in employment until June 1972. It is a requirement of the ability to make the election that the person is employed at the relevant time. Also the appellant would have been on honeymoon on 17 April 1972 as she was married on 15 April 1972.

(3) As regards the alleged 1976 election, the appellant was employed by the MoD at the time. Aldershot was not the appellant's tax office and would not have any of her details to process such an election. Her tax office was in Wales. There is no Aldershot address shown in the deductions sheets of the MoD produced by HMRC. That the office was Aldershot is inconsistent with the statements of account produced by HMRC in their bundle which in several places state "office unknown".

(4) In 1976 the information would have been required to be sent to Cheadle Hulme for action, being where she was based for the MoD, as no other tax office could or would process information relating to personal details of employees covered by the Official Secrets Act. To have discussed any aspect of her employment with anyone outside the establishment of her employer would have contravened the Official Secrets Act. Had she made such a contravention she would have faced dismissal and prosecution. (See also 35.) This demonstrates that she provided all relevant details on her circumstances to her employer.

(5) The appellant was granted a decree nisi for the dissolution of her marriage on 14 November 1975 and her recollection is that she received the decree absolute in January 1976. She did not remarry until 15 May 1976. Under the regulations in place at the time an election could not be made unless a marriage certificate was produced in support of the election. It was not possible for the

appellant to have made that election due to not being married and not having any such certificate at that time.

(6) In addition the appellant submitted that it would never have crossed the appellant's mind to make such elections. At the period in question she had suffered post traumatic stress disorder due to violence in her family circumstances. The appellant would not in any way want to be reliant on a man. She has always been highly engaged with the issue of obtaining equal rights for women. The making of such an election would be wholly out of kilter with this outlook.

48. Mr Greenshields gave evidence that the entries under "Benefits" related to benefits claimed such as sickness benefits as indicated by "SB". For example the notation in columns l, m and n shows "23.10.73 706 SB". This means that an enquiry was received from the local office in Aldershot relating to a sickness benefit claim made by the person.

49. The entries under "Permanent Notes" showed notes as follows:

(a) Against the year "64/65" - "student from 20/3/64 to 25/10/65.

(b) Against the year "69/70" - "HMF W1437107 enlisted WRAC 3/4/69 RF200.

(c) Against the year "71/72" - "HMF Discharge 5/7/71 (with a further illegible note).

(d) Against the year "73/74" - "NPE 5373" .

(e) A further entry which was not legible.

50. Mr Greenshields gave evidence that the entries in "Permanent Notes" in o to u are notes on the person's employment history. So the entry for 1964/65 showed the person as being a student from 20/3/64 to 25/10/65. The entry against the year 1969/70 showed an employment with the Armed Forces as an enlistment with WRAC and the further "Discharge" entry showed the end of that employment in the year 1971/72 with the precise date being 5 July 1971.

51. The appellant noted that information given as to when she was a student was wrong. She was a student from September 1953 until Easter after her sixteenth birthday in 1965.

52. Mr Greenshields stated that the references to "V" and "NV" in various places in the RF1 meant that the relevant information was verified or not verified by the DSS in the sense of whether the person filling in the RF1 had seen the underlying documents such as a marriage or divorce certificate. In accordance with the rules at the time the obligation was on the person to provide updated information such as relating to marriage status and address direct to the DSS or in some cases to the employer. Therefore the DSS was reliant on receiving updated information from the person primarily or the employer. We accept Mr Greenshields' evidence in this respect.

53. The appellant noted that a number of entries on the RF1 regarding marriage and divorce dates were not verified. In particular she noted that the entries regarding marriage and divorce in 1976 were stated to be not verified. She thought that these entries would surely have had to be verified for her to have made an election in that year.

54. The appellant also noted inaccuracies in documents provided by HMRC as showing that the records generally were unreliable, in particular:

(1) The deduction sheet produced by the Army for the period 1971/72 which referred to "Case CE" but showed the wrong national insurance number for the appellant.

(2) A deduction sheet prepared by the MoD for the tax year 1974/75 which contained the appellant's national insurance number and referred to "Sheldon CE" but showed the wrong date of birth for the appellant.

55. The appellant queried with Mr Greenshields how the DSS would detect that such details were incorrect. Mr Greenshields said that the computer system which was in place should detect such errors by trying to match the number to the name of the person or possibly by reference to the date of birth of the person. We accept his evidence in this regard.

56. As regards the deduction sheet produced by the Army for the period 1971/72, the appellant noted that this would have been received by the DSS at the beginning of the 1972/73 tax year which is when the alleged election took place. In the line for that year in the RF1 there is a "Q run" note indicating that there was a query but there is no indication that this was resolved.

Employment in later years

57. From the discussion at the hearing, the parties had largely reached agreement as regards the NICs position for the years from 1979 onwards. However, the appellant remained of the view that some additional NICs had been paid by her in the year 1995/96 as regards employment she had through the Beaver Employment Bureau which was not reflected in the schedule to HMRC's decision letter. A letter was produced to the tribunal from Group 4 Total Security Ltd addressed to "whom it may concern" dated 13 November 1996 which stated that the appellant had worked for that company on a special project for 6 months from the end of 1995 to the beginning of 1996. The letter went on to note that the appellant was not actually employed by the company but was contracted to the company by the Beaver Employment Bureau. We accept on the basis of this letter that the appellant had a position with that company in the tax year 1995/96 as set out in the letter.

Appellant's submissions

58. The appellant did not make a married woman's election with effect from 17 April 1972 for the reasons set out above.

59. The appellant did not make a reduced rate election with effect from 6 April 1976 for the reasons set out above.

60. The RF1 on which HMRC rely as showing the appellant made a married woman's election is not of the required standard to constitute a legal record of a person's NICs position and to be produced as evidence in this tribunal (under the Civil Procedure Act 1995 and the Civil Procedure Rules). It is handwritten, illegible in places, contains numerous crossings out and abbreviations which are not comprehensible.

