



TC02705

Appeal number: TC/12/01076

NATIONAL INSURANCE – Home Responsibilities Protection – Married Women's Election to pay Reduced Rate Contributions – whether election made when original Certificate of Election may have been destroyed – whether election had lapsed - whether election correctly reinstated – Social Security Contributions (Transfer of Functions) Act 1999 – Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JANET SMITH BROWN

Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
PETER R SHEPPARD, FCIS, FCIB,
CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on 11
April 2013**

Andrew Brown and Janet Brown for the Appellant

Stephen Duke, Officer of HMRC, for the Respondents

DECISION

Introduction

- 5 1. The Appellant, Mrs Janet Smith Brown ("JB"), appealed against the decision of the Respondents ("HMRC") made on 18 May 2011, under Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999, that from 6 April 1975 to 27 August 1988, JB was liable to pay National Insurance Contributions at the reduced rate.
- 10 2. In terms of this decision, JB is unable to qualify for a full rate State Retirement Pension and also prevented from qualifying for Home Responsibilities Protection ("HRP") in the period from 6 April 1978 to 9 May 1991.
3. JB believes that she did not elect to pay reduced rate contributions from 6 April 1975 or at any time thereafter.
- 15 4. JB elected to pay full contributions commencing 28 August 1998.
5. The Appeal was made later than the 30 day deadline and, in the absence from any objections from HMRC, the Tribunal allowed the Appeal to be received late.

Legislation

20 Regulation 3(1)(a) of the National Insurance (Married Women) Regulations 1948 (SI 1948/1470) which was superseded by the National Insurance (Married Women) Regulations 1973 (SI 1973/693) provided that a married woman who was self-employed was excepted from liability to pay National Insurance contributions unless she elected otherwise.

25 Under Section 3(1) of the Social Security Pensions Act 1975 the provision to except a married woman from paying Class 2 contributions ceased to have effect.

Regulation 91(1)(b) of the Social Security (Contributions) Regulations 1975 (SI 1975/492), provided for married woman to elect to be not liable to pay Class 2 contributions.

30 Regulation 100 of the same regulations provided for a self-employed married woman who was excepted from liability under Regulation 3(1)(a) of the National Insurance (Married Women) Regulations 1948 to be deemed from 6 April 1975 to have made an election under Regulation 91.

35 Under the provisions of Regulation 91(4) of the Social Security (Contributions) Regulations 1975 which was superseded by Regulation 100(4) of the Social Security (Contributions) Regulations 1979 a married woman could not make an election after 11 May 1977.

5 Regulation 92(1)(c) of the Social Security (Contributions) Regulations 1975 provided that a woman's choice would terminate if, at any time after 5 April 1978, there were two consecutive tax years during which she had no earnings in respect of which primary Class 1 (employed earners) contribution were payable and in which she was not self-employed.

The Facts

6. Married women were entitled not to pay National Insurance Contributions when the National Insurance Scheme was introduced in July 1948.

10 7. An employed married woman was liable to pay Class 1 (employed person rate) contributions unless she elected not to do so. A self employed or non employed married woman was not liable to pay Class 2 (self employed) rate or Class 3 (non employed) rate contributions unless she elected to do so and, accordingly, unless an election to pay was made, no contributions were payable.

15 8. On 6 April 1975, the National Insurance Scheme was radically changed and, significantly, the married women's choice remained in place but those who had previously chosen not to pay contributions became liable to pay married women's reduced rate contributions.

9. It was also possible up until 11 May 1977 to elect to pay reduced rate contributions after which it was not possible to make a new election.

20 10. A self employed married woman who had not elected to pay Class 2 contributions before 1975, retained the right not to pay until after that date until such time as she choose to begin to pay. If, however, she became employed rather than self employed then the "election" (i.e. the choice not to pay Class 2 contributions) continued as a choice to pay reduced rate contributions.

25 11. HRP came into operation on 6 April 1978. It provided that the State Pension rights of a person would be protected if they were prevented from going out to work because of responsibilities at home.

30 12. Persons who received Child Benefit for a child under the age of 16 were entitled to HRP for any complete tax year in which they did not work or they worked but paid insufficient National Insurance Contributions for the year to count towards their State Pension. There was an exception to this to the extent that a married woman who had a valid election to pay reduced rate contributions was not entitled to HRP.

35 13. Evidence was given by JB and by Alan Greenshields ("AG"), an official of HM Revenue and Customs National Insurance Contributions and Employment Office (which together with the National Insurance Office, the Department of Health and Social Security and their successors are hereinafter referred to as ("the Department")).

