TC01996

Appeal number: TC/2011/05322

National Insurance Contributions – married woman's election – revocation - The National Insurance (Married Women) Regulations 1948 - the Social Security Pensions Act 1975 - The Social Security (Contributions) Regulations 1975 and 1979

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAROL ANNE SLATER **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
NIGEL COLLARD

Sitting in public at The Appeal Service, Brighton on 21 February 2012

Mrs Slater appeared in person

Lisa Storey of HMRC for the Respondents

DECISION

1. This matter concerns a decision made on 12 April 2011 by HMRC under s 8 of The Social Security Contributions (Transfer of Functions etc) Act 1999, to the effect that from 29 May 1972 until 5 April 1975 Mrs Slater was not liable to pay class 1 National Insurance contributions and from 6 April 1975 to 6 July 2007 she was liable to pay reduced rate National Insurance contributions.

2. Mrs Slater now appeals against that decision, by her Notice of Appeal dated 8 July 2011, in which she argues that her election to pay reduced rate National Insurance contributions should have been treated by HMRC as having ended on 5 April 1985. She does not dispute that she made an election not to pay class 1 National Insurance contributions, but tells us that she was unaware that this election had continued in force throughout the rest of her career, and unaware of the impact that the continuing election would have on her state retirement pension. She asks the Tribunal to direct that HMRC treat the election as having been revoked in 1985, for reasons which appear later in this decision.

3. Mrs Slater first became aware of her very much reduced pension entitlement when she asked for a forecast in 2007, at which point she immediately revoked her election and paid what additional contributions were then permitted in order to improve her position. Having reviewed all the records and discussed matters with Mrs Slater, an HMRC officer told Mrs Slater in 2009 that HMRC would treat her as having revoked her election to make reduced rate contributions in 1985. That decision was confirmed by the HMRC officer's immediate line manager. However, it transpired that neither the relevant officer nor her immediate line manager had the authority to make that offer in a formal sense on behalf of HMRC. Subsequently, that officer's view was overruled and HMRC refused to treat the election as having been revoked in 1985. Mrs Slater has spent a considerable amount of time and energy challenging what she (understandably) sees as the unjustness of senior officers overruling the first officer's conclusion. After having reached the end of the complaints process in 2011, she went back to HMRC and asked it to make a formal decision which she could appeal to the Tribunal. That resulted in the decision of 12 April 2011 which was before us in this appeal.

4. The Tribunal's jurisdiction in this matter is derived from s 10 of The Social Security Contributions (Transfer of Functions etc) Act 1999 and is limited to the question of whether the decision of 11 April 2011 should be varied or "stand good" i.e. whether it is correct. The burden of showing that HMRC's decision of 12 April 2011 was wrong rests with Mrs Slater as the Appellant. Whilst we sympathise with the fact that Mrs Slater has been through a protracted and difficult experience in order to bring her appeal to us at all, as we have explained to her, the Tribunal has no jurisdiction in respect of her complaints about HMRC's internal handling of this matter, which has already been considered by the Adjudicator and the Parliamentary Ombudsman.

The Facts

5. With the important exception of events in 1994, the facts of this case are largely undisputed. Mrs Slater accepts that she completed form CF9 in May 1972. This form constituted an election not to pay class 1 National Insurance contributions as a married woman and contained a declaration to the effect that she had read and understood the contents of the accompanying leaflet, which explained that the election could be revoked at any time but would otherwise remain in force. The original documentation is no longer available and we do not, of course, expect Mrs Slater to remember the details of this event. However, we do not need to make a finding of fact about the original election because Mrs Slater, as noted above, accepts that she made it.

6. Mrs Slater's career path was not unusual from then on. She had some maternity leave, she resumed work, she transferred to different employers over the succeeding years. She transferred from working in the NHS to working in the voluntary sector. She is a professional woman, a qualified nurse who by the end of her career was the Chief Executive of a Hospice.