61. No original document evidencing any such election or supporting the entries made on the RF1 has been produced. Therefore, the information which HMRC allege the RF1 contains is not in any way verified and is wholly unreliable. There is no evidence as to when the entries were made on the form RF1. The entries could have been made at any time in the last 40 years.

62. HMRC have destroyed the underlying records relating to the RF1 so that verification is not possible. HMRC say that the destruction of the underlying documents after a period of six years was in compliance with Department regulations in place at the time. They have provided no information on what rule or regulation they rely. It seems that the relevant documents would have been destroyed at the latest in 1986 (being 6 years after 1980). If HMRC are saying the destruction took place under rules applicable to HMRC this would not have been lawful as responsibility for NICs did not pass to HMRC until 1999.

63. In any event the failure to keep these documents is a breach of HMRC's duty of care and a breach of data protection laws and contractual principles. The documents belonged to both parties and it was not HMRC's right to be able to destroy the documents before they had ceased to have a purpose. The destruction of the documents leads to the inability for the appellant to have a fair trial in breach of the requirements of Article 6 of the European Convention of Human Rights. It has been held in the European courts that if vital evidence is destroyed, as it has been here, a person cannot receive a fair trial which is a breach of their human rights.

64. The appellant referred to a case in the social entitlement tribunal of *Mo v HMRC* 2014 UKUT 199 at [13] and [17]:

> "While I can accept that there may be circumstances in which it is possible to rely on a misrepresentation in a claim form without the claim form itself being available in evidence, there would have to be sufficient secondary evidence and here there was none.
>
> I have absolutely no hesitation in allowing this appeal. I agree with Mr Eland that the tribunal erred in law for the reasons outlined above. Moreover the tribunal appears to have proceeded on the assumption that decision makers never make mistakes, a position which is simply unsustainable."

65. The appellant stated that HMRC do make mistakes and quoted examples which have been publicised.

66. HMRC had failed to keep adequate records but improperly seeks to put the onus on the appellant by asking the appellant to produce evidence such as payslips and forms P14 years after the event (as set out in the correspondence with HMRC). It is for HMRC to keep adequate records as regards a person's NICs contributions.

67. HMRC's interpretation of the NICs rules is incorrect, in particular, as regards the continuation of any election in 1975 and onwards. The appellant's submissions on this point are further set out below.

68. The appellant made a number of points about the difficulties she had had in resolving her NICs position for other years in relation, in particular, to obtaining information from HMRC. The difficulties cited include delays in obtaining information from HMRC, that the information eventually provided was incomprehensible and inadequate (referring in particular to certain forms RD218 "Statement of Account" provided to her by HMRC) and the information was unverified. The appellant noted that her husband had requested his NICs records and had received much more comprehensive information.

69. The appellant said that in case law a man's statement is often accepted as true whereas a woman's is not. She quoted a number of decisions involving women where the decision had gone against the person concerned. She noted that Cambridge University had done research showing that women had more developed memory than men for information and she did remember what had happened in this case.

70. The appellant relied in good faith upon HMRC and her employer and should not be penalised for their failings, in particular, those of HMRC in not keeping adequate records.

71. The appellant believes that she had paid NICs in the later years which are not shown in the schedule produced by HMRC as attached to their decision letter. In particular, the appellant referred to NICs paid in the tax year 1995/96 whilst the appellant was employed through the Beaver Bureau Employment Agency with Group 4 Total Security Ltd. The appellant referred to a letter confirming her employment in this period (as set out in 57).

HMRC's submissions

72. The RF1 demonstrates that the appellant elected not to pay NICs as an employed married woman from 17 April 1972 by submitting an application to the DSS local office in Aldershot. This remained effective until 5 April 1975.

73. Under the NICs rules in place at the time the election made with effect from 17 April 1972 was, as a matter of law, deemed to continue under the different sets of rules introduced in the relevant period. When the NICs regime was changed in 1975 it continued, with effect from 6 April 1975, as an election to pay contributions at the reduced rate under that regime.

74. The RF1 shows that the appellant reaffirmed her choice by submitting a further election to the DSS again at Aldershot which took effect from 6 April 1976. Under the applicable rules, the reduced rate election remained in place until 2 November 1979, the date on which Mrs Morgan obtained a divorce from her then husband.

75. The records held by HMRC show that the appellant paid no NICs in the period from 17 April 1972 to 5 April 1975 and reduced rate NICs from 6 April 1975 to 2 November 1979 which accords with the above position.

76. The appellant criticises the way in which her clerically maintained NICs record, in the RF1, was kept. As explained by Mr Greenshields, many of the notations used on the record are in abbreviated format and their meanings would not be obvious to a person outside the DSS. However, they were known and understood by those who maintained the records and by those who used them as part of their everyday work. They have the meanings stated by Mr Greenshields in his evidence. The records were for internal use and were not intended to be kept in a way which was for use by the taxpayer. When a person requested information about a record it was transposed into a format that could be easily understood.

77. Deletions on the record were as a result of superseded information being received and were not errors. This was in accordance with practice at the time as outlined in Mr Greenshields evidence.

78. As Mr Greenshields has stated in evidence, at the relevant time, the DSS relied on the taxpayer or employer to keep it informed of any changes of circumstance. The fact that some information, such as change of address, was not recorded was because the information was not made known by the taxpayer to the DSS or the employer. Similarly a change of marital status and the date from which it was effective could only be from the taxpayer. The taxpayer was the prime source of the information.