14. JB gave evidence of a meeting which she said took place in 1984 with the local Department office in Dumfries. This was the only evidence of this meeting as no

written records survive in the form of a note of meeting, the form which it was said was signed at the meeting or the certificate that resulted from the meeting.

15. HMRC and the Department relied throughout on JB and JB's employers' National Insurance records but these were limited to a Statement of Contributions, copy pay slips, replacement postings for Class 1 contributions, all dated 1988 and a copy of NI1 dated April 1984, being the Department's explanatory leaflet entitled "Married Women – Your National Insurance ..." which had as an attachment a claim form, CF9, being a "Married Women's Application for a Certificate of Election or Revocation of Reduced Liability". It contained a declaration which said "I am a married woman and the information I have given applies to me and is true to the best of my knowledge and belief. I have read the leaflet NI1 (or have had it explained to me). My wishes (and choice where necessary) are as shown below".

16. Any actual CF9 which was signed was no longer in existence nor was the certificate which should have been issued following the acceptance of such an application.

17. The CF9 form contains two choices to pay with full liability or reduced liability.

18. The Tribunal were also provided with the draft letters which HMRC said should have been sent to women who had paid full rate contributions in error and also a Surrender of Certificate form. These were all blank forms and no completed forms or any forms signed by the Department or by JB were submitted to the Tribunal.

19. AG provided helpful and useful guidance of the practices and procedures of the Department based on his work in the records branch of the Department until 1978 and his subsequent work, all of which had been related to contributions and procedures.

20. AG had also been involved in training new officers and providing written instructions which included spending two years as a specialist instruction writer in the records branch. AG did not deal with the contribution records of JB at the time but gave evidence, in light of his experience, on the general administrative procedures which existed in bringing National Insurance Contributions to account, the maintenance of the contributions records and the associated practices which existed, both locally and within the Department's central office.

21. AG accepted that in relation to JB's case, his evidence was hearsay and was merely an exposition of what should have happened if best practice and procedures had been carried out and the individuals dealing with JB were following instructions and exercising their discretion as they had been trained to do so. AG accepted that there may have been instances when that was not the case.

22. JB gave evidence of her working career. She left school in 1959 and worked as an employee in her father's farming enterprise. When he retired in approximately 1964, JB continued to work for the farming enterprise but in a self employed capacity. In March 1968, JB married and became a house wife and subsequently a mother. Her son was born in October 1972 and her daughter in May 1975. JB obtained Child Benefit for each child until they were the age of 16.

23. JB advised the Department of her marriage in 1968 and ceased to make any further National Insurance Contributions until she returned to part time work in 1984 working in a Dumfries and Galloway Council primary school.
24. There are two versions as to what happened next.
- 5 25. JB says that she was discussing with a colleague the amount of her National Insurance Contributions which were deducted from what was a relatively low salary/wage. Accordingly, JB contacted the local department office and asked if she could pay reduced rate contributions. JB says she was told she could not because no election was in place and after 1977 it was impossible to have a new one but could
10 appeal the decision. JB appealed the decision which resulted in her attending a meeting at the Department's local office in 1984. JB says that when she went to the office she was shown into a room and had a discussion with a young man who was in his early 20s and seemed rather nervous. He kept going out of the room in JB's view to ask advice from colleagues.
- 15 26. JB explained that she had not worked for the previous 15 years and at the end of the interview the young man said that JB would be allowed to elect to pay the reduced rate.
27. JB says she was given no explanation as to how he arrived at this conclusion and saw no reason to ask. As far as she was concerned, it was a simple request to
20 switch from one type of national insurance to another and she thought the complicated part would be getting her contributions for the short period of her employment returned to her.
28. At this meeting, JB recalled signing a form and, also either being given or being sent shortly thereafter, a certificate which she then says she passed to the head teacher
25 of the school where she was working to pass to the wages office of Dumfries and Galloway Council.
29. JB has no recollection of whether, in the remaining period of her employment until she stopped work on 20 September 1985 and from 1 October 1985, attended the Glasgow College of Food Technology until 27 March 1986, her weekly pay advice
30 actually showed a reduction on the National Insurance Contributions or not.
30. In a letter to HMRC dated 4 June 2009 JB accepts that she was sent a refund of the contributions which amounted in total to £238.59.
31. At the hearing, HMRC agreed that this amount would be consistent with the National Insurance Contributions paid within the relevant periods of repayment.
- 35 32. JB worked part time from 1986 until 1988 and full time from 1989 to her retirement on 17 July 2004. In evidence JB confirmed that from 1968 until 1984 (and thereafter) she was at no time self employed.

