TC01771

Appeal number: TC/2009/15395

NATIONAL INSURANCE CONTRIBUTIONS – whether contributions were paid in error so that an obligation to refund them arose under regulation 52(4)of the Social Security (Contributions) Regulations 2001 – consideration of the meaning of "error" in regulation 52(9) – Appellant had paid contributions 31 days before an announcement of a proposal for a change in the law which, if implemented (as it was), would not have enhanced Appellant's entitlement to a Basic pension – held that the contributions were not paid in error – Osborne v HMRC and Clifford Bonner v HMRC followed – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

JANET HOWELL **Appellant**

- and -

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

TRIBUNAL: JOHN WALTERS QC (TRIBUNAL JUDGE)
GORDON MARJORAM

Sitting in public in Nottingham on 6 January 2012

There was no appearance by or on behalf of the Appellant
Mrs. L. Storey, Officer, HMRC, for the Respondents

DECISION

1. This appeal has been categorised as a standard appeal. A letter dated 28 December 2011 was received at the Tribunal Centre from the Appellant, Mrs. Janet Howell, stating that she would not be attending the hearing of the appeal because her husband, Mr. A. Howell, who had proposed to appear on her behalf, had had a heart operation and had been advised not to put himself under any undue stress. The Appellant went on in her letter to make observations which the Tribunal has taken into account – see: below.

2. The Respondents ("HMRC") were represented by an Officer, Mrs. L. Storey, and in the circumstances the Tribunal proceeded with the hearing pursuant to rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, considering that it was in the interests of justice to do so. The issue before us turned on a point of law. If a question of fact had been decisive, it would have been more likely that we would have adjourned the hearing of the appeal to give the Appellant a further opportunity to attend to give evidence.

3. Besides the Appellant's Notice of Appeal, dated 22 October 2009 and HMRC's Statement of Case submitted on 8 April 2010, we considered the Appellant's letter dated 24 June 2011 in which she stated that she would not be calling any witnesses, Lists of Documents served by both sides, the Appellant's letter dated 28 December 2011 (see: above), two bundles of documents and a bundle of authorities served by Mrs. Storey. Mrs. Storey also handed up a speaking note containing the substance of the oral submissions which she made at the hearing.

4. The appeal was brought against a decision made by HMRC and notified to the Appellant by a Notice dated 19 January 2009 that "[t]he Class 3 Contributions, paid for the periods from 6 April 1996 to 5 April 2002 and 6 April 2004 to 5 April 2005, were not paid in error".

5. The Class 3 Contributions in issue were voluntary contributions paid by the Appellant for the years 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001 and 2001/2002 (6 years) and 2003/2004 and 2004/2005 (2 years). These years are hereinafter referred to as "the Relevant Years"). The Appellant paid these contributions, amounting to £2,446.10 in total, on 24 April 2006.

6. She had obtained a State Pension forecast from the Pension Service (part of the Department for Work and Pensions), dated 16 March 2006. The relevant narrative was as follows:

> "***Boosting your pension***
>
> You record shows that for 8 years in the last 9 years you have not paid enough National Insurance contributions to make them qualifying years (those years are shown below [they were the Relevant Years]). You may be able to make voluntary contributions to make up the difference. "

7. The letter stated that the total amount of voluntary Class 3 Contributions need to boost the Appellant's State Pension was £2,466.10 (which was apportioned over the Relevant Years).

8. On 25 May 2006, the then Government published a White Paper entitled 'Security in Retirement: Towards a New Pensions System'. This included proposals to reduce to 30 the number of qualifying years required for a full Basic State Pension for men and women reaching State Pension age on or after 6 April 2010 and to convert years of Home Responsibilities Protection prior to 6 April 2010 into qualifying years by replacing Home Responsibilities Protection with credited National Insurance contributions.

9. Both of these proposals were subsequently included in a Pensions Bill which was introduced into Parliament in November 2006. This Bill was enacted as the Pensions Act 2007, which confirmed both the original proposals.

10. In consequence, the Appellant, who by making the voluntary Class 3 Contributions had acquired further qualifying years, was in the position that she only needed 30 qualifying years, and the acquisition of additional qualifying years had, in retrospect, been unnecessary to qualify for a full Basic State Pension.

11. On 21 February 2007, the Appellant requested a refund of the payment made, due to the reduction in the qualifying years requirement. She wrote:

> "I now understand that the qualifying years for a woman have been reduced to 30 years and therefore I needn't have paid over the £2,466.10. Can you please repay it to me as I can ill afford it."

12. On 8 March 2007, Mr. P.D. Taylor of the National Insurance Contributions Office Refunds Group wrote to the Appellant informing her that she was not entitled to a refund because they were paid before 25 May 2006, 'properly at the time in accordance with the law and in line with Government policy at the time'.

13. During the course of further correspondence, a refund of contributions was made for the years 2002/2003 and 2003/2004. This amounted to £443.60. The reason for this refund being made was that the contributions made for those years had been made at a time when they were insufficient to make the year in question a qualifying year and they were permitted to be refunded for this reason under regulation 49 of the Social Security (Contributions) Regulations 2001 ("the 2001 Regulations"). The refund for 2003/2004 was £361.40, and was a refund of part of the amount of £2,466.10, which had been paid by the Appellant on 24 April 2006.