79. The appellant has supplied no documentary evidence to show that she paid full flat-rate or earnings related NICs during the period in which HMRC consider she had made the married woman's election and a reduced rate election. If an election was not made the employer would have been liable to deduct and account for the relevant NICs at the full rate. The employer was entitled not to make full deductions only if they received authority in the form of a certificate or "tear off" portion from the special NICs card. It is reasonable to suppose that the MoD received this. The end of year returns submitted by the MoD as the appellant's employer for the tax years 1975/76 to 1978/79 show reduced rate contributions were deducted by the employer which is consistent with the elections being in place and that the MoD had accordingly received the necessary notification to deduct NICs at the reduced rate.

80. The appellant has queried the dates of marriage and divorce shown on the RF1 and has been asked on a number of occasions to supply her correct dates of divorce. She has also been asked to produce documentary evidence such as copies of pay statements or P60s to enable the NICs which she alleges are missing to be identified. She supplied a P60 for the 2004/05 tax year in respect of her employment with Morson Resources. The additional NICs contributions identified from that were

placed on her NICs record and a refund was paid. Efforts have been made to trace any other missing contributions using a variety of surnames but these have not produced any record of missing contributions (and details of the searches were produced to the tribunal).

81. When the appellant started to pay full rate NICs in the 1979/80 year tax year she would have noticed an increase in the amount being deducted from her earnings.

82. The appellant alleges other NICs contributions are missing for other years but those have either been placed on her record or were already on her record but not on the year in which she believes she paid them. As noted, HMRC have carried out searches but can find no trace of any further NICs and the appellant has provided no supporting evidence of any such contributions.

Law – NICs rules

The National Insurance Act 1946 and 1948 Regulations

83. This Act introduced the requirement for employees to pay NICs and the concept of the married woman's election. The Act gave the Minister power to make regulations modifying the provisions of the Act in their application to married women and to provide for excepting a woman from flat-rate NICs if she made an election (s 59). A married woman who made the election was still required to make a small contribution under industrial injuries provisions, known as an exempt rate contribution. There was a large difference between these rates. For example in April 1972 the weekly rate payable for an employed woman who had made a married woman's election was £0.04. The exempt rate contribution did not count for any benefits other than for industrial injuries.

84. The National Insurance (Married Women) Regulations 1948 (S1 1948/1470) (the "**1948 Regulations**") were made under this power and governed the making of the married woman's election. The main provisions were under regulation 2 as follows:

> "2. - (1)(a) A woman may elect not to be, and thereafter (subject of the provisions of paragraph (2) of this regulation) shall not be, liable to pay contributions under the [National Insurance Act 1946] in respect of any employment as an employed person for any period during which she is married.
>
> (b) Nothing in this regulation shall relieve an employer of any liability imposed on him by the Act in relation to employer's contributions.
>
> (2)(a) Any such election by a married woman not to pay contributions as an employed person may be made by her at any time by giving notice in writing to the Secretary of State to that effect, and the election shall be operative from the beginning of the week next but one

following the week in which the notice was given or from such earlier date as the Secretary of State may allow.

(b) Any such election by a married woman may be cancelled by her at any time by giving notice to the Minister to that effect, and such cancellation shall be operative from the beginning of the week next but one following the week in which the notice was given or from such earlier date as the Minister may allow

Provided that such cancellation shall be without prejudice to the right of the person concerned again to make any such election from time to time.

(3)(a) A married woman who has elected not to pay contributions in accordance with the provisions of this regulation, and who is at the time of the election in an employed contributor's employment or thereafter enters such employment, shall at that time or at the commencement of the subsequent employment, as the case may be, make application to the Minister for a certificate of such election, which shall be issued to her by the Minister on any such application, and the married woman shall produce such certificate to her employer forthwith.

(3)(b) If a married woman cancels any such election in accordance with the provisions of this regulation, she shall surrender the certificate to the Minister at the time of the cancellation, and forthwith notify her employer of the cancellation".

85. The certificate which a woman who was employed was required to obtain and provide to her employer (under regulation 2(3)(a)) was a form of married woman's special national insurance contribution card known as an "exempt rate card". Unless the employer received such a card, the employer was obliged to deduct NICs at the usual rate from the woman's earnings.

86. An employer was obliged to return the exempt rate card to the employee on termination of the employment (under Regulation 3(1) of the National Insurance and Industrial Injuries (Collection of Contributions) Regulations 1948).

The Social Security Act 1965 and the 1973 Regulations:

87. The 1946 Act was replaced by the Social Security Act 1965 and the 1948 Regulations were replaced by the National Insurance (Married Women) Regulations 1973 (the "**1973 Regulations**") made pursuant to powers given in that Act.

88. The 1973 Regulations set out provisions relating to the married woman's election in much the same form as under the 1948 Regulations. The making of the election was provided for under regulation 2(1)(a).

89. Regulation 21 of the 1973 Regulations revoked the previous 1948 Regulations but provided for the continuity of elections made under the 1948 Regulations as follows:

> "(2) anything whatsoever done under or by virtue of any regulation revoked by these regulations shall be deemed to have been done under or by virtue of the corresponding provision of these regulations, and anything whatsoever begun under any such regulation may be continued under these regulations."

Social Security Act 1975 and the Social Security Pensions Act 1975 and the 1975 Regulations.

90. There was a major reworking of the NICs provisions in 1975. Under the new legislation employees' NICs became earnings related and they were collected under the PAYE system. The record system was computerised. The married woman's ability to elect not to pay flat-rate NICs was replaced by an ability to elect to pay earnings related NICs at a reduced rate. Reduced rate NICs were due in 1975 at 2% of earnings which exceeded the lower limit whereas full rate NICs were paid at 5.5% of earnings over the lower earnings limit.

91. The ability to make a reduced rate election was provided for in regulation 91 of the Social Security (Contributions) Regulations 1975 (1975/492) (the "**1975 Regulations**"). These Regulations applied with effect from 6 April 1975.

