



TC02684

Appeal number: TC/2012/357

NICs – whether late payments correctly attributed by HMRC –yes - whether there was a failure to exercise due care and diligence- yes - whether HMRC bound to accept pensioner’s allocation – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COLIN MURFITT

Appellant

- and -

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE
 JULIAN SIMS**

Sitting in public at Havant Magistrates Court on 29 January 2013

Mr Murfitt in person

Ms L Storey, HMRC officer, for the Respondents

DECISION

1. The issue between the parties was whether a payment made by Mr Murfitt should have been treated as voluntary class 2 contributions for 24 years from 1984-2008. There were also a subsidiary issue whether Mr Murfitt was entitled to make further late contributions or whether he had failed to exercise due care and diligence.

Facts

The history

2. The appellant's case, which HMRC had earlier disputed, but by the time of the hearing had accepted, was that he ceased to be resident in the UK in 1968 and indeed since that time had not spent 7 or more consecutive days in the UK. He had gone to work on the Continent and was now and had for many years been resident on Alderney.

3. The appellant accepted that HMRC's record of his NI contributions was accurate. This showed that he had paid 10 years of contributions (1960-1968) and (1970-1972). On his retirement he did not get the pension he expected. A letter from the DWP (Department for Work and Pension) dated 31-12-2008 invited him to pay one extra year in order to qualify for the minimum 25% pension and to make further voluntary contributions to bring it up to a 50% pension. The letter gave details of how much Mr Murfitt needed to pay in respect of the years the DWP considered him to be in time to pay in order to improve his pension.

4. This led to an exchange of correspondence between the appellant and DWP as the appellant considered he was entitled to make up many more years than set out in the DWP letter and at a much lower rate of contribution.

5. On 31 August 2009 the appellant sent a letter to HMRC (CAR – the Charities Assets and Residence section which dealt with overseas NI contributors). With this letter Mr Murfitt enclosed a cheque for £2,701.10, and stated that he considered this to represent voluntary Class 2 payments for 24 years at the rate of £2 per week for most years with slightly higher rates for the years 2002-2006.

6. We find HMRC acknowledged receipt of that cheque by letter dated 14 September 2009. Although Mr Murfitt put in issue at the hearing whether the letter had been sent or received, we find it was both sent and received because (a) HMRC produced in evidence and we accept a print out of an internal computer record recording the sending of the letter and (b) Mr Murfitt's suggestion he had not seen it struck the panel as opportunistic and, for reasons explained below, we did not find his evidence wholly reliable (c) letters sent by Mr Murfitt in the period afterwards showed that he was aware of the contents of the letter (and strongly disagreed with it) and that he had clearly been in contact with the author of the letter.

7. No copy of the letter is available. Remarkable although it appears to the panel, HMRC did not keep one. All their computer records is how the money received was allocated and that a letter was sent to Mr Murfitt and the DWP to advise them of the allocation.

5 8. The allocation made by HMRC was to treat the payment as representing class 3
contributions from 1996-2002 (6 years) and class 2 contributions for 2002-2008 (6
years). This gave Mr Murfitt an enhanced pension as it treated him as having made
contributions for another 12 years. However, Mr Murfitt was very unhappy with the
allocation as he had expected to get an enhanced pension on the basis of having made
10 contributions for another 24 years (ie 12 more years than HMRC allowed).

An arrangement to pay voluntary contributions?

9. One issue of fact between the parties, although only relevant to the subsidiary
issue of “due care and diligence” was whether there was, or whether Mr Murfitt
reasonably thought that there was, a an arrangement under which a Mr David Lee (or
15 one of the companies owned and controlled by him & for which Mr Murfitt worked
on a self employed basis for many years to 1981) had agreed to pay voluntary
contributions for Mr Murfitt from 1968 onwards.

10. Mr Murfitt’s case was that there was such an arrangement. Therefore we had to
consider the reliability of this evidence and the Tribunal gave Mr Murfitt the
20 opportunity to explain the position. We found Mr Murfitt’s evidence overall to be
vague, rambling and frequently irrelevant to the question asked and, for the reasons
given below, unreliable.

