



**TC01703**

**Appeal number: TC/2011/00227**

*National Insurance – Married woman’s election to pay at reduced rates – Appellant’s understanding of English not good – Whether she did make election – CF9 document destroyed by HMRC – Whether HMRC’s record correct – Appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**MRS CATHERINA GERDA PROCHAZKA**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MISS J C GORT (judge)  
JANE SHILLAKER (Member)**

**Sitting in public in Oxford on 22 September 2011**

**Mr Richard Prochazka appeared on behalf of the Appellant**

**Mrs Lisa Storey, an officer of HMRC, appeared on behalf of the Respondents**

## DECISION

1. This is an appeal against a decision of 10 August 2010 made under s.8 of the Social Security Contributions (Transfer of Functions) etc Act 1999 that from 8 March  
5 1971 to 5 April 1975 Mrs Prochazka was not liable to pay National Insurance Contributions and that from 6 April 1975 to 5 April 1978 she was liable to pay contributions at the married woman's reduced rate. This decision was based on an election said to have been made by Mrs Prochazka in 1971 to opt out of paying National Insurance ("NI") contributions as a married woman. The effect of the  
10 decision is that Mrs Prochazka now has a reduced pension entitlement of 75% of the full rate.

2. The principle grounds of appeal are that (i) Mrs Prochazka, whilst accepting that she did not pay NI contributions in the relevant period, never saw or signed form  
15 CF9 (the form which was both an application for a National Insurance contribution card and an application to elect whether or not to pay contributions at the full rate); (ii) Mrs Prochazka did not see or have explained to her the leaflet NI 1, the National Insurance Guide for Married Women issued in October 1970; (iii) she was thereby denied the choice of whether or not to opt out of paying contributions, (iv) in the  
20 circumstances she should be given the opportunity of paying the amount she would have paid in contributions and of claiming the full pension.

3. A bundle of documents containing inter alia all the correspondence between the parties was produced by HMRC. Mr Prochazka presented the case on behalf of  
25 Mrs Prochazka (his wife) and gave evidence. Mr Alan Greenshields, an officer of HMRC, gave evidence on behalf of the Respondents. After the close of proceedings Mr Prochazka addressed a letter to the Judge in which he made further submissions. This letter was sent on to HMRC for any response, and after some administrative confusion, a reply was received from Mr Greenshields. We admitted both the initial  
30 letter and the reply and take both into consideration in this case.

### **The Facts**

4. The background is that Mrs Prochazka, who is of Dutch origin, came to the  
35 UK from Holland on 16 May 1969 to work as an au pair. She left in June 1970 but returned on 16 August 1970. At that time she had only studied English for some 2 hours per week. On 10 October 1970 she married Richard Prochazka. Having started work at the High Wycombe branch of Woodward and Stadler, on 7 April 1971 she registered for NI, having, according to HMRC's records, elected not to pay NI  
40 contributions as from 8 March 1971. Those records give the date of her birth, of her arrival in the UK and of her marriage, and refer to her starting work on 7 April 1971. They also record her then address and her education. Her name is misspelt, and she was not from 1969 to 1970 in full-time education, as the record states.

45 5. At the time, if a woman wished to opt out from paying NI contributions she had to provide evidence that she was married and form CF9 had to be completed. The usual practice was for an employee to attend her local NI office where she would be

given NI 1 and the process would be explained. It would however have been possible for the matter to have been concluded by post, but it would have been necessary to produce evidence of being married.

- 5 6. Mrs Prochazka denies ever having seen the NI 1 and denies having signed form CF9, and asks for it to be produced. This is not possible as it was HMRC's policy, having transferred the information from the CF9 to the permanent NI record, only to retain the CF9 for a period of 6 years.

## 10 **The Legislation**

7. Regulation 2(1)(a) of the National Insurance (Married Women) Regulations 1948 (SI 1948/1470) provides for the making of an election.

- 15 8. Regulation 2(3)(a) of those regulations states that an employed married woman who has elected not to pay contributions shall: "... make application to the Minister for a certificate of such election ... and the married woman shall produce such certificate to the employer forthwith."

- 20 9. There was no "certificate" as such, the authority was in the form of a married woman's special NI card (exempt rate card as it was commonly known), or a flat rate card to which there had been affixed form CF16.