92. Regulation 100 provided for continuity where a woman had made a married woman's election under the previous rules:

> "if, immediately before the appointed day [6 April 1975], there is a current election under regulation 2(1)(a) of the 1973 Regulations, the woman in question shall be deemed to have made an election under regulation 91 of [the 1975 Regulations]."

93. Every reduced rate election was stated to be made for a complete year commencing not earlier than the year next beginning after the date on which the election was made. That was the case except that, where an election was made not later than 11 May in the relevant year and the woman making the election was entitled to make an election from the beginning of that year, it could be made in respect of the year in which it was made (regulation 91(4)).

94. Such an election continued for each complete year after the year in which it was made until such time as it was revoked (under the provisions of regulation 92).

95. The revocation provisions included a rule that the election did not continue in any year "beginning after that in which a woman's marriage or remarriage was terminated" (otherwise than by the death of her husband) if she was not again a married woman at the end of that year (regulation 92(2)). (There are other revocation cases which are not in point here).

96. A year for the purpose of these regulations was a tax year running from each 6 April to 5 April in the following year (regulation 1).

1979 Regulations

97. Further changes were made to the election provisions with effect from 6 April 1977 under the Social Security (Contribution) Regulations 1979 (SI 1979/591) (the "**1979 Regulations**")

98. The 1979 Regulations permitted a woman who was married on 6 April 1977 to make a reduced rate election but provided that no further elections could be made after 11 May 1977 (regulation 100).

99. The circumstances where an election ended included where a woman was no longer married (regulation 101(1)(a)).

100. There was a continuity provision in regulation 102 which provided that:

> "where but for the former regulation 91 [of the 1975 Regulations] ceasing to have effect on 6 April 1977 (being the date on which section 130(2) of the Act (married women and widows) was repealed) an election made under that regulation before that date would have continued to have effect on [6 April 1977], that election shall be treated as made under regulation 100 of these Regulations."

101. The legality of all of these regulations was the subject of detailed consideration by the Special Commissioners in *Gutteridge v Revenue and Customs Commissioners* [2006] STC 315. In that case it was noted that there is some doubt as to whether regulation 102 of the 1979 Regulations provides for the continuation of an election deemed to be made under regulation 91 of the 1975 Regulations (as opposed to an actual election). Broadly, that is because regulation 102 refers only to "an election made under" the former regulation 91 which arguably may not include one deemed to be made under that regulation. However, the view was taken and we agree that this is covered by regulation 108 of the 1979 Regulations. This provides that where as respects a woman immediately before the appointed day of 6 April 1977:

> "there is a current an election under regulation 2(1)(a) of the [1973 Regulations]… that women shall be deemed to have made an election under the former regulation 91".

Law – appeal rights and burden and standard of proof

102. HMRC's decision was made under s 8 of the Social Security Contributions (Transfer of Function, etc) Act 1999. This includes provision that it is 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 and whether contributions of a particular class have been paid.

103. The person has a right of appeal to the tribunal against any such decision (under s 11 of that Act). On any such appeal if "it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good" (regulation 10 of the Social Security Contributions etc (Decisions and Appeals – Transitional Modifications) Regulations 1999).

104. The general principle is that the burden of proof, meaning the obligation of establishing a disputed fact, lies on the person who advances it. This has been held to be applicable both as regards an appeal against an assessment and a decision of HMRC. For example, in the case of *Kalron Foods Ltd v HMRC* [2007] STC 1100 Warren J summarised the position as follows at [32]:

> "… a taxpayer who appeals against an assessment takes on himself the burden of proving that the assessment is wrong because, unless he proves that, there is nothing on which the tribunal can find an error in the assessment. I see no reason to think that that position is any different in relation to a decision by HMRC in respect of which there is a right of appeal to a tribunal …. "

105. The standard of proof is the civil standard of proof on the balance of probabilities. In other words the tribunal needs to be satisfied that the facts which support a party's case are more likely than not to be true.

Preliminary issues

106. The appellant submitted that:

(1) As she had submitted to the tribunal before the hearing, documents which HMRC had produced after the date of 26 June 2015 specified in the tribunal's directions and/or which were illegible when first produced should not be admissible in evidence before the tribunal.

(2) Mr Greenshields' evidence was not admissible. Mr Greenshields was in the appellant's view making assertions as to the factual position as regards information in the RF1 which he could not possibly know as he was not involved in preparing that form. Also the witness statement had been provided to the appellant late only 2 weeks before the hearing.

107. The appellant referred to the *Gutteridge* case as supporting this view and also referred to the Civil Procedure Act 1995 and the Civil Procedure Rules. We see nothing in the decision in *Gutteridge* which affects our conclusion on either the admissibility of HMRC's documents or of Mr Greenshields' evidence as set out below. The appellant also in effect argued that the RF1 should not be admitted as evidence. We have dealt with this as part of the discussion on the main issue.

Tribunal procedure

108. The tribunal is a body set up by statute to hear appeals on tax matters where permitted to do so by law. The tribunal is governed by the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273 (L.1)) (the "**Rules**").

109. Under rule 2 the overriding objective of the Rules is stated to be to enable the tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly is stated to include:

> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

110. Rule 2 also states that the tribunal must seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any rule or practice direction. Parties must help the tribunal to further the overriding objective and co-operate with the tribunal generally

111. Under rule 15(1) the tribunal may give directions as to issues on which it requires evidence or submissions and the nature of the evidence or submissions it requires. Rule 15(2) provides that the tribunal may:

> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) exclude evidence that would otherwise be admissible where—
>
> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
> (iii) it would otherwise be unfair to admit the evidence.