11. The details of the claimed arrangement were vague but in essence it seemed Mr
Murfitt’s claim was that Mr David Lee (or his company) would pay the NICs but day
25 to day responsibility for this was left to his personal assistant (a Miss Hilda Fordham.)
Miss Fordham had left Mr Lee’s employment in around 1968 or 1969, and according
to Mr Murfitt, had failed to instruct her replacement to continue making the NIC
payments for Mr Murfitt, and so from then on the payments were not made.

12. He did not claim that the arrangement to pay his voluntary contributions was
30 recorded in writing nor did he claim that he had ever checked that the payments were
made.

13. There were inconsistencies in this story. It is inconsistent with the fact that
NICs were not paid from the moment Mr Murfitt left in 1968, but were then paid
again in 1970-1972. It fails to explain why, if Mr Lee had agreed to make the
35 payments on behalf of Mr Murfitt, why he did not instruct Miss Fordham’s
replacement to make the payments in the same way (Mr Murfitt claims) he instructed
Miss Fordham to do it.

14. Further, Mr Lee died in 1981 and Mr Murfitt agrees that he still did not check
whether his voluntary NICs were being paid on his behalf but said he “assumed” that
40 they were. And Mr Murfitt maintained this position even though it was also Mr

Murfitt's case that control of the companies was taken over by Mr Lee's girlfriend who proceeded to realise what assets she could from the companies and would have nothing to do with Mr Murfitt. In these circumstances, we find his failure to check after 1981 can only be consistent with a belief that there was nothing to check: he did not check because he knew that no payments were being made.

15. We note that there were other inconsistencies in Mr Murfitt's evidence. He claimed that he did not hold and had not seen his NIC contributions card once he commenced working for Mr Lee or his companies. This was because, he said, Mr Lee held the cards as he was subject to regular inspections by NIC inspectors. This makes no sense: Mr Lee only needed to hold the records that showed that he had made the legally required employer deductions and as Mr Murfitt ceased to be resident or working in the UK any contributions he made would have been voluntary.

16. Further we accept from the evidence of HMRC's copy of Mr Murfitt's record that the address for correspondence held for Mr Murfitt was his mother's, although Mr Murfitt claimed he would have given Mr Lee's address.

17. For all these reasons we cannot accept Mr Murfitt's evidence on the claimed arrangement as reliable. We find that there was no arrangement for Mr Lee or anyone else to pay voluntary NICs on Mr Murfitt's behalf; nor would it have been reasonable for Mr Murfitt to believe that there was such an arrangement and in any event Mr Murfitt did not believe that there was such an arrangement.

The law

18. The Social Security (Contributions) Regulations 2001 at Regulation 147(1) provides that:

“147(1)...a person...may ...if he so wishes and if he satisfies conditions specified in paragraph (3) below pay contributions in respect of periods during which he is outside the United Kingdom as follows....”

19. This applied to both class 2 and class 3 contributions. HMRC accepts that Mr Murfitt fulfils the conditions for this paragraph to apply: the issue between them was (a) time limits and (b) amount.

20. Regulation 148 provides:

“148. Entitlement to pay Class 2 or Class 3 contributions under regulations 146 or 147 shall be subject to the following conditions –
(a) that the payment is made within the period specified in regulation 48(3)(b)(i) and....”

21. Regulation 48 provides:

“48(3)

(b)(i) where the contribution is payable in respect of any year before 6 April 1982, before the second year following the year in respect of

which it is paid; and where the contribution is payable in respect of any year after 5 April 1982, before the end of the sixth year following the year in respect of which it is paid....”

22. Mr Murfitt paid his contributions, as mentioned above, on 31 August 2009. HMRC, however, treated the payment (for the purposes of time limits) as made in 2008 as that is when Mr Murfitt first wrote to them querying his position. This concessionary treatment worked in Mr Murfitt’s favour and obviously he does not challenge it.

23. Even if Mr Murfitt’s contention is right and his payment covers 24 years, this does not go back beyond 1984. The time limit under Regulation 43(3)(b)(i) is therefore 6 years. This would only entitle Mr Murfitt to pay contributions back to 2002.