- 25 10. This was an adhesive label that was attached to the card by the local office authorising the employer to affix only exempt rate contributions to the flat-rate card.

- 30 11. Until an employer had received either a special card or an ordinary rate card with form CF16 attached he was obliged by law to deduct Class 1 (employed person) rate contributions from the woman's wages and affix Class I (employed person) rate contributions from the woman's wages and affix Class 1 rate stamps to the card.

- 35 12. Regulation 3(1) of the National Insurance and Industrial Injuries (Collection of Contributions) Regulations 1948 provides that an employer shall return the insurance card to the employee on termination of employment.

13. On 6 April 1975 the National Insurance scheme was reconstructed and contributions paid by employees and employers became related to earnings. To accommodate the new scheme the record keeping system was computerised.

- 40 14. Under the provisions of regulations 100 and 91 of the Social Security (Contributions) Regulations 1975 (SI 1975/492) a non paying election made prior to 6 April 1975 was deemed to continue without a break as a reduced rate election from 6 April 1975.

- 45 15. Regulation 92(1)(c) of the Social Security (Contributions) Regulations 1975 provides that a woman's choice will terminate if, at any time after 5 April 1978 there are two consecutive tax years during which she has no earnings in respect of which

primary Class 1 (employed earners) contribution are payable and in which she was not self-employed.

16. In accordance with regulation 2(6) of the Social Security Pensions (Home Responsibilities) Regulations 1994, a married woman would be entitled to Home Responsibilities Protection (“HRP”) if from 6 April 1975 to 5 April 1980 she had no earnings for which primary Class 1 contributions were payable and was not at any time a self employed earner. HRP was introduced to protect the pension rights of men and women who are prevented from going out to work because of responsibilities at home. A married woman cannot benefit from HRP for the same period that she had a liability to pay reduced rate NI contributions. Mrs Prochazka’s record shows that she was entitled to HRP from 6 April 1978 to 29 July 1995 because she had been awarded Child Benefit.

### 15 **The Appellant’s case**

17. Mr Prochazka made a competent and credible witness, but Mrs Prochazka had felt too upset by the case and too anxious to appear in person. On her behalf Mr Prochazka gave evidence that it would have been possible for the wages clerk at Woodward and Stadler to have filled in form CF9 on her behalf, and whilst she worked in High Wycombe, wages were made up at the Gerrards Cross branch, one of the partners bringing the wages across once a week. He suggested that her details could have been passed on to Gerrards Cross by telephone and then posted to the local NI office. Contrary to the suggestion made on behalf of HMRC that there was no advantage to an employer in deducting the reduced rate, he submitted that employees might compare their actual wage packets, and thus the employer who deducted less might find it easier to recruit staff at a time when there was little unemployment in the area.

18. It was suggested by Mr Prochazka that Mrs Prochazka herself would have been unaware of the existence of the NI department and therefore someone else (probably her prospective employer), must have been involved in the registration process. Her understanding of English was not good and she would not have been capable of understanding the document NI 1, which consisted of 22 pages and was in places ambiguous. Confronted by it she would have sought help from her husband, and he himself had no recollection of being consulted about it or seeing the document. It was therefore possible that the CF9 was completed on her behalf and without her knowledge. She did not authorise anyone to sign it or send it on her behalf.

19. Mr Prochazka submitted that the NI 1 did not state clearly that signing the CF9 in the wrong place could reduce your pension entitlement; the NI contribution card does not bear the word ‘pension’; HMRC ought to have returned the form CF9 to Mrs Prochazka rather than destroying it. These matters were all relied on, together with the fact that Mrs Prochazka did not herself complete or sign the CF9, it was submitted that, having been denied the choice of opting out, and not having been made aware that she was thought to have opted out, it would be unjust to deny Mrs Prochazka the

option of making up the shortfall in her NI contributions and then receiving a full state pension.