112. It is clear from this that when deciding to admit evidence or not the tribunal is not bound by the rules applicable to civil proceedings generally as to the admissibility of evidence. When evidence which is otherwise admissible is provided outside the time allowed by a direction the effect of the Rules is to require the tribunal to consider the issue in all the circumstances of the case in accordance with the overriding objective of enabling the tribunal to conduct and decide the appeal fairly and justly, which includes the considerations set out in 109.

Admissibility of HMRC documents

113. The directions issued by the tribunal on 22 May 2015 required both parties, by 26 June 2015, to send the other (and the tribunal) a list of documents on which the

party intended to rely and provide the other party with copies of documents on the list that had not already been provided to the other party. The directions also provided for HMRC to provide a bundle of all such documents (and other documents) by 21 August 2015.

114. In a letter of 24 June 2015 the appellant acknowledged that she had received HMRC's statement of case dated 15 June 2015 together with a list of documents. She noted, however, that she received copies of some only of the documents listed some of which were illegible. The tribunal wrote to HMRC on 16 July 2015 requiring HMRC to provide legible copies of the relevant documents. On 20 July HMRC wrote to the appellant stating that HMRC had not yet sent all of the documents as they were not required to do so until 21 August 2015. On the same day HMRC wrote to the tribunal to confirm that they had sent further clear copies of the relevant documents which the appellant had said were illegible. They noted that in any event copies of the documents in question had previously been sent to the appellant some time ago but they had complied with the tribunal's request nevertheless. HMRC wrote to the tribunal on 11 August 2015 confirming that they had sent the full bundle of documents to the appellant.

115. From the correspondence available to the tribunal on the hearing day we do not know precisely what documents were sent to the appellant in June and July 2015. However, it is clear that HMRC sent further copies of documents which the appellant said were illegible in July 2015 and the full set of documents was sent to the appellant on 11 August 2015. This was nearly four months before the tribunal hearing.

116. Having regard to the overriding objective of dealing with matters fairly and justly and, in particular to any unfairness to the appellant, we decided to allow HMRC to produce their full set of documents to the tribunal. From the list of documents it was clear that they were of potential relevance to this matter although it remained to be seen what weight the tribunal would put upon any particular piece of evidence. We could not see that there was any prejudice or unfairness to the appellant in admitting the documents given the full bundle of documents had been sent to the appellant nearly four months before the hearing. We noted, however, that if the appellant felt she had not had sufficient time to consider any matter we would be prepared to consider allowing further written submissions following the hearing. The appellant did send further written submissions following the hearing which we have taken into account.

Admissibility of Mr Greenshields' evidence

117. As regards Mr Greenshields' evidence, the appellant had formed the view that Mr Greenshields was appearing as a witness of fact as regards the form RF1 and whether the appellant had made the relevant elections or not. We stated that we did not regard Mr Greenshields as a witness of fact in this respect given that he was not involved in the preparation of the RF1. Mr Greenshields confirmed that he understood this was the case and any implication to the contrary in his witness statement was unintentional. Rather Mr Greenshields was to give evidence to explain the practice and procedures of the DSS at the relevant time including as regards an

RF1 (as set out in 22 and 23). It was clear that the evidence of Mr Greenshields was potentially relevant to the case of HMRC. The weight to be attached to his evidence would be determined by the tribunal. We concluded that it would not be in the interests of fairness and justice for his evidence not to be permitted at all which would in effect deny HMRC their opportunity to put a substantial part of their case.

118. On the timing of the production of the witness statement it is not apparent from the correspondence available to the tribunal precisely when the witness statement was sent to the appellant. The directions did not refer specifically to the witness statement. We were concerned as to whether the appellant had had sufficient time to consider the witness statement. It appeared, however, that the appellant had had the statement for at least two weeks and had had sufficient time to consider it. In all the circumstances, we decided that there would not be any prejudice or unfairness to the appellant in the tribunal proceeding to hear the evidence of Mr Greenshields as part of the hearing.

Discussion – main issue

119. As set out in full above, the main issue is the appellant's NICs position in respect of the period from 17 April 1972 until 2 November 1979 as regards whether the married woman's election and a reduced rate election was in place. In addition the appellant's position is that she paid NICs in later years which are not shown in HMRC's schedule to their decision letter.

Consideration of married woman's election on 17 April 1972

120. The first question is whether the appellant made a married woman's election with effect from 17 April 1972. The ability to make such an election and the procedure for doing so was governed by the 1948 Regulations (see 83 to 86). These provide that a woman could make an election in respect of any employment as an employed person "for any period during which she is married" (regulation 2(1)(a)). The election could be made at any time by the woman giving a notice to the Secretary of State and the election was effective from the "the beginning of the week next but one following the week in which the notice was given or from such earlier date as the Secretary of State may allow" (regulation 2(2)(a)). The procedure was for the woman to fill in a CF9 and to take or send this to the local DSS office.

121. The only written or documentary evidence produced to the tribunal as evidencing the making of the election is the form RF1 details of which are set out above. Having examined the RF1 and considered it in the context of the facts, we have concluded that it relates to the appellant.

122. We note that it contains the wrong middle name for the appellant and that the appellant states she did not live at 2 of the 5 addresses specified in the form. Neither HMRC nor the appellant could provide any explanation as to why these addresses appeared. HMRC's stance is that they would have been provided by the appellant or the employer as those were the parties who, in line with procedures at the time, HMRC relied on for the provision of such information. The form also contains other

disputed information (leaving aside the election references for the moment) such as whether there was a break in the appellant's employment with the MoD and the precise dates when she was a student.