7. Throughout her career (subject to two exceptions considered below) Mrs Slater paid no, or reduced rate, contributions, consequent upon her completion of the CF9 form in 1972. Her election transferred with her from employer to employer and we heard that each employer had a legal duty to deduct standard rate contributions from her pay unless they were shown valid authority to made reduced rate contributions. Mrs Slater expressed doubts that the correct procedures had been followed because she says she was unaware of them at the time, but she has presented no evidence to the contrary and her case does not turn on this point. As the behaviour of successive employers was consistent with them having been informed of the election which Mrs Slater accepts she had made, we proceed on the basis that each employer had received the relevant evidence of her election, although it is not before us now.

8. We heard evidence from Mr Greenshields, a witness called by HMRC with an impressive knowledge of the historic systems, of the means by which an employer would have been made aware of the election – initially by the production of a card held by the employee and produced to each employer, and later by a certification system. Mr Greenshields explained the steps that successive governments had taken to make women who had made the election to pay reduced rate contributions aware of their position, including a leaflet (NI 1) which accompanied form CF9, advertising in the national press and targeted mail shots in 1989 and 2000. Although there was no factual dispute before us as to whether Mrs Slater had been included in the mail shots (unsurprisingly, she does not recall them after all this time) it is implicit in Mrs Slater's case that she feels that insufficient effort was made by HMRC and its predecessor bodies to make her aware that her election to pay reduced rate contributions was still in force and of the consequences of this for her retirement pension.

9. There were two occasions on which standard rate contributions were deducted from Mrs Slater's pay. The first of these was in the 1984-1985 tax year and the second in the 1992 – 1993 tax year.

10. In the 1984-1985 tax year, Mrs Slater's then employer submitted a return showing that she had made standard rate contributions of £45.53. By this time,

the national insurance records system had been computerised and we heard that, in general, when contributions appeared to have been made at the wrong rate, an "output" was generated by the computer for clerical investigation. We were told that such an output required an officer to check the records, make direct contact with the employee and employer and, in a married woman's election case, to invite the woman to apply for a refund of the difference between the standard rate and reduced rate contributions and ask her if she now wished to revoke her election. For reasons of administrative convenience, this procedure was subject to a lower limit of contributions to the value of £68 during the relevant tax year, so that no output requiring clerical investigation was made in Mrs Slater's case, in view of the £45.53 which had been deducted from Mrs Slater's pay. (At the hearing, HMRC sought to argue that this amount in fact fell within the ratio for reduced rate contributions during that year so that it might be concluded that the employer had simply entered the wrong code rather than deducted the wrong amount. This argument had not been relied on prior to the hearing and Mrs Slater had no advance notice of it. In the circumstances we have proceeded to make our decision on the basis that the £44.53 was an erroneous standard rate contribution as shown by the code, which is the position that HMRC adopted when it made its disputed decision of 12 April 2011. This analysis of the position is fairest to Mrs Slater but, as will be seen, has no impact on our final decision in any event).

11. Mrs Slater argues that the failure to notify her of the erroneous deduction in the 1984-1985 tax year represents a crucial missed opportunity for her to have been advised of her continuing election and its consequences, and asks us to find on the balance of probabilities that she would have revoked her election at that point if she had been contacted. She goes further in arguing that, because it was a matter of administrative convenience not to contact her, HMRC should accept that she would have revoked the election in 1985 if she had been contacted, and therefore that, in fairness, HMRC (and the Tribunal) should treat her election as though it had been revoked in 1985. (We note in passing that the regulations made in 1975 and 1979 provided for a revocation to be triggered in circumstances where a standard rate contribution was made on the employee's behalf by her employer in the "erroneous belief" that this was required and that the employee wished to pay standard rate contributions from the following tax year. It was not argued before us that the payment of standard rate contributions in the 1984-5 tax year had triggered a revocation in reliance upon these provisions and we do not consider that there is any basis for us so concluding, given that we have no evidence as to whether Mrs Slater's employer at that time had "an erroneous belief" that she was required to make standard rate contributions in that year or indeed of Mrs Slater's wishes which were not, in any event, ascertained at the time).