14. However HMRC has refused to refund the balance of the payment (£2,104.70) because (to quote their letter of 11 November 2008):

> 'no error occurred and tax years in question [1996/1997 to 2001/2002] all counted towards Basic State pension and/or Bereavement benefit. In my opinion, you made an informed choice to pay Class 3 NICs based upon the information you had at that time. This information was correct, based on the legislation at the time, and once payment had been made your benefit entitlement increased.'

15. The basis on which the Appellant claims the refund which has been refused is that the contributions had been paid 'in error'. Contributions paid in error must be returned by HMRC on an application being made. This is the effect of regulation 52 of the 2001 Regulations. However it is provided in regulation 52(9) that:

> "In this regulation "error" means, and means only, an error which-

(a) is made at the time of the payment; and

(b) relates to some past or present matter."

16. HMRC's case is that the error which the Appellant claims to have made in this case is the error of paying voluntary Class 3 Contributions at a time shortly before the announcement of forthcoming legislation which (if enacted – which it was) would in retrospect render the making of those contributions unnecessary to boost the Appellant's Basic State pension entitlement. On that basis, HMRC submit, the error did not (as at 24 April 2006) 'relate to some past or present matter'.

17. HMRC support their case by reference to the appeal of *Osborne & Others* [2009] UKFTT 241 (TC), in which the First-tier Tribunal (Judge Berner) decided the point in HMRC's favour by reference to what he described as the Category 1 Appellants. Judge Berner said:

> "I agree with [Counsel for HMRC] that a payment made in ignorance of internal Government thinking [on] an unpublished proposal is not one made in error. Such inchoate material was not material that was available to the Category 1 Appellants at the times they made their payments and it could not therefore have formed the basis of decisions which they made as regards payment. The only past or present matters on which the Category 1 Appellants could at those times have made their decisions were the existing legal requirements in respect of qualifying years. No error was made by any of the Category 1 Appellants in those respects."

18. The matter was appealed by some of the Category 1 Appellants to the Upper Tribunal (Tax and Chancery Chamber) under the case name *Clifford Bonner & Others v HMRC* [2010] UKUT 450 (TCC). Again HMRC was successful. The judges of the Upper Tribunal stated:

> "We fully agree with the decisions of both Richards J [in *Fenton v HMRC* [2010] EWHC 2000 (Ch) in which a similar point arose for decision] and Judge Berner about the application of regulation 52 in this group of cases. The definition of "error" in regulation 52(9) is wide in terms of the material scope of the term but it is entirely clear about its temporal effect. It can only apply to errors made at the time of payment, and then only to errors about some present or past matter. A future change of law, as yet unannounced, cannot be the cause of an "error" within that temporal rule."

19. Looked at by reference to the conditions obtaining on 24 April 2006 (the date of payment), the Appellant obtained what she intended to obtain, in terms of enhanced pension entitlement, in return for making the contributions in issue. That fact militates against there having been any error.

20. The Appellant, in her letter of 28 December 2011, contends that the relevant error was made during the discussions in Parliament on the changes to the number of qualifying years required for a woman to be entitled to a full Basic State pension. She states that it was said in Parliament that it would be sensible to advise people that this matter was under discussion and that there may be downward changes in the qualifying years. The powers that be at HMRC were fully cognisant of these potential changes, yet continued to send out Forecast letters which should have carried a "health warning" that possible changes were on the way. She states that the sensible procedure would have been to anticipate the very simple fact that people would be caught up in this matter, as the Appellant was, and put in place measures to avoid it. It was a mistake and therefore an error.

21. These arguments cannot be accepted for a number of reasons. First, regulation 52 of the 2001 Regulations contemplates that a contribution has been paid in error – which must mean that the mistake has been made by the paying party, and not by HMRC. Secondly, the discussions in Parliament to which the Appellant refers will have taken place after she paid the contributions in dispute.

22. Thirdly, the Appellant raises, what is in effect an argument of fairness, going beyond an interpretation of HMRC's obligation under regulation 52 of the 2001 Regulations to return a contribution paid in error. The Appellant argues that it is unfair that she should not be repaid the contributions in issue, given that they were made in response to a Forecast issued by HMRC and were paid only 31 days before the White Paper on contributions reform was published.

23. A similar argument was rejected by Judge Berner in the *Osborne* appeal on the grounds that the Tribunal's jurisdiction is limited to appeals against HMRC's decisions that payments were not made in error. This Tribunal agrees with Judge Berner's decision on this point.

24. However we would add that it seems to us that even if we had jurisdiction to consider the fairness issue which the Appellant has raised we would have rejected her argument. The consequences of effectively requiring HMRC to give notice to the interested public of changes in the law which may be under consideration within Government but are as yet unpublished would be so wide-ranging that a burden which would be administratively impossible to support would thereby be imposed on HMRC. Fairness is a two-way street and it would be unfair to require HMRC (or any administrative organisation) to consider which unpublished proposal under consideration ought to be indicated to interested members of the public (and which should not). It would be difficult or impossible to decide at which stage of consideration, before publication, such indication should be made. There may in addition be reasons of security, policy or confidentiality prohibiting the publication of such material. Above all, to impose such an obligation on HMRC would undermine the principle of legal certainty, which is an important guarantee of the rule of law in a democratic society.

25. For these reasons we dismiss the Appellant's appeal.

Right to apply for permission to appeal

26. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. 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.

JOHN WALTERS QC

TRIBUNAL JUDGE
RELEASE DATE: 24/01/2012