123. However, otherwise the RF1 contains information which on the facts clearly tallies with the appellant and her circumstances such that we have no real doubt but that this record relates to the appellant. For example, the names and surnames given are those of the appellant (except the incorrect reference to "Hellen"), three of the addresses are definitely those of the appellant, the form refers to employment with WRAC and as a civil servant, both of which occupations the appellant had during the relevant periods, the form contains references to spouses as being Mr Dooley and Mr Sheldon, to whom the appellant was married at points during the relevant period and the dates of the marriages and divorces specified tally with those of the appellant.

124. We have next considered the evidence on whether a married woman's election was or was not made with effect from 17 April 1972. In considering this we note the following:

(1) We accept Mr Greenshields' evidence on the practices and procedures the DSS operated at the time as regards the NICs system and record keeping, the way in which a married woman's election was made and recorded and that the RF1 and the manner of the entries made on it are in accordance with those practices (as further set out above in the "facts" section).

(2) We accept Mr Greenshields' evidence that the DSS operated a system of checks and audits such that the risk of error was relatively low.

(3) We accept Mr Greenshields' evidence that the entry on the RF1 "MN1/NP17/4/72 (NI Only)" means "Married Woman Employed Not Paying contributions from 17 April 1972" and that such an entry indicates that the person to which it relates made a married woman's election which was effective from the specified time.

(4) We note that it is clear from the rules and guidance at the time that the obligation was on a woman to notify the DSS of any change in marital status. If a married woman wished to make a married woman's election she would do this by filling in a CF9 and taking or sending this to a local DSS office. The DSS would then examine the form and update the woman's RF1 in accordance with the procedures set out by Mr Greenshields. A form RF1 should not show an election as having been made unless the DSS had received and checked the form CF9.

(5) We note that whilst the RF1 does appear to contain some errors it largely contains correct information and is correct as regards the dates of the appellant's marriages and divorces including her marriage on 15 April 1972.

(6) Under the rules in place at the time the employer was not absolved from accounting for an employed woman's NICs unless it received an exempt card certificate which the woman was required to obtain from the DSS and hand over to her employer.

(7) No flat-rate NICs were paid by the appellant in the period from 17 April 1972 until 5 April 1975 which accords with an election having been made and an exempt card certificate having been provided.

125. We accept that the DSS/HMRC can and do sometimes make errors. We are not acting on any assumption that the DSS/HMRC must be presumed to be error free. We do not doubt the appellant's integrity as to her belief that she did not make this election. We have formed our conclusion on weighing up the available evidence from each party in all the circumstances.

126. As noted, the tribunal has to be satisfied of the position on the balance of probabilities. On the one hand, we are faced with the RF1 and supporting oral evidence of Mr Greenshields as to the effect of that document, the entries on it and related DSS procedures and the fact that HMRC's records do not show that flat-rate NICs were paid in the period. On the other hand we have the appellant's recollection of events of over 40 year ago that she did not make the election. We note also that the appellant does not have any records of the NICs position as these were lost on her move to Spain.

127. Overall, in all the circumstances, we have attached more weight to the RF1, as a contemporaneous written record of the appellant's NICs position in the relevant period and Mr Greenshields' evidence, as an officer of HMRC with considerable experience in this field, as to the meaning of the RF1 entries and HMRC's practices and procedures. That is not to say that we doubt the appellant believes the assertions she makes. But in all these circumstances we consider the memory of events of over 40 years ago to be less reliable than the contrary written record.

128. It is difficult to see that it is more likely than not that an error would have been made on the RF1 as regards the making of the election. We consider that to be the case given the specific nature of the entry, that it should only have been made following receipt of the relevant election documents as signed and submitted by the appellant herself and that the other relevant information on the form is correct. In particular we note that the date of the marriage on 15 April 1972, being the marriage which gave rise to the ability to make the election, is correct. We also note Mr Greenshields' evidence as to the relatively low incidence of errors at the time.

129. Our conclusion is that, on the balance of probabilities, the appellant made the married woman's election with effect from 17 April 1972.

130. We note that the appellant's recollection is that she was not in employment on 17 April 1972. She had a break in her employment and was not back in employment until June 1972. She also states she was on honeymoon at the relevant time. In her view this means that she could not have made the election with effect from 17 April 1972.

131. However, under the applicable 1948 Regulations, the requirement was simply that an election could be made "at any time" by giving notice and it could take effect "from an earlier date" (under regulation 2(1)(a)). On that basis the date of 17 April

1972 is not necessarily the date when the election was taken to or sent to the local DSS office.

132. Nor do we think that the 1948 Regulations require that the woman was actually in employment at the precise point when the election was made. The election would not of course have any effect until such time as the employment commenced but it seems a woman was permitted to make the election in anticipation of employment. This is supported by regulation 2(3)(a) of the 1948 Regulations which refers to a married woman who has made the election and who is at the time of the election in employment "or thereafter enters such employment" (in which case she was required to apply for a certificate to give to the employer when the employment started).

133. We also note that the appellant's recollection does not seem to be supported by the records of her employer at the time, Reckitt & Coleman. They produced two deduction sheets for the 1972/73 year (see 17 above). One was in the name of Case and the other in that of Sheldon. The first states a "leaving date" of 15 April 1972 and the second a "leaving date" of 11 January 1973. This seems to indicate that the employer treated the occasion of the appellant's marriage as though the employment had come to an end (thereby recording the total pay and contributions to that date under her maiden name) and requiring the issue of a new deduction sheet in her new married name. The amount specified to be paid to the appellant in the second sheet indicates that the employment recorded in that sheet may relate to the whole period from 15 April 1972 to 11 January 1973 (being around £700 for that period compared with £30 for the short period from 6 April 1972 to 15 April 1972).

134. As regards the reliability of the form RF1 as evidence of the appellant's NICs position in these proceedings, we note that we may permit evidence where it would not be admissible in civil proceedings (under rule 15 of the Rules). Therefore the tribunal is not bound by the Civil Evidence Act which the appellant cites. As set out above in relation to the preliminary issues, in deciding whether to permit evidence, the overriding requirement is to ensure that matters are dealt with justly and fairly.

