



TC02301

Appeal number: TC/2011/07780

TYPE OF TAX – Class 1A National insurance contributions – “making good” benefits in kind – interaction of income tax and NIC charges – statutory interpretation – secondary regulations cannot override primary statute.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARCIA WILLETT LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE RACHEL SHORT
DAVID EARLE**

**Sitting in public at Keble House, Southernhay Gardens, Exeter on 17 August
2012**

Mr R Bibby for the Appellant

**Mr D Lewis, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. This is an appeal against a decision of HMRC under s 8 Social Security Contributions (Transfer of Functions, etc) Act 1999, of 28 March 2011 concerning the payment of Class 1A national insurance contributions (“NICS”) by Marcia Willetts Ltd (the “Taxpayer”) for the five tax years 2002 – 2003 to 2006 – 2007 inclusive. The total NIC payments due for those five periods are £7,864.

The Legislation

2. The relevant legislation is set out at s 10 of the Social Security Contributions and Benefits Act 1992 (“SSCBA”). S 10 states that:

“10(1) Where-

(a) for any tax year an earner is chargeable to income tax under ITEPA 2003 on an amount of general earnings received by him from any employments (“the relevant employment”),

(b) the relevant employment is both –

(i) employed earner’s employment, and

(ii) an employment, other than an excluded employment within the meaning of the benefits code (see Chapter 2 of Part 3 of ITEPA 2003)

(c) the whole or part of the general earnings falls, for the purposes of Class 1 contributions to be left out of account in the computation of the earnings paid to or for the benefit of the earner,

a Class 1A contribution shall be payable for that tax year, in accordance with this section, in respect of that earner and so much of general earnings as so falls to be left out of account”

3. The specific charging provision of the Income Tax Earnings and Pensions Act 2003, (“ITEPA”) referred to in s 10, is s 203 of ITEPA and this determines the amount of a cash benefit received by an employee and that is imported into s 10 of SSCBA. (The cash equivalent of the amount treated as earnings). In particular, s 203(2) states that

“the cash equivalent of an employment related benefit is the cost of the benefit less any part of that cost made good by the employee to the persons providing the benefit”.

It was accepted that there are specific charging provisions in ITEPA s 105 and s 106 which refer to the provision of accommodation, but it was agreed that there was no

substantive difference between the relevant drafting of these provisions and s 203 therefore s 203 is referred to throughout.

4. Also relevant are the Social Security (Contributions) Regulations 2001 (The Regulations), which stipulate at para 71 the time when Class 1A contributions are payable: Para 71(1) states that the date for payment is 19 July in the year immediately following the end of the year in respect of which it is payable.

Procedural Issues

5. The Appellant's skeleton argument and supplementary bundle were served outside the time limit set by the Tribunal. At the hearing the Respondent agreed that these documents could be admitted and the Tribunal proceeded on that basis.

Agreed Facts

6. The Taxpayer is a company whose business is exploiting the writing skills of its two directors. It is a closely held, family company. The Taxpayer owns a property, occupied by the two directors. The directors paid the bills relating to the property, but the Taxpayer paid for structural repairs to the property.

7. It was not the intention of the Taxpayer to provide benefits in kind to the directors, who did not regard themselves as enjoying benefits in kind. However, as a result of discussions with HMRC it was accepted by the Taxpayer that the structural repairs paid for by the Taxpayer amounted to benefits in kind which had been provided for the tax years 2002 – 2003 to 2006 -2007 inclusive, which were chargeable under s 203 ITEPA.

8. In order to remove the income tax charges, the Taxpayer "made good" the benefits in kind under s 203(2) ITEPA on 6 May 2008 by an adjustment to the directors' company loan accounts. This had the effect of removing the income tax charge under s 203 ITEPA for each of the relevant periods.

9. The Taxpayer was charged Class 1A NICs as well as income tax in respect of the benefits in kind arising relating to the property in accordance with s 10 SSCBA for each of the tax years 2002 – 2003 to 2006 -2007.

10. It was accepted by both parties that the onus of proof in this case is on the Taxpayer to demonstrate that he has been over charged tax.

The Arguments

11. The question for the Tribunal is whether the fact that any income tax liability under s 203 has been removed as a result of the Taxpayer "making good" the benefits in kind, also means that the s 10 SSCBA obligations to account for Class 1A NICs falls away.