33. HMRC's version was detailed within correspondence from the period 28 March 2009 to 6 December 2011 which was submitted to the Tribunal ("the Correspondence").

5 34. HMRC say in their letter dated 2 November 2009 of the Correspondence that JB had a valid election in force from 6 April 1975 which meant that she was entitled to pay a reduced rate contribution if she was employed or not to pay Class 2 contributions if she were self employed.

10 35. HMRC said that to have this election JB must either have completed a form CF9 or notified the Department that she had been self employed on 5 April 1975 with the result that she would have been treated as having an election not to pay contributions from 6 April 1975.

15 36. It continued "this election would have lapsed on 5 April 1980 unless you had notified us that you wanted your choice to continue. From 11 April 1977, a married woman could no longer elect to pay contributions or elect to pay reduced rate contributions unless she had already made this choice".

20 37. The letter continued "when you returned to work during the 1984-1985 tax year your employer did not have a certificate of election so he deducted full rate contributions from your wage. When this information was received in the Department it did not match the recorded liability and you were contacted about this matter. At that time you signed to say you wanted to continue with your reduced rate election and you were offered a refund of the full rate contributions you had paid. You have already confirmed that you received a refund of contributions. You could not have made a choice at that time to pay reduced rate contributions but you could have confirmed that you wanted to continue to pay reduced rate contributions".

25 38. The letter continued ".....the Department accepted that you were entitled to have an election from 6 April 1975. Due to the passage of time there are no case papers available from that time but your records show that you had a valid election. We do hold documents which show that your employer deducted full rate contributions during the 1984-85 to 1986-87 tax years and that these were changed to reduced rate contributions and a refund paid to you in September 1988. This action could not have been taken unless the Department had been confident that you were entitled to pay reduced rate contributions, you had signed a form to say you wanted to continue to pay reduced rate contributions and you wanted a refund of the contributions you had paid at the full rate".

35 39. These two accounts of how the issue arose at some time in the period 1984 to 1988 are contradictory.

40. JB says that she raised the matter with the Department who told her she could not make an election but said she could appeal the matter and visit the local office.

40 41. HMRC, in 2 November 2009, state that they contacted JB about the matter because they had noted a discrepancy between the deductions made by the employers and the deductions they should have made, based on what they say were their records.

42. In evidence, it was suggested that the claim for the refund of contributions could not have been made until 1988 as it was highly unlikely there would have been the delay from 1984 or 1985 until 1988 for the matter to be processed.

5 43. The correspondence continued with a dispute as to whether JB had made an election in April 1975 as JB had no recollection of making such an election because she was confined and gave birth to her daughter in May 1975 at the time the election was said to have been made and further had advised HMRC that she was neither employed nor self employed in 1975.

10 44. In HMRC's letter of 5 July 2010, HMRC outline that in any interview in 1984 the Department would have considered all information JB provided and reinstated the election from 6 April 1975 but because they could not do so at that 1984 date, the latest date at which the election could have been reinstated, was 10 May 1977 which was the day before the right to elect was abolished on 11 May 1977.

15 45. In a letter of 11 October 2010, HMRC said "if HMRC decide your married women's election should not have been reinstated and you satisfy the condition for the award of HRP then it will be awarded for the period you claimed Child Benefit.....if it is found that HMRC were at error in reinstating your reduced rate election then you would be put back in the position you would have been in had the error not occurred. In these circumstances I would imagine that the pension payments would be
20 backdated".

46. In a letter of 15 March 2011 HMRC addressed an issue raised by JB to the effect that where a married women's election was in force and, there was a two year period when there were no earnings, an election would automatically lapse.

25 47. The letter continued "the right to pay reduced rate contributions ends if during two consecutive tax years, from 6 April 1978, a woman has no earnings on which Class 1 NI contributions are payable and she was not self-employed at any time within that two year period. This is known as the '2 year test'".

30 48. The letter continued "As you received no earnings during the 1978-79 and 1979-80 tax years, your reduced rate choice would have lapsed by the two year test on 5 April 1980. However, when you resumed employment with Dumfries County Council in 1984 you queried the fact that you were paying the full rate NI contributions and your election was reinstated from 6 April 1975. You would have had to sign a refund form CF28 at the time confirming that you agreed that you had paid NI contributions at the wrong rate". No CF28 was submitted to the Tribunal.