135. In our view it would not be in accordance with justice and fairness not to admit the production of a document which HMRC argue is the permanent NICs record of the appellant for the relevant period, being the only form of documentary evidence available and, which essentially forms their case on the elections point. It is in the interests of justice and fairness for the tribunal to have regard to all available evidence presented by both parties whether in the form of written records or oral evidence. The weight to be attached to the admissible evidence, whether documentary or oral, is then for the tribunal to decide looking at all the relevant circumstances of the case. We do not consider this as unfair to the appellant. The tribunal has to examine all available evidence presented in making its decision.

136. We accept the evidence of Mr Greenshields that the underlying documents from which the information on an RF1 was compiled, such as a CF9, were routinely destroyed in accordance with the policy of the DSS at the time. Accordingly we do not consider that the destruction of the documents in this case was made with any

improper motive which would have any bearing on the admissibility of the RF1 as evidence in this case.

137. That the underlying records have been destroyed does not of itself mean that the tribunal can or should ignore the RF1 record as the appellant in effect argues. The tribunal has to make a decision on the basis of the evidence available taking into account factors which may affect the weight to be attached to that evidence. This is what we have done as explained.

138. Otherwise we do not have jurisdiction to consider whether the destruction of the documents was not within the powers of the DSS/HMRC or was somehow improper or in breach of other laws. The tribunal is a body formed by statue to consider appeals against certain tax matters to the extent permitted by legislation. The tribunal does not generally have the power to review the actions or behaviour of the taxing authority. This means that we also do not have any power of review of the behaviour of HMRC personnel who have been dealing with the appellant's NICs affairs in this matter.

139. We note the appellant's argument that the destruction of the underlying records and documents means that the appellant cannot have a fair hearing in breach of Article 6 of the European Convention of Human Rights. Article 6 of the Convention applies to "civil rights and obligations". The European Court of Human Rights has decided that tax matters are not *civil* matters: *Ferrazzini* [2001] ECHR 464. In that case the issue was whether tax proceedings in Italy were governed by Article 6. The Court held at [28] and [29] that:

> "However, rights and obligations existing for an individual are not necessarily civil in nature……..
>
> In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the "civil" sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, *mutatis mutandis*, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

140. Therefore, the appellant's right to a fair hearing is not governed by the principles set out in the Convention. That is not to say that the appellant does not have a right to a fair hearing. The appellant is of course entitled to a fair hearing of this appeal in accordance with the Rules governing this tribunal which we have applied in making our decision including as regards the evidential issues.

Consideration of NIC's position following making of the married woman's election with effect from 17 April 1972

141. On the basis of our conclusion that the appellant made an election with effect from 17 April 1972, we have considered the on-going effect of that election under the different sets of regulations in place over the relevant years.

142. Under the 1948 Regulations an election made by a married woman continued until revoked. As set out above, over the years 1973 to 1979 there were a number of changes to the NICs rules governing the married woman's election and the reduced rate election when introduced in 1975. Broadly, the effect of the changes was that an election made under the 1948 rules was deemed to continue under the replacement rules (and to continue as a reduced rate election when that replaced the married woman's election) without any action required to be taken by the woman concerned. We have considered the precise effect of these continuation rules in this case under each set of rules for each applicable year.

Continuation of election under the 1973 Regulations – tax years 1973/74 and 1974/75

143. The 1973 Regulations, which replaced the 1948 Regulations, provided that an election made under the 1948 Regulations was treated as though it was made under regulation 2(1)(a) of the 1973 Regulations (regulation 21 (see 87 to 89 above)). Therefore, the appellant's election continued in place under the 1973 Regulations for each of the tax years 1973/74 and 1974/75.

Continuation of election under the 1975 Regulations – tax year 1975/76

144. The 1973 Regulations were replaced by the 1975 Regulations. These provided for an election made or deemed to be made under the 1973 Regulations to be treated as though made under the 1975 Regulations as a reduced rate election (under regulation 100) as follows:

> "if, immediately before the appointed day [6 April 1975], there is a current election under regulation 2(1)(a) of the 1973 Regulations, the woman in question shall be deemed to have made an election under regulation 91 of [the 1975 Regulations][which provided for the making of reduced rate elections].

145. This requires consideration of the election position as at 6 April 1975, being the appointed day when the 1975 Regulations took effect. As noted the effect of the 1973 Regulations was that the appellant's election, as originally made under the 1948 Regulations, was deemed to be made under regulation 2(1)(a) of the 1973 Regulations. As the election was not revoked and the appellant was married as at 6

April 1975, there was, immediately before 6 April 1975, "a current election under regulation 2(1)(a) of the 1973 Regulations". Regulation 100, therefore, applied to deem the appellant's election to continue as a reduced rate election.

146. There is a question as to when such a deemed election is to be taken as having effect. The appellant pointed to regulation 91(4) of the 1975 Regulations as providing the answer to this. She interpreted this as meaning that any previous election made by her (which she does not in any event accept she made) would not have simply continued under these rules as HMRC argue.

147. Regulation 91(4) provides that a reduced rate election made in a year does not take effect until the following year, unless it is made before 11 May in the year in which it is made and the woman making the election has, from the beginning of that year, been entitled to make the election (see 93 above). A year for this purpose is the period from 6 April to the following 5 April.

148. The appellant noted that she was divorced as at 11 May 1976 (in the tax year 1976/77) and was not remarried until 15 May 1976. In her view, therefore, she was not eligible to make an election as at 11 May 1976, which meant that any actual or deemed election could not take effect until the following tax.