HMRC's arguments

12. HMRC's position is that the obligations under s 10 SSCBA remain despite the fact the any related income tax charge has been removed. This is because the s 10 obligation is determined as at the time of the due payment date under para 71 of the Regulations and anything which happens subsequently cannot alter the original charge.

13. There is no provision in the NIC legislation confirming that "making good" removes a Class 1A obligation. It is accordingly not possible to "make good" an obligation to pay Class 1A NICs.

14. HMRC argue that in the light of s 203 ITEPA, a taxpayer's income tax liability is contingent and so s 10 SSCBA must be read as subject to an "implied limitation that the earner must make the payment before the tax liability for the year becomes due" and therefore the obligation to pay the Class 1A NICs cannot be changed by events subsequent to the payment due date (HMRC statement of case – 20 Dec 2011).

15. In the Taxpayer's case the making good payment was not made until some time after the due date for each of the Class 1A contributions had passed, therefore it could not retrospectively remove the obligation to pay those contributions.

16. HMRC state that the timing rules at para 71 of the Regulations are effectively a charging provision. The Class 1A obligation crystallises on that date and cannot be subsequently changed. This position is reflected in the HMRC Manuals referred to by HMRC for example at NIM 15201 and 17130:

"Class 1A NIC refunds cannot be made when a subsequent event occurs which may alter the amount on which NICs were originally assessed"

And similarly at NIM 17070, in the context of the definition of an error at para 52(9) of the Regulations:

"The error must relate to something which occurred before the date by which payment of the Class 1A NICs must be made".

Taxpayer's Arguments

17. The Taxpayer's position is that s 10 SSCBA is dependent on the existence of a charge under s 203. If a making good payment had removed the s 203 income tax charge, it must also remove the s 10 Class 1A payment obligation. The making good provisions in s 203 are an integral part of the calculations of the benefits which are chargeable to tax. If there are no general earnings chargeable to income tax, there is nothing on which s 10 SSCBA can bite.

18. In the Taxpayer's view, it is not intuitive to apply an NIC charge on a benefit which has been extinguished by a later payment. The ITEPA is a comprehensive charging code and the SSCBA is totally dependant on a charge arising under ITEPA.

19. The timing rules at para 71 of the Regulations are merely machinery provisions and cannot be used to create a charge to tax which would not otherwise exist.

20. The Taxpayer took issue with HMRC's interpretation of "chargeable" for these purposes, and argued that the making good payment under s 203 meant that nothing had been either charged or "chargeable" under s 203 and therefore nothing could be charged under s 10.

Statutory Interpretation

21. Both parties raised principles of statutory interpretation in their defence, and stressed that tax statutes must be construed purposively. The Taxpayer's point was that it is necessary to take account of the underlying purpose of the legislation; HMRC's approach "distorts the underlying approach of the legislation" and displaces the effect of s 203. HMRC's contentions would lead to an absurd result.

22. HMRC argued that "where a number of statutory provisions are intended to operate together, they must be construed by reference to each other....." So the payment provisions of the Regulations have to be taken account of in determining not just when but also whether an NIC charge arises.

23. The Taxpayer also referred to the decision in *Pepper v Hart*, ([1992] STC 898), to the extent that the Tribunal considered that the legislation was unclear.

Decision

24. Having considered the arguments of both parties, the Tribunal has concluded that there can be no charge to Class 1A NICs in circumstances where there is no income tax charge and that the time for payment rules in the Regulations cannot override the provisions of the primary legislation.

25. Both parties referred to principles of statutory interpretation and the taxpayer referred to the decision in *Pepper v Hart*. The Tribunal does not consider that this is a circumstance where *Pepper v Hart* principles are required. The basic rule of statutory interpretation is that statutes must be interpreted in accordance with their plain meaning. It is only when a statute is obscure, ambiguous or leads to an absurdity that the *Pepper v Hart* principles can be called upon. If they are called upon, the relevant Hansard statements have to be clear and made by the promoter of the legislation. It is an approach which the courts have applied only in a very narrowly defined set of circumstances (see for example in the context of tax law, comments in *Melluish (Inspector of Taxes) v BMI (no 3) Ltd [1995] STC 964*), which the Tribunal does not consider are present here.