24. However, other rules gave an extended time limit for class 3 contributions. These rules are contained in Regulation 50A which provides as follows:

“50A (1) This regulation applies to Class 3 contributions payable in respect of the tax years 1996/7 to 2001/2 (“the relevant years”).

(2) If a person (“the contributor”) [fulfils conditions set out in (a)-(c)] he may pay the contribution within the period specified in paragraph (3).

(3) The period within which the contribution may be paid is the period beginning with the coming into force of these Regulations and ending –

(a) in the case of a contributor who has reached or will reach pensionable age before 24 October 2004, on 5 April 2010; and

(b) in the case of a contributor who will reach pensionable age on or after 24 October 2004, on 5 April 2009....

25. HMRC accepted that Mr Murfitt fulfilled the conditions in Regulation 50A(2) and could have the benefit of the extended time limit (as they considered his claim made in 2008 although the money was not paid until August 2009).

30 *The rate of contributions*

26. HMRC assumed that where Mr Murfitt had the option of paying either class 2 or class 3 NICs that he intended to pay the cheaper contribution (and they allocated his payment accordingly). We rely on the rates of NICs 1975-2012 as set out by HMRC. These were not challenged by the appellant. From this we find historically the rate of Class 2 contributions was higher than the rate of Class 3 contributions. But in 2000 this changed when the rate of class 2 was dropped from £6.55 to £2 per week. It has increased since that date but remains very significantly lower than Class 3 contributions.

27. It was Mr Murfitt’s contention that he was entitled to pay Class 2 contributions at the £2 rate applicable in the years 2001/2 to 2003/4 for the years 1984-2004 (he paid at the slightly higher rates for the later years of 2004/5 to 2007/8).

28. We find that under Regulation 147 payment is made in respect of periods; under Regulation 48 it must be paid before a certain date. There is nothing in the regulations that suggests that the payment, if made, is in any different amount than if it had been paid on time. So, even if Mr Murfitt is entitled to pay Class 2 NICs for 1984-2001, he could only be entitled to pay them at the rates applicable in each particular year.

29. And those rates prior to 2000 were higher than the class 3 NIC rates.

30. So the £2,701.10 was allocated to those years for which DWP considered (and we find) that Mr Murfitt had a right to make late payments.

31. Mr Murfitt does not suggest that he intends to make any other late payments. Could he do so if he wished? There are regulations (Reg 50 and 61 of the 2001 Regulations) which allow back payments to be made in special circumstances for both Class 2 and Class 3. These regulations allow back payments to be made at any time within HMRC's discretion if an officer of HMRC is satisfied that:

“(a) the failure to pay is attributable to the contributor's ignorance or error; and
(b) that ignorance or error was not the result of the contributor's failure to exercise due care and diligence.”

32. Mr Brian Penney's decision in his letter of 12 May 2011 was that condition (a) was satisfied in that Mr Murfitt's failure to pay arose through ignorance or error but condition (b) was not satisfied because he found there was a failure to exercise due care and diligence.

33. We could only interfere with Mr Penney's decision to the extent it was unreasonable in the *Wednesbury* sense: *Walsh v Secretary of State for Social Security* (1994) at page 14. We see nothing unreasonable in Mr Penney's decision that Mr Murfitt failed to exercise due care and diligence: indeed we entirely agree with his decision for the reasons given above where we discuss Mr Murfitt's evidence. There was no arrangement in place to pay Mr Murfitt's voluntary contributions and we find Mr Murfitt neither did think nor could he reasonably have thought that there was such an arrangement in place. Mr Murfitt was aware of the NIC system and was on his own evidence aware that contributions could be paid in respect of periods he was not resident yet, we find, he knew that no such contributions were being made.

34. In any event HMRC accept that Mr Murfitt could pay additional class 3 contributions under s 13A Social Security Contributions and Benefits Act 1992 (as inserted by the Pensions Act 2008). This allows him to pay an additional 6 years of Class 3 contributions at *current* Class 3 rates. Mr Murfitt so far has declined to do so.

