



TC02366

Appeal number: TC/2012/03033

National Insurance Contributions – Small earnings exception – Appellant below threshold - not informed of exception by Respondents’ Helpline – Class 2 national Insurance contributions paid by the Appellant – No entitlement to reclaim under Social Security (Contributions) Regulations 2001 – Whether legitimate expectation of a refund – No – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JASON PUGSLEY

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JILL C GORT
MEMBER ANTHONY HUGHES**

Sitting in public at London on 26 September 2012

Mrs J Pugsley, the Appellant’s wife, appeared on his behalf.

Mrs L Storey, Presenting Officer for the Respondents.

DECISION

1. This is appeal against a decision made on 11 October 2011 under S.8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 that the Appellant (“Mr Pugsley”) was liable to pay Class 2 National Insurance contributions between 3 April 2005 and 11 April 2009. This decision was upheld on review by a letter dated 14 December 2011.

2. By his Notice of Appeal dated 9 February 2012 Mr Pugsley contended, where relevant, as follows:

“HMRC are refusing to refund the payment of Class 2 NICS for the period 2005-2009, Mr Pugsley owed HMRC earned under the threshold each year. HMRC have confirmed that if Mr Pugsley owed HMRC for period 2005-2009, he would be required to pay. The same rule should apply, Mr Pugsley has made payment when it was never due. Mr Pugsley sought a refund to be informed that HMRC regulations do not allow for this. ...”

3. At the hearing HMRC treated the issue in the appeal as being whether Mr Pugsley was entitled to repayment of the Class 2 National Insurance contributions which he had made between 3 April 2005 and 11 April 2009 which amounted to some £500+ approximately.

4. There was no dispute that Mr Pugsley had made such contributions, nor that during the relevant periods he was a “low earner” and would have qualified for the “small earnings exception” had he notified the tax authorities in accordance with the statutory provision set out below.

The Statutory Provisions

5. Liability for Class 2 (Self employed) National Insurance contributions

In accordance with Section 11(1) of the Social Security Contributions and Benefits Act 1992 (“the Act”), every self-employed earner who is over the age of 16 is liable to pay Class 2 National Insurance (NI) contributions for each week in which they are self-employed.

Notification of Liability for Class 2 National Insurance contributions

In accordance with Regulation 87 of the Social Security (Contributions) Regulations 2001 (“the 2001 Regulations”), every person who becomes or ceases to be liable to pay a class 2 contribution shall immediately notify the relevant date to the Board in writing or by such means of electronic communication as may be approved.

Exception from liability for Class 2 National Insurance contributions on the grounds of small earnings

Section 11 (4) of the Act provides that a self-employed earner who would otherwise be liable for Class 2 NI contributions may be excepted from this liability for any period where their earnings are less than a specified amount in a tax year (“a small earnings exception”).

Section 11 (5) of the Act provides that regulations made for the purpose of Section 11(4) shall not except a person from liability to pay contributions otherwise than on his own application, but may provide for so excepting a person with effect from any date not earlier than 13 weeks before the date on which his application was made.

Application for certificates of exception

In accordance with Regulation 44 (1) of the Social Security (Contributions) 2001 (“the 2001 Regulations”), a self-employed earner who desires to have a small earnings exception by virtue of section 11(4) of the Act shall make an application for that purpose to the Board who, if they grant the application, shall issue to the applicant a certificate of exception.

Regulation 44(5)(b) of the 2001 Regulations states that the period specified in the certificate may at the discretion of the Board commence on such date not earlier than 13 weeks before the date on which the application was made as the Board may consider appropriate to the circumstances of the case.

Earnings for the purposes of certificates of exception

In accordance with Regulation 45(1) of the 2001 Regulations, for the purposes of section 11(4) of the Act, the earnings of an applicant for a certificate of exception shall, in respect of any particular year, be treated as less than the amount specified in that section if it is shown to the satisfaction of the Board that

- a. In the year preceding the particular year, the earnings of the applicant were less than the amounts specified for the preceding year and that there has since been no material change of circumstances; or
- b. In the particular year the earnings of the applicant are expected to be less than the specified amount.

Regulation 45(2)(a) of the 2001 Regulations defines “earnings” as net earnings from the employment as a self employed earner.