26. It is the Tribunal's view that in this case the primary legislation is clear. S 10 SSCBA and s 203 ITEPA are inter-dependent and a Class 1A NIC charge can only arise when there is an income tax charge. The Tribunal agrees with HMRC that there is no specific wording in s 203 which makes it clear that a "making good" payment has retrospective effect for the purposes of s 10, but we consider that on a plain reading of s 203(2) a "making good" payment extinguishes an income tax charge ab initio and that therefore there are no general earnings, or income tax charge to which s 10 can apply.

27. The Tribunal's view is that this is an interpretation which is consistent with both the purpose of the NIC legislation, which is to charge benefits to tax only to the extent that they are actually received and in line with the general approach of UK tax legislation, which allows for the taxpayer's chargeability to be altered by subsequent changes of fact or law. The general structure of UK tax legislation is that a tax liability can be impacted by future events; losses can be carried back to earlier periods, tax returns can be kept open for 12 months or longer in some cases, HMRC can amend tax returns on the basis of facts "discovered" after the event.

28. There are two significant objections to HMRC's approach as a matter of statutory interpretation; the first is that the Regulations are made pursuant to the primary legislation, SSCBA s 175. It is a principle of UK law that subordinate legislation cannot go beyond the scope of the primary legislation to which it is subordinate. Second, in cases of doubt, subordinate legislation should be construed in the light of the enabling act – in this case the SSCBA. (*Halsbury's Laws of England*, Vol 96 at 1067 referring to authorities including *Rickards v A-G of Jamaica*, (1848) 6 Moo PCC 381).

29. Our view is that HMRC's approach offends against both of these principles. It attempts to suggest that the Regulations are effective to produce a charge to tax which is not imposed by the primary legislation by crystallising the Taxpayer's liability at a particular point in time. Secondly, the approach produces a result which is not in line with the purpose of the primary legislation.

30. It is only when the primary legislation is applied by reference to the Regulations that any absurdity arises. Attempting to impose the time limits from the Regulations as part of the determination of whether a charge arises under the primary taxing provisions produces results which are at odds with the overall purpose of the legislation.

31. The Tribunal cannot see how it can be legitimate to apply HMRC's "purposive approach" to the inter action of primary and subordinate legislation which results in Class 1A NIC payments being set in stone as at the date when the payment becomes due, particularly since the result is, as here, that the Taxpayer is being charged NICs on a benefit which was not ultimately received.

32. We have considered in this regard the provisions at para 52 of the Regulations to which HMRC referred and which do allow for amendments to NIC payments to be made. While recognising that errors can be made and that NIC payments can be repaid to reflect that Reg 52 (9) nevertheless attempts to limit errors which can give rise to re payments as –

“in this regulation “error” means, and means only, an error which –

is made at the time of the payment; and

relates to some past or present matter”

33. HMRC's position is that para 52 is not relevant here because the NIC payments were made on the basis of facts which were correct at the time of the payment. While the Taxpayer has not argued that the repayment should be made on the basis of an error under para 52, we consider that the drafting of s 52(9) is at best odd, and at worst an ineffective defence against retrospective changes of fact or law which would impact NIC payments.

34. It is worth noting also that the primary legislation, at s10ZC SSCBA does give regulation making power to allow Class 1A contributions to be amended as a result of retrospective changes of law arising from changes made to the charging provisions of s 203 ITEPA (s 10ZC (2) (b)), reflecting the general principle that there should be no NIC charge where there is no s 203 income tax charge.

35. In the light of all of the above, we consider that the "making good" provisions at s 203 result in any taxable benefit and therefore any income tax charge being extinguished and treated as never having arisen. There can therefore be no chargeable benefit to which s 10 could ever attach and no Class 1A payments can be due.

36. We do not believe that it can be correct to limit primary taxing provisions which allow a taxpayer to extinguish a charge to tax by making a payment, by reliance on a subsidiary regulation which imposes time limits by reference to which tax has to be paid. For these reasons the Taxpayer's appeal is allowed and the Class 1A NIC liabilities set out in the s 8 Notice of 28 March 2011 should be set aside.

37. 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.

**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 8 October 2012