12. The deductions position appears to have been corrected by her employer in the subsequent tax year, because Mrs Slater continued to pay reduced rate contributions until the 1992 – 1993 tax year, during which there was a similar event where standard rate deductions were made from Mrs Slater's salary. This time, the records show that the computer generated an output, and we were told by Mr Greenshields that Mrs Slater would have been contacted, asked if she wanted a refund and asked if she wanted to revoke her election. HMRC has no

documentation to prove that this happened and Mrs Slater told us that she had no recollection of being contacted in 1994, however the records do show that a refund of £48.33 was authorised to be made to Mrs Slater on 4 August 1994. Mr Greenshields told us that this could only have occurred if the Department had received a form, signed by Mrs Slater, to claim the refund and he also told us that that form would have been accompanied by an explanatory letter inviting her to elect to pay full rate contributions in the future. Mrs Slater told us she did not recall having received a refund but Mr Greenshields told us that there was no record that the payable order for this amount had not been cashed, which would have been the case if it had gone astray. HMRC therefore asks the Tribunal to find on the basis of its records that Mrs Slater elected to receive a refund in 1994 and further that she chose to continue with her election at this time. Thereafter, the records show that Mrs Slater continued to pay reduced rate contributions until 2007 when it is agreed that she formally revoked her election.

13. We now turn to consider the significance of these events within the context of the legal framework within which they took place.

The Law

14. In 1972 when Mrs Slater made her election, the relevant law was the National Insurance Act 1946 and regulations made under it (The National Insurance (Married Women) Regulations 1948) under which married women could elect not to pay national insurance contributions in respect of any employment.

15. The law changed by reason of s 3 of the Social Security Pensions Act 1975, which abolished reduced rate contributions for married women from 6 April 1977. However, transitional provisions (contained within The Social Security (Contributions) Regulations 1975) provided that women in Mrs Slater's position who had previously made an election not to pay were deemed to have made an election to pay a reduced rate and to continue with it unless certain events took place or they explicitly revoked it. The Regulations provide for a revocation to be made prospectively but not retrospectively.

16. We were referred to a number of decisions of the First-tier Tribunal and its predecessor bodies in respect of married women's elections. These included *Gutteridge v HMRC (2006)* SPC00534, *Whittaker v HMRC* (2006) SPC00528 and *Spraggs v HMRC* [2011] UKFTT 333 (TC) (in all of which decisions the issue for determination was whether or not an election had in fact been made); and *Register v HMRC* [2010] UKFTT 186 in which the issue to be determined was whether relevant contributions had been made. We were not referred by Mrs Slater or by HMRC to any cases which raised issues similar to Mrs Slater's case and, in any event, we note that we are not bound by decisions of the First-tier Tribunal which turn on their own facts and do not set a precedent.

17. One point that Mrs Slater did seek to make in her submissions to us was that in these cases, differently constituted Tribunals had made findings of fact to the effect that HMRC's records were not necessarily conclusive evidence of the facts stated in them. We entirely accept that submission and note that it is incumbent upon us to make findings of fact, on the balance of probabilities, in

relation to any matters which are disputed. As we have also noted above, the burden of proof rest with Mrs Slater, as the Appellant in this case, to satisfy us to the relevant standard that HMRC's records are wrong in any material respect. These issues are particularly relevant to the events of 1994, to which we turn in reaching our conclusions below.

The Arguments

18. We are grateful to Mrs Slater and to Ms Storey for putting their respective cases to us so succinctly.

19. As noted above, Mrs Slater's argument was that had she been informed of her position in 1985 when (as we find) standard rate contributions had been made, she would at that point have revoked her election. She argued that she has been placed in a position of considerable disadvantage because HMRC failed to inform her of her position at that time for reasons of its own administrative convenience and further that more should have been done to make her aware of the continuing force and consequences of the election which she had made in 1972.