20. The argument produced by Mr Prochazka subsequent to the hearing was that in para 14 of his witness statement Mr Greenshields had stated that the information on Mrs Prochazka's permanent record MWI/NP meant that she was a married woman in Class 1 employment who wished not to pay NI contributions. This was contradicted by leaflet NI 1 at p.8 where it is stated: "Class 1 contributions give cover for all benefits", therefore Mrs Prochazka should have been entitled to full benefits, including a full state pension and maternity benefit. In response to Mr Prochazka's late submission in respect of Class 1 contributions, Mr Greenshields responded that class 1 contributions were paid by employed persons, but where an employed married woman had elected not to pay contributions, she removed her liability to pay Class 1 contributions as an employed person and so was not required to pay Class 1 contributions. He further pointed out Mrs Prochazka's record was marked MWI/NP followed by the date of the election. This marking showed that the married woman (Mrs Prochazka) was an employed person but had elected not to pay at the Class 1 rate. The NI 1 leaflet set out the benefits which might be obtained if the married woman chose to pay Class 1 contributions.

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### **The Respondents' case**

21. Mrs Prochazka had herself made an election not to pay NI contributions, effective from 8 March 1971. To start work she would have needed to obtain a NI contribution card and the only way this could be done was by completing the necessary registration forms CF8 (which had to be filled in if you were over 18) and CF9. As the record contained details of the date of her arrival and education, these must have been supplied by her, and she would have had to have provided her marriage certificate as the election only applied to married women. She could either have taken the forms away or completed them at the local office in High Wycombe, which was where she was registered on 7 April 1971.

22. Mrs Storey referred us to the case of *Gutteridge SC/3111/05*, in which the Special Commissioner Charles Hellier stated at para 152:

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"I do not conclude that the absence of the CF9 is evidence that it was not signed by Mrs Gutteridge."

At para 196-197 he said:

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"It is a steep hill that a taxpayer needs to climb to show that her recollection of events 35 years ago is more likely to be correct than a written record ...

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"In reaching this conclusion I must be clear that I did not believe Mr and Mrs Gutteridge were not telling the truth as they recalled it ... but merely saying that it seems to me that their truthful account of their

recollection is more likely to be an account of faulty recollection than of a correct one.”

5 We were also referred to the case of *Morgan* SC/3085/2008 in which the Special Commissioners preferred HMRC’s written records to Mrs Morgan’s claim not to have signed an election to pay contributions at the special rate then available to married women, saying at para 11:

10 “I find it implausible that an election would have been recorded, whether or not correctly ... if as she said Mrs Morgan made no election at the time.”

15 23. The case of *Whittaker* SC/3308/2005 was similar in that Mrs Whittaker also relied on the absence of the CF9, and in that the Special Commissioners found in favour of HMRC.

### **Reasons for Decision**

20 24. In this appeal the burden of proof is on Mrs Prochazka to prove her case on the balance of probabilities.

25 25. We accept Mr Greenshields’ explanation in respect of Mr Prochazka’s late submission about the effect of Class 1 contributions.

25 26. Whilst we have every sympathy for Mrs Prochazka in this case, and whilst it is probable that, at the time HMRC’s record was made, her understanding of the effect of signing the CF9 would be limited, nonetheless we find on the balance of probabilities, the burden of proof being upon her, that she did cause the CF9 to be signed. There can be no other explanation for the detailed information which is  
30 contained in HMRC’s record, albeit ‘Gerda’ is misspelt as ‘Gera’, and there are other minor inaccuracies. It is very probable that she understood that she would be making smaller NI contributions, and therefore was happy with that method having understood the full consequences of agreeing to pay at the reduced rate. Although the cases referred by HMRC are not binding on us, they are very persuasive and there is  
35 nothing in the present case which causes us to distinguish it. We would echo the words of Special Commissioner Hellier (as he then was) in the case of *Gutteridge* referred to at para ... above.

40 27. It would, given the possibility of later dispute, have been preferable for HMRC to have returned the CF9 to Mrs Prochazka at the conclusion of the 6-year period rather than destroying it. However, given that its contents had been transposed to their records, we do not find that HMRC were in breach of any obligation either to retain the form or to provide it to Mrs Prochazka. The argument from Mr Prochazka that it was unjust not to allow Mrs Prochazka to make up the shortfall in her NI  
45 contributions and thereby obtain a full state pension, was predicated upon her having been denied the choice of whether or not to opt out from paying full contributions. As we do not find that she was denied that choice, we do not find it unjust that she is

denied the opportunity to make up the shortfall. In any event HMRC do not have the power to allow Mrs Prochazka to make good the shortfall in payments in the circumstances.

5 28. This appeal is dismissed.

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

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**MISS J C GORT  
TRIBUNAL JUDGE**

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**RELEASE DATE: 4 January 2012**