35 49. HMRC went on to say that by agreeing a refund of the full rate National Insurance Contributions for 1984-85 to 1986-87 tax years, JB reaffirmed that choice.

40 50. In HMRC's letter of 18 May 2011, they stated "The option for a married woman to make an election to pay reduced rate contributions was abolished from 11 May 1977. The law does not allow an election to be made after that date but any valid election could continue.... the only reason the Department would reinstate your election was if you told them you were self employed before 6 April 1975 but you did

not elect to pay Class 2 NI contributions at that time or you provided evidence that you had made an election between 6 April 1975 and 10 April 1977. You could not have made the election in 1984 when you started working for Dumfries County Council".

5 51. In HMRC's letter of 17 October 2011 they addressed the issue of JB saying on "a few occasions" that she was not self employed and referred to JB's National Insurance Contribution record which was submitted to the Tribunal highlighting that there was a shortfall of contributions for the contribution year in which JB married.

10 52. The Department say that they would have informed JB that she had paid 41 weeks Class 2 National Insurance Contributions as a self employed person.

53. The resulting records for every year after 1968 show no National Insurance Contributions paid by JB until 1984. In other words, from 1969 to 1984, no contributions were paid.

15 54. AG gave evidence that even although no contributions were paid this could not negate the Department's belief that JB was self employed. AG explained that normally further evidence of self employment would be required in these circumstances such as proof of sole trader or partnership accounts but these do not appear to have been requested and on JB's evidence could not be provided because she was not self employed.

20 **The Appellant's Submissions**

55. JB says that she was not self employed and was not employed from 1968, when she became a housewife and mother, until 1984 and that at that date the two year test would have cancelled any deemed election to pay reduced rate National Insurance Contributions.

25 56. JB says that she did not elect to pay married women's reduced rate National Insurance Contributions in 1975, and was confined at that time, did not and could not state that she was self employed from 1968 to 1975, had not made an election to pay Class 2 contributions and did not make an election between 6 April 1975 and 10 May 1977.

30 57. JB says she signed a form at the Dumfries office of the Department and was issued with a certificate which she gave to the head teacher of the school who said she would subsequently send it to Dumfries County Council's pay office.

58. JB says she received a refund of contributions in 1988.

35 59. JB says she does not understand how in view of the two year test an election could be reinstated as when she first raised the matter in 1984 she was told that she had no election in place and was too late to make one.

The Respondents' Submissions

5 60. HMRC say that under Regulation 100 of the Social Security (Contributions) Regulations 1975, a self employed married woman was deemed to have a certificate of exception under Regulation 3(1)(a) of the National Insurance (Married Women) Regulations 1973 and was deemed to have made an election under Regulation 91 of the Social Security (Contributions) Regulations 1975 not to pay contributions.

10 61. HMRC say that the only way in which an election from 6 April 1975 would be shown on JB's record was if she was self employed before 1975 and had not elected to pay Class 2 contributions or the information that she provided at the interview in 1984 led the Department to believe she was or had been self employed and so the election was allowed to continue from April 1975 or the election was allowed to continue throughout the period in question because the Department believed she satisfied the conditions to allow her to do so.

15 62. HMRC say it was not possible for a married woman to make a reduced rate election after 11 May 1977 and, whereas it is not HMRC's contention that JB definitely made a reduced rate election in 1975, it is possible that the election was reinstated and entered onto the record after the Department were satisfied that her elections would have continued after 6 April 1975 under Regulation 100 of the Social Security (Contributions) Regulations 1975.

63. HMRC say that JB must have provided some evidence to show that her election should have continued for her record to have been noted and the election reinstated.

25 64. HMRC say JB has given conflicting information during the course of the investigations. HMRC say that at the time JB attended the local department office and was told the reduced rate, she would have been given a certificate of reduced rate authority and been required to give this to her employer. HMRC say that their records show that the employer received no such certificate because they continued to deduct full rate contributions.

30 65. The year end return submitted by her employer for the years 1987 to 1988 shows they deducted reduced rate contributions and, consequently, the years in which full rate contributions were deducted in error were investigated and a refund was made of the difference.

66. HMRC say the contributions could only be refunded once JB had signed the necessary claim form and that JB acknowledged having received the refund.