Return of Class 2 contributions paid by low earners

Regulation 47 of the 2001 Regulations allows, upon application in writing, for Class 2 contributions, which have been paid for a period since 6 April 1988 and

are for a period where earnings from employment as a self employed earner were less than the amount specified in section 11(4) of the Act to be repaid.

Under Regulation 47(2) of the 2001 Regulations the application for the repayment of those class 2 contributions must be made not earlier than 6 April and not later than 31 January immediately following the year for which those class 2 contributions were paid.

Where a repayment has been made, Regulation 47(4) of the 2001 Regulations allows for the self-employed earner to be excepted from liability for the contributions repaid to him and a certificate of exception is issued in respect of the period for which they were originally paid.

The Issue

6. The issue for the Tribunal was whether Mr Pugsley was entitled to a refund of the contributions he had made either as a matter of law or as a matter of legitimate expectation.

The Evidence

7. We heard evidence from Mr Geoff Stanton of HMRC on behalf of the Respondents and from Mr Pugsley. A bundle of documents were provided by HMRC and Statements of Case from both parties.

The Facts

8. Mr Pugsley started a period of self-employment on 3 April 2005. On 16 May 2005, in order to register as self-employed, he contacted HMRC's self-employment telephone helpline. With the help of the person on the helpline Mr Pugsley completed the relevant form CWF1 which it is necessary for self-employed persons to do to comply with Regulation 87 of the 2001 Regulations. This document was later destroyed by HMRC. The record of that conversation shows that he was not asked (as he should have been) the level of his earnings, but was offered a self-employment information pack, an offer which he accepted, but we accept that the pack was never received by Mr Pugsley.

9. From April 2005 until 8 September 2007 Mr Pugsley paid Class 2 contributions by quarterly bill and by direct debit from 9 September 2007 until 8 January 2011. He had not followed up the non-receipt of the information pack from HMRC.

10. Whilst paying quarterly Mr Pugsley was sent a bill each quarter which was accompanied by a set of notes. Those notes give information about low earnings and specifically state that a person may not have to pay class 2 contributions, but that exception has to be applied for.

11. From 9 September 2007 when he changed to paying by direct debit Mr Pugsley each March was sent details of the revised rates including information about low

earnings. This leaflet had a heading which stated; ‘What happens if your earnings are low?’ This was followed in smaller print by the following;

“If your earnings from self-employment are low, you can apply for an exception from paying Class 2 contributions. For more details see leaflet CF10 National Insurance Contributions for self-employed people with small earnings, available from....”

12. Mr Pugsley had formerly been self employed on five separate periods between October 1988 and March 2003. From 1988 to 1994 he was required to complete a registration form CF11 which addressed the issue of low earnings and directed taxpayers to form NI 27A ‘People with low earnings from self-employment’. In 1994 this form was replaced by Form CAO2 ‘for self-employed people with small earnings’. Both these forms set out that it was possible to obtain a refund of Class 2 NI contributions paid during a period of small earnings, that there were time limits and advised how to obtain a refund.

13. From 1988 up until April 1993 Mr Pugsley had paid his Class 2 contributions by stamping a card. P.3 of that card states in bold capital letters: ‘Low earnings? – then you may not have to pay - see instruction 5 (page 4); Instruction 5 sets out special provisions apply where earnings from self-employment are expected to be below a certain level (less than £3,030 in tax year 1992/93) and refers to leaflet NI27A.

14. Mr Pugsley had employed an accountant who had completed his returns between 2005 and 2009. Early in 2011 Mrs Pugsley had spoken to the accountant and queried the issue of Mr Pugsley’s low earnings. She had been advised to contact HMRC’s helpline. Mr Pugsley wrote to HMRC on 31 January 2011 and raised the issue of his class 2 contributions on his low self-employed earnings between 2005 and 5 April 2010. During that time he had been paying class 1 contributions and by the letter he reclaimed a full refund of all the class 2 contributions he had paid since April 2005.

15. There was correspondence between the parties in the course of which Mr Pugsley was informed that it was too late to apply for a repayment of his class 2 contributions for the year prior to 2009-10. He was sent a form CF10 in order to apply for a current certificate of exception. Having completed this form, Mr Pugsley complained that at the time he had originally spoken to the helpline in April 2005 he had not been told about the possibility of applying for a small earnings exception. There were further telephone calls, letters and various complaints from Mr Pugsley which we do not propose to set out here and which are not relevant to this appeal.

