



TC02119

Appeal number:TC/2011/06615

TYPE OF TAX – national insurance contributions- married woman’s reduced rate elections – evidence as to whether elections made – balance of probabilities –first election out of context with lifestyle and anomalous– second election correctly recorded and valid.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS PATRICIA FRANKS

Appellant

- and -

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

**TRIBUNAL: JUDGE RACHEL SHORT
WILLIAM HAARER**

Sitting in public at Keble House, Southernhay Exeter on 3 May 2012

**Mrs Patricia Franks, Mr Colin Howe of Borders and West and Mr Roskilly for
the Appellant**

**Alison Johnson and Alan Greenshields instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This appeal concerns the making of a married woman's election under the
5 National Insurance (Married Women) Regulations 1948(SI 1948/1470) "The
Regulations".

2. HMRC's position is that Mrs Franks made an election to pay nil rate national
insurance contributions under regulation 2(1)(a) for the periods 13 May 1970 to 5
10 April 1975 and a fresh election from 6 April 1975 to 15 November 1982 to pay
reduced rate contributions.

3. Mrs Franks does not accept that she made these either of these elections and has
appealed against HMRC's decision of 17 June 2011 that she did.

4. The effect of Mrs Franks having made the elections under s 2(1)(a) is to
significantly reduce the amount of state pension to which she might be eligible. In
15 particular, the impact of having made the election for Mrs Franks is that it precludes
her from "Home Responsibilities Protection" under s 2(4) (a) of the Social Security
(Home Responsibilities and Miscellaneous Amendments) Regulations 1978. Mrs
Franks would otherwise be eligible for Home Responsibilities Protection from 6 April
1978 to 5 April 1983.

20 5. It is worth noting that the Tribunal has jurisdiction to consider whether the
reduced rate national insurance elections were made by Mrs Franks, but does not have
jurisdiction to consider an appeal in respect of Mrs Franks' actual entitlement to
Home Responsibilities Protection. The only question to be decided by this Tribunal is
whether, on the balance of probabilities, Mrs Franks did not make these elections
25 under Regulation 2(1)(a).

6. HMRC contend that Mrs Franks made an election first on 13 May 1970 and
secondly on 6 April 1977.

Agreed Facts.

7. Mrs Franks' permanent national insurance record (the RF1) records the
30 elections made at the dates referred to by HMRC. The Tribunal was shown the
original of this document and its annotations were explained.

8. In order to make an election Mrs Franks would, in both cases, have had to
complete a form CF9, which was attached to leaflet NI 1. This form has to be signed
by the married woman herself.

35 9. Mrs Franks married Mr Roskilly in August 1967, gave up the job which she had
in Cornwall and moved to Devon. She gave birth to her first child in 1968 and had
two more children, her third child was born in April 1973.

10. From the date when she was married until 1977, Mrs Franks did not undertake any paid employment. In 1977 she started working evening shifts for Standard Telephone and Cable "STC" in Bovey Tracey. STC were a substantial company, employing more than thirty people on their evening shifts.

5 11. Mrs Franks and Mr Roskilly were divorced in November 1982. At that time Mrs Franks was employed on a part time basis at Gidleigh Park Hotel.

The Law

10 12. Regulations 2(1)(a), 2(2)(a) and 3(1)(a) of the National Insurance (Married Women) Regulations 1948 provided the right for employed and self employed married women not to pay national insurance contributions. If a woman exercised that right, by means of an election on a specified form, she was only obliged to pay a small amount under the Industrial Injuries Act which provided cover for accidents at work, but no actual National Insurance (NI).

15 13. The Regulations obliged an employer to apply a standard rate of NI deductions from an employee's pay unless they had received a certificate that NI contributions should not be paid.

20 14. The law changed in April 1975 as a result of the Social Security Pensions Act 1975 and the Social Security Contributions Regulations. From that date employees paid NI contributions as a percentage of their earnings. It remained possible to make a married woman's election, the effect of which was to reduce the rate of NI from the standard 5.75% to a reduced 2% (Section 3 of the Social Security Pensions Act 1975).

The Evidence.

25 15. Given the importance of the factual evidence in this case, all of the witnesses were sworn.

16. On behalf of HMRC Mr Greenshields spent some time explaining the detailed procedures which HMRC had in place for processing and recording married women's elections at the relevant time.

30 17. If a married woman wanted to make a reduced rate NI contribution, she would do this by filling in form CF9, which was attached to Leaflet NI 1. We were shown an original NI 1 leaflet from this period with the attached form. It was agreed that this was rather a dull document.

35 18. Leaflet NI 1 could be obtained from any local tax office and once filled in was either returned to that office or passed to the woman's employer. In both cases the form would then be sent to HMRC's central records office in Newcastle and the woman's permanent record, the RF1 would be amended accordingly. There was no

basis on which an RF1 could be amended without the back up evidence of a CF9 if all procedures were being properly followed.

19. If a woman was employed, her employer would issue her with an NI 1 and the “stamp” affixed to her NI card would reflect the lower rate contributions. Until April 5 1975 when the use of the NI card was abolished, the card would be sent to HMRC at the end of each year and checked against the employee’s RF1. The original card would then be destroyed.