149. We do not agree with this interpretation. In our view the correct interpretation is that an election which is deemed by regulation 100 to be made under the 1975 Regulations takes effect from the date on which those regulations came into effect on 6 April 1975. This follows from the requirement to consider whether there is a current election under the previous 1973 Regulations "immediately before 6 April 1975" and the wording stating that where there is such a current election, the woman in question "shall be deemed *to have made* an election" under regulation 91. In other words the woman is deemed to have made the election as at or immediately before 6 April 1975. This accords with the natural meaning of the wording used and with the clear intent of the provisions to provide unbroken continuity in the election position without the need for the woman in question to take any action.

150. On that basis, the appellant was deemed to have made a reduced rate NICs election under the 1975 Regulations for the tax year 1975/76 with effect from 6 April 1975.

Continuation under 1975 Regulations – tax year 1976/77

151. The next question is whether that deemed reduced rate election continued in effect in subsequent years.

152. Under the 1975 Regulations the election continued for each complete year unless the election was revoked under the further provisions in regulation 92. This provided that an election does not continue in any year "beginning after that in which a woman's marriage or remarriage was terminated" if the woman does not remarry by the end of that year - meaning the year in which the marriage is terminated. This means that if the appellant was divorced in the tax year 1975/1976 but was not

remarried in that year, the election would be revoked for the tax year 1976/77 and onwards.

153. The appellant contends that the decree absolute for her divorce from Mr Sheldon was received in January 1976. The decree absolute document produced to the tribunal, however, shows a date of 7 May 1976 which accords with the date shown on the RF1. We have concluded that the divorce date was 7 May 1976. The appellant's marriage was terminated, therefore, in the tax year 1976/77 and not the prior year 1975/76. It is not disputed that the appellant was married again on 15 May 1976, in the same tax year as her previous marriage terminated. On that basis there was no revocation of the election at this point as the appellant remarried in the same tax year as that in which her previous marriage terminated. The deemed reduced rate election therefore continued in place for the tax year 1976/77.

Continuation under the 1979 Regulations – tax years 1977/78, 1978/79 and 1979/80

154. The next question is whether the election continued in effect under the 1979 Regulations which applied from 6 April 1977. As set out above, in our view the combined effect of regulation 102 and 108 of the 1979 Regulations was that an election deemed to have been made under the 1975 Regulations was treated as made under the 1979 Regulations (see 97 to 101). This means that the appellant's deemed reduced rate election continued to have effect for all periods until she divorced on 2 November 1979.

Consideration of reduced rate election with effect from 6 April 1976

155. On the basis of the above analysis, it is not necessary to decide whether the appellant made an actual reduced rate election on 6 April 1976 as HMRC contend. However, in case we are wrong on the analysis above, we have gone on to consider this.

156. For the same reasons as set out in relation to whether the appellant made a married woman's election with effect from 17 April 1972, we have concluded that, on the balance of probabilities, the appellant made a reduced rate election with effect from 6 April 1976. The comments made in 120 to 140, except those relating to the specifics of the 1972 election, also apply here.

157. In addition we note the following as regards the 1976 reduced rate election:

(1) As for the 1972 election, we accept Mr Greenshields' evidence that the entry on the RF1 "MW/NP 6/4/76 (706)" means "Married Woman Employed Not Paying contributions from 6 April 1976" and that such an entry indicates that the person to which it relates made a reduced rate election which was effective from the specified time.

(2) We again note that whilst the RF1 does contain some errors it contains the correct information as regards the dates of the appellant's marriages and divorces including her marriage and divorce in 1976.

(3) Reduced rate NICs were paid by the appellant in the relevant period as supported by HMRC's records and the records of the MoD, by whom the appellant was employed at the time, as regards the tax years 1975/76 to 1978/79. The appellant does not have any records which support her view.

158. We cannot see that the making by the appellant of a reduced rate election, whether at Aldershot or otherwise, or the processing of a reduced rate election at any location other than Cheadle Hulme would breach any requirement of the Official Secrets Act 1920 (as amended and in place at the relevant time).

159. The appellant argued that under the 1975 Regulations she was not eligible to make an election with effect from 6 April 1976 as she was divorced at that time and did not remarry until 15 May 1976. As set out we have concluded that the appellant was divorced on 7 May 1976. In any event we note that an election made under the 1975 Regulations took place for a complete year in accordance with the provisions set out in regulation 91(4). The fact that the election is specified to be effective from the start of a tax year does not necessarily mean, therefore, that it was actually made on that date.

NICs position in later years

160. As noted the parties confirmed that most of the issues as regards the appellant's NICs position for later years had been resolved. However, the appellant remained of the view that the schedule to the decision letter omits NICs she had paid in 1995/96 as regards employment positions she had on a temporary basis through the Beaver Bureau, an employment agency.

161. No documentation was produced in support of this except the letter referred to at 57 which confirmed that the appellant had a position on an assignment for Group 4 Total Security Ltd from late 1995 for six months and that her services were provided by Beaver Bureau. We accept that this shows that the appellant did have some employment in the tax year 1995/96.

162. The schedule prepared by HMRC attached to their decision letter states the appellant paid no NICs in the tax year 1995/96. HMRC have produced documents showing they searched their systems both as regards Beaver Bureau and Group 4 Total Security Ltd for any trace of NICs paid by the appellant in this period but they found none.

163. Whilst we accept that the appellant had a role with Group 4 Total Security Ltd no further information has been provided on the employment arrangements which would enable us to conclude that, on the balance of probabilities, HMRC's decision that no NICs were paid in that period is incorrect. In the absence of any further information on that employment, it is a matter of speculation as to how and at what level and by whom the appellant was remunerated and whether NICs were in fact paid.

Conclusion

164. For all of the reasons set out above, the appellant's appeal is dismissed.

165. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 5 APRIL 2016