20. HMRC's argument is that whilst it is possible that Mrs Slater would have chosen to revoke her election in 1985, it is also possible that if she had been informed of her position she would have claimed a refund and continued with her election. Ms Storey asks us to find on the balance of probabilities that Mrs Slater claimed a refund and continued her election in 1994 on the basis of HMRC's records. If we are satisfied that that event took place on the balance of probabilities, she asks us to find that Mrs Slater would have taken the same course had she been contacted in 1985. She argues that this means that Mrs Slater has not suffered an injustice as a result of HMRC not contacting her in 1985 but rather that she chose not to revoke her election until 2007 and should be treated accordingly.

21. HMRC further argues that it (and consequently the Tribunal) has no power in law to treat her election as having been revoked with effect from 1985.

Conclusions

22. As noted above, we have considerable sympathy for Mrs Slater's position. We have considered her arguments most carefully and were grateful for the additional arguments presented on her behalf by Mr Slater.

23. However, we must be guided by the law and accordingly we accept Ms Storey's submission that we have no power to direct HMRC to treat Mrs Slater's election as having been revoked with effect from 1985. The reason for this is that this is not a case where we are able to substitute our own findings of fact for HMRC's, as the Tribunal did in the cases we refer to at paragraph 16 above. This is a case where the fact of the election is accepted, the applicability of the relevant law is

also accepted, but where Mrs Slater asks us to find that she would have revoked the election in 1985 if she had been given the opportunity to do so. Even if we were to find on the balance of probabilities that she would indeed have done so, this is a qualitatively different argument from one asking the Tribunal to make a finding of fact, for example, that she had never made the election or that she had tried to revoke the election but HMRC had not received or processed it. Instead of asking us to find that different facts did, on the balance of probabilities, pertain in her case, Mrs Slater asks us to overturn HMRC's decision on the basis of an essentially hypothetical scenario, which we conclude we may not do.

24. We are supported in this approach by the relevant legislation and regulations which, as noted above, provide for prospective revocation of an election to pay reduced rate National Insurance contributions but not for retrospective revocation. We conclude that HMRC (and consequently the Tribunal) has no legal basis for treating a revocation as having been made without first finding that there had been a material error of fact which justifies a finding that a revocation had been made at the relevant time and so would operate prospectively from that point. In this case, Mrs Slater has not argued that there was a material error of fact which justifies such a conclusion.

25. Our conclusions in the preceding two paragraphs are sufficient to lead us to dismiss Mrs Slater's appeal. The question of whether Mrs Slater accepted a refund of overpaid contributions in 1994 and thereafter consciously continued with her election, having been provided with the relevant information, is not one that is capable of dislodging our conclusions as to the law. However, for the sake of completeness, we now make a finding of fact that on the balance of probabilities that a refund was claimed by Mrs Slater and that she did decide to continue with her election from 1994 until 2007 when she revoked it. In making this finding of fact we do not for one moment suggest that Mrs Slater was untruthful or unreliable in any way and we entirely accept her evidence that she had no recollection of this event. However, as noted above, Mrs Slater is the Appellant in this matter and so she bears the burden of satisfying us that HMRC's oral and documentary evidence was wrong in relation to the refund. She would only be able to do so if she could challenge the evidence of Mr Greenshields that the refund was made and that information about the right to revoke the election would, in the normal course of events, have been communicated to her at that point. She would also have to satisfy us on the balance of probabilities that the documentary evidence produced to us in support of Mr Greenshield's evidence was incorrect. For understandable reasons, she was unable to challenge HMRC's evidence in a way that caused us to doubt that it was, on the balance of probabilities, accurate and so we find that she did claim and accept a refund in 1994. We do not go on to decide whether, on the basis of that finding, Mrs Slater would have acted in the same way had she been contacted in 1985 because, for the reasons set out above, such a finding could not, in any event, provide a proper basis for overturning HMRC's decision now under appeal.

26. For all the above reasons we dismiss the appeal and direct that HMRC's decision of 12 April 2011 shall stand good.

27. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 18 April 2012