20. Mr Greenshields could not give a definitive percentage of the number of women who would have made a married woman’s election in the late 1960s and early 1970s, 10 but did say that the office in Newcastle received “lots of elections” at that time. One of the reasons for this was the greatly reduced rate of NI which the election gave rise to. In 1970 standard NI contributions would have been 15 shillings a week, which was reduced to 8d if an election was made.

21. Mr Greenshields stressed that the making of the married woman’s election had 15 no impact of the amount of NI which was paid by the employer. There was no incentive for an employer to encourage or discourage a woman from making an election.

22. Mr Greenshields said that all records kept in Newcastle were subject to internal 20 audit controls, spot checks and two levels of review. Overall the error rate of the clerks in that office was quite low, approximately 1%. Clerks who consistently made errors were picked up quickly and if their error rate rose above 1% there was “quite a to do”.

23. Mr Greenshields talked us through the entries on Mrs Franks’ original RF1:

(1) RF300/23/4/70 – Indicating that Mrs Franks’ record had been updated for 25 a change of address.

(2) MW/1/NP 13/5/70 – Indicating that a married woman’s reduced rate election had been made effective from 13 May 1970.

In respect of this second entry he explained that the effective date on the RF1 need not 30 be the date when the CF9 was actually signed because a CF9 could be back dated for up to 6 weeks.

24. After 1975 HMRC’s records procedures changed as NI became part of the 35 PAYE system, under the Social Security Act 1975 and the Social Security and Pensions Act 1975. A married woman who had made a valid election paid contributions at 2% of her earnings rather than 5.75%. Elections made prior to the change in law remained valid. The process by which women made the reduced rate election remained the same.

25. An annual return would be made by the employer showing the amount of NI paid by an employee. If the full rate of NI had been deducted when an election was in

force that would not be accepted and a report would be generated for investigation by HMRC.

26. Mr Greenshields referred us to Mrs Franks' computer record (form RD19 – technical account, which was the permanent computerised record which replaced the RF1 from April 1975) for 1977 which included a reference to a fresh election being made in April 1977 on the basis of a newly submitted CF9. “*dkt 130 –low rate authority – reduced rate authority from 06.04 77(H) to 15/11/82(H)*”. That record also referred to her “category B” contributions from 1977 until 1982, when her category is changed to “A”, reflecting the date of her divorce.

27. HMRC could not produce the original CF9 document in either case, since these would have been destroyed in accordance with their standard document retention policy. Mrs Franks’ computer record is therefore the primary source of information about the April 1977 election. Mr Greenshields confirmed that there were no entries on Mrs Franks’ records for the period from May 1970 to April 1977, reflecting the fact that she was not employed during this period.

28. However, there were records for the period after Mrs Franks recommenced employment in 1977 and particularly for the significant NI rate change which applied when Mrs Franks got divorced. Mrs Franks would have been prompted about the change in her contribution rate and, at a later date, about the shortfall in her class A contributions and this is reflected on her RD19.

Mrs Franks’ evidence.

29. Mrs Franks described what she was doing during the periods when HMRC are suggesting that a married woman’s election was made; having given up her job to get married and move to Devon in 1967 she had her first child in 1968 and spent the next nine years at home raising three children while her husband, Mr Roskilly, went out to work.

30. Mrs Franks went back to work on a part time basis in 1977 for the local company STC. In November 1982 she and Mr Roskilly were divorced.

31. Mrs Franks described herself as someone who took great care over signing forms, following advice from her father never to sign anything that she did not understand. Mr Roskilly supported this and explained that he dealt with all of the formalities and documents when they were married, such as signing the rental agreement on their house, registering the births of their children and all household bills.

32. Mrs Franks said that she had no recollection of having signed a CF9 either in 1970 or in 1977. Had she been presented with such a form, she would have referred this to Mr Roskilly and they would have discussed it. Neither she nor Mr Roskilly had any recollection of such discussions taking place. Mrs Franks could not remember

dealing with any documents from the time when she left her employment in Cornwall until she started work with STC in 1977.

5 33. In respect of her time with STC, she accepted that they were a substantial company with their own personnel department, but she had no memory of signing or being asked to sign a CF9 as part of the commencement of her employment with them. Throughout the time she worked at STC she believed that she was paying full NI rates. She said that she received regular pay slips, but did not scrutinize these in any detail.

10 34. Mr Howe on behalf of Mrs Franks stressed that the married woman's election of 13 May 1970 bore no relevance to Mrs Franks' life at that time. She would have had no reason for making an election in 1970 since she had no intention of working on a full or part time basis.

15 35. Mr Howe also referred to a number of previous decisions in this area, in particular *Whittaker v HMRC* [SpC 529 2006] pointing out that in that case (in which the taxpayer lost), there was corroborating evidence of the election having been made from the taxpayer's employer, unlike in this case where the only evidence which HMRC have produced of the April 1977 election is the computer print out (the RD19) and, for the May 1970 election, their own records (the RF1). In the *Whittaker* case HMRC did produce a copy of the CF9 form, which they had not been able to do for
20 Mrs Franks.