16. Mr Pugsley was eventually repaid the class 2 contributions he had paid between 2009-10, and he was sent a certificate of exception relating to the period prior to 9 January 2011. HMRC confirmed to him that he could apply for a repayment of class 2 contributions paid in 2010-2011 after 10 April 2011.

17. In the course of further correspondence Mr Pugsley asked HMRC for a record of his 2005 call to the helpline claiming that he had specifically asked about earnings thresholds during that call. The record of the call was produced to us but there is no reference to the earnings threshold. It was accepted before us by HMRC that Mr Pugsley should have been told by the helpline about the possibility of applying for a small earnings exception.

Reasons for Decision

18. It is clear from the legislative provisions set out above that whether or not a self-employed person is a low earner, he is nonetheless required to pay class 2 National Insurance contributions unless he applies at the appropriate time for an exception. If he does come below the small earnings exception threshold (which varies annually) then he is required by S11(4) of the Act and Regulation 44(1) of the 2001 Regulations to make an application for a small earnings exception. It is only in circumstances where such an application has been made that HMRC (formerly the Board of Inland Revenue) are empowered to issue a certificate of exception. In the absence of such a certificate, the only discretion available to HMRC is provided by Regulation 44(b) of the 2001 Regulations. This discretion however is not applicable in the present circumstances, being limited to a date not earlier than 13 weeks before the date on which the application was made, and therefore does not avail Mr Pugsley in respect of the periods appealed because he did not apply until 2011.

19. We have set out the issue before us at paragraph 6 above. It is quite clear from the statutory provisions that Mr Pugsley is not as a matter of law entitled to a refund given that at no point did he apply for a certificate of exception within the time limits laid down and as stated above, HMRC have no discretion in the matter.

20. Mr Pugsley's appeal was not so much based on a claim of legitimate expectation that he would be refunded the payments he had made, but rather on the novel proposition that since HMRC would have the ability to enforce payment if Mr Pugsley did not pay the taxes that were due, so there should be a corresponding right for Mr Pugsley to enforce a refund of any taxes which have been paid when, as he claims is the situation here, they are not due. We know of no authority for such a proposition and therefore treat the appeal as being founded on a legitimate expectation that a taxpayer will be properly informed of his obligations and his rights in respect of payment of tax, and if he is not so informed, or is wrongly informed, then he may expect compensation or a refund.

21. Turning to the issue of legitimate expectation, we will examine whether or not the circumstances are such that Mr Pugsley might, as he in effect, claimed, have any such expectation, before turning to the matter of whether or not this Tribunal has any power to decide the appeal on such a basis.

22. Whilst Mr Pugsley claimed to have enquired about the small earnings exception in 2005, although the evidence shows no such enquiry to have been made, it is nonetheless the case that he ought, when he made that call as HMRC accept, to have been informed about how he might apply for an exception. Is the fact that he was not

so informed sufficient to ground a claim for a legitimate expectation that he will be entitled to a refund of the payments made? We do not find that it is, for the following reasons:-

(i) Mr Pugsley had accepted the offer of an information pack. Whilst we accept his evidence that he did not receive it, it was also his evidence that he made no follow up request for one;

(ii) At the time Mr Pugsley employed an accountant who could, if asked, have advised him of the procedure. This is relevant because it appears from Mr Pugsley's claim to have asked the helpline about earnings thresholds that he was aware that his level of earnings might entitle him to exception from payment;

(iii) Prior to 2005 Mr Pugsley had on five occasions been self-employed and would on each occasion have received information referring to low earnings and the time limits relating to applying for a refund;

(iv) Both in the periods when he paid quarterly and later when he paid by direct debit Mr Pugsley was sent information which would have enabled him to make a claim for exception from liability to pay. It is evident that he did not properly read these or any of the earlier leaflets sent to him by HMRC.

Because of our finding that Mr Pugsley has no grounds for a claim of legitimate expectation, we do not find it necessary to consider the issue of whether or not we would have power to allow the appeal on that ground.

For all the above reasons we dismiss this appeal.

23. 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.

**JILL C GORT
TRIBUNAL JUDGE**

RELEASE DATE: 9 November 2012