35. So, so far as statutory law is concerned, the £2,701.10 was allocated in respect of NICs in the only way it could have been allocated and was allocated to best advantage for Mr Murfitt.

HMRC bound to treat payment as payment of 24 years?

36. Mr Murfitt's main claim in the Tribunal was that, irrespective of what right he had under social security law to pay back contributions, because he made the payment of £2,701.10 expressly for 24 years, and HMRC accepted the payment and did not
5 return the payment, HMRC cannot now hold Mr Murfitt to the strict letter of the statutory law.

37. Mr Murfitt's case on this rests on a recent decision of the Court of Appeal *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504. In that case the tenant owed rent to its landlord. It wrote a letter proposing to pay rent for the current period but
10 leaving outstanding rent owing for an earlier period. The landlord verbally refused this arrangement, but when the payments were made as proposed, kept the money. The landlord sought to forfeit the lease for non payment of rent and it therefore became necessary for the court to decide whether the rent was paid in respect of the earlier or later period.

38. The Court decided that the contractual law of appropriation applied which allows the *debtor* to appropriate a payment: and the creditor only has the right to reject the money in order to reject the appropriation. The creditor could not keep the money but substitute his own appropriation. This meant in that case that the payment
15 of rent was for the later period and the landlord was unable to forfeit the lease.

39. Mr Murfitt believes that that case helps him here. He sent in his cheque for £2,701.10 with an accompanying note that it was payment of 24 back years of NICs. HMRC unilaterally chose to treat it as payment of 12 years NICs. They did not return the money to him, nor, initially, even offer to return the money. Therefore, says Mr Murfitt, HMRC are fixed with the appropriation of money made by Mr Murfitt and
20 must credit him with an extra 24 years of NICs.

40. We do not agree. The *Thomas* case concerned two parties to a contract. There is no contract between Mr Murfitt and DWP. The contractual law of appropriation does not apply here. In any event, Mr Murfitt was not a debtor: he was not liable to pay NICs. He merely had the right to pay certain back years of NICs if he chose to do
30 so in order to boost his pension. Unlike the tenant in *Thomas*, he was not part-paying a debt he owed and selecting which bit of the debt he was actually discharging: Mr Murfitt owed no debt. The *Thomas* case is irrelevant.

41. What Mr Murfitt's case amounts to is saying that, even though he was not entitled to make back payments for 24 years and did not pay sufficient money to cover the 24 years even if he had been, because he sent with the money a statement
35 that it was to be applied for 24 years, DWP were somehow either bound to give Mr Murfitt the benefit of 24 more years contributions or return the money. And because they did not return the money, says Mr Murfitt, DWP must now give him a pension as if he had the right to and had actually paid for an extra 24 years.

42. HMRC's case is that Mr Murfitt is entitled to the return of the money if he wishes and such an offer has been made now to him in writing. Alternatively, he can leave the money as it is allocated to the 12 years.

43. We do not agree with Mr Murfitt's contention. The contractual law of appropriation does not apply here. Mr Murfitt paid the money under mistake of law and would be entitled to recover it. DWP will return it. He cannot complain. (We note, of course, that he has not asked for the money to be returned and were he to do so he might well find that the extra pension already paid to him on the back of these extra voluntary contributions and which would have to be returned, could exceed the contributions to be repaid).

44. But he cannot hold DWP to an appropriation that he made when he paid the money as he had no right in law to make those extra back contributions nor to make them at the rate of £2 per week. The only possible claim he could make would be one of judicial review: claiming that DWP should in their *discretion* give him a greater pension than the one to which he is entitled in law. Apart from the fact that this tribunal has no jurisdiction to hear a claim of judicial review, we cannot see any reason why DWP should exercise its discretion in such a way. The starting point is that the law should apply to all and we see no reason at all why Mr Murfitt should be given a greater pension than he is entitled to in law and certainly not simply because he paid money to DWP with an attached note telling DWP to apply it in a manner which he was not entitled to in law.

45. We therefore dismiss the appeal.

46. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 30th April 2013