25 36. Mr Howe stated that the single computer print out which had been produced for the April 1977 election should not be treated as good evidence because there is nothing to back it up. Mr Howe did accept that the RF1 was good evidence for the May 1970 election, but argued that what it recorded did not make any sense in the context of Mrs Franks' lifestyle in 1970.

Decision

37. This case concerns discrepancies between Mrs Franks' recollections of what she did, or did not do, more than forty years ago and what HMRC's records say she did more than forty years ago.

30 38. In order to succeed in her arguments Mrs Franks needs to demonstrate that her recollections are more likely to be correct than HMRC's records and that, on the balance of probabilities, she did not make these elections in May 1970 and April 1977. She is in the difficult position of having to prove a negative as well as demonstrating that personal recollections that something was not done should over
35 ride HMRC's official records.

39. Forty years is a long time. There are some life events which are more memorable than others. Most people would be able to remember when they got married, when they had children and when they got divorced. Other events are less memorable, including the completion of bureaucratic forms such as the CF9.

40. The keeping of written records is one way of ensuring that significant events are not forgotten. That does not mean that the records are infallible. It is always possible for records to be completed incorrectly or to be subsequently altered. However, it does mean that there needs to be strong evidence that the written records are incorrect
5 in order for the memories of one particular individual to override those records.

41. There was nothing in the evidence brought before the Tribunal to suggest either that Mrs Franks was not presenting her true recollections of what occurred in 1970 and 1977 or that the records kept by HMRC had been falsified in any way.

42. Mr Howe has suggested in his written arguments that HMRC's failure to
10 produce Mrs Franks' original CF9 elections suggests some intentional desire by HMRC not to produce relevant evidence. Given that these documents were destroyed as part of a standard (and widely accepted) document retention policy, we do not consider that this failure to produce the relevant documents has any bearing on HMRC's case.

15 43. Mr Greenshield's evidence suggested that HMRC applied standards to record keeping procedures in Newcastle which were well within acceptable standards for procedural processes of this kind and which had the effect of minimising clerical errors.

44. However, in respect of the May 1970 election, both Mrs Franks and Mr Howe
20 have pointed out the incongruity in the timing of the making of the election as recorded by HMRC and what Mrs Franks was doing in early 1970 (looking after a small child) with no thought of returning to the workforce. While we accept HMRC's argument that there could be a time lag between the date recorded as the effective date for the election and the date when the CF9 was actually signed, to tie the CF9 into any
25 event in Mrs Franks' life when she might have been expected to sign such a form (such as on her marriage), the time lag would be very great indeed.

45. In this context we would refer to the *Gutteridge* decision [*Gutteridge v HMRC*
30 SpC 534 2006] where there was an eight month time lag between the making of the election and the effective date which was not treated as effecting the validity of the record. We have concluded that there is a significant difference between an eight month time lag and the, for example, three years which elapsed from the date of Mrs Franks' marriage and the date when the election was recorded by HMRC.

46. HMRC could not provide a rational explanation for why an election might have
35 been made in May 1970 and we cannot see one either. It seems completely counter to what might be expected of woman in Mrs Franks' position at that time. She cannot recall making an election and would have had no reason to make an election. The recording of an election for that time seems to us to be sufficiently anomalous as to call into question the integrity of HMRC's records, despite their generally high standard of care.

40 47. For these reasons, we have concluded that it is more likely than not that Mrs Franks did not make an election in May 1970 and that this represents one of the rare

instances in which HMRC's records are incorrect, despite their generally low error rate.

5 48. The position in respect of the April 1977 election is rather different. At this time Mrs Franks would have had a reason to make an election, at the start of her new employment. That employment was with a substantial employer who would have had its own systems for recording NI rates and who consistently deducted the reduced rate NI from Mrs Franks' pay (as demonstrated by the RF19 and the employer's deductions cards which were presented to us). Mrs Franks' employer had reason to believe that Mrs Franks had made a lower rate election, and this is reflected by
10 HMRC's computer records.

15 49. Mr Greenshields explained that HMRC did checks to ensure that employers were only applying the reduced rate when valid elections were in place and we think that it is reasonable to conclude that a sophisticated employer like STC would be unlikely to apply the reduced rate unless they had the proper basis on which to do that, i.e. a CF9.

20 50. In these circumstances we have concluded that it is more likely than not that Mrs Franks has failed to recall that an election was made as part of the, no doubt lengthy, paperwork which she completed when she started this employment and that this is more likely than both HMRC and her employer's records as to her NI status being incorrect.

51. For these reasons we have concluded that it is more likely than not that Mrs Franks did make a CF9 election in April 1977 and that her pension rights and any rights to Home Responsibility Protection, should be calculated on that basis.

25 52. 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)"
30 which accompanies and forms part of this decision notice.

**RACHEL SHORT
TRIBUNAL JUDGE**

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RELEASE DATE: 15 June 2012