35 67. HMRC say that the letter which accompanied the claim form gave her the option of cancelling her reduced rate if she wished to do so but there was no record of her having revoked her choice until 27 August 1998.

68. HMRC say that the records of the Department are correct and that JB has submitted no evidence to show that she did not pay contributions at the reduced rate;

and unless the Department had been assured by JB that her election should still be valid then it would not have been reinstated in 1984 when she returned to work.

69. HMRC refer to the Special Commissioner case of *Mrs Daphne Carol Gutteridge v HMRC* Commissioners and to the comments by the Special
5 Commissioner, Hellier, where he said "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 where, even although it is found that the written record may be liable to error, it is found that the likely rate of error is very small.... In reaching this
10 conclusion I must be clear that I did not believe that Mrs or Mr Gutteridge were not telling the truth as they recalled it in their evidence but merely saying that it seems to me that their truthful account of their recollection is more likely to an account of a faulty recollection than that of a correct one".

70. HMRC say the Appeal should be dismissed.

Decision

15 71. The Tribunal considered the submission by HMRC that JB had provided conflicting evidence in the correspondence and, consequently, whether this affected their view of her credibility as a witness.

72. Having considered the individual statements put forward by HMRC in this regard and taking account of the complex nature of the subject matter and legislation,
20 together with the length of time over which these events took place, the Tribunal did not believe that the information was conflicting or contradictory to the extent of challenging JB's credibility.

73. The Tribunal noted that elements of HMRC's letters in the correspondence also contained conflicting information which may have caused confusion for JB as she has
25 less experience of these matters. HMRC's letter of 18 July 2009, which confirmed that refunds of full rate National Insurance Contributions were made as shown in a table which showed an amount refunded in each of the three tax years of £238.59.

74. At the hearing the actual "replacement posting for Class 1 contributions forms" were submitted all dated 6 September 1988 which referred to three amounts (£99.60,
30 £81.31 and £57.22) which are said to total £238.59 (but in fact total £238.13) and not three payments of £238.59".

75. HMRC's letters in the correspondence make no mention of the two year test until this was raised by JB and this issue was not directly responded to in the HMRC's stated case.

35 76. In the Tribunal's view, HMRC's earlier letters in the correspondence fail to adequately explain that the election in 1975 is a deemed election and it is only later in the correspondence that it becomes clear that JB's record may have shown a lapsed election which would be consistent with her being told that she did not have one in 1984 and, therefore, had to appeal and visit the local office to try and obtain one.

HMRC say that that entry could have been reinstated by which the Tribunal understood, on the basis of the evidence before them to mean overwritten.

77. No audit trail exists to show what the position was before 1984.

5 78. To reinstate the election, the Department believed that JB was self employed after she married and had not made an election to pay Class contributions which meant no contributions would be shown on her contribution records; which is HMRC's only evidence of her self employment during her marriage.

79. JB says that in her appeal and at the meeting in 1984 she made it quite clear that she was neither employed or self employed for 15 years from 1968 until 1984.

10 80. Even if there is a dispute about her employment status in 1968, the Tribunal accept that JB was neither self employed nor employed from 1969 until 1984 when she commenced work part time in a local primary school.

15 81. Whether or nor an election "to continue to make reduced contributions" had actually been made or deemed to have been made in 1975, this election must have failed the two year test and, accordingly, lapsed.

82. When JB commenced work in 1984 she was told that there was no election in place and that she was too late to make one and that is consistent with either there having never been an election in place in 1975 or it having lapsed.

20 83. HMRC say that they instigated the review because there was an election in place and JB attended the office to "confirm her existing choice".

84. No declaration exists and the only evidence before the Tribunal is what should have happened or what might have happened in order for the election to be reinstated.

25 85. The Form, CF9 confirms an "existing choice" but the Tribunal do not accept that confirming an existing choice allows an election which has lapsed to be reinstated.

86. HMRC say that the only way in which an election from 6 April 1975, deemed or otherwise, would be shown on JB's record was if she was self employed before 1975 and had not elected to pay Class 2 contributions.

30 87. The Tribunal believe that JB was self employed for a period of two years and from the date of her marriage, was not self employed and made no election to pay Class 2 contributions. JB paid no Class 2 contributions because she was not self employed, not because she was self employed and choose not to elect to pay Class 2 contributions.

35 88. HMRC say that if JB provided information at the interview in 1984 which led the Department to believe she was or had been self employed, the election would be allowed to continue from 1975.

89. AG set out the type of information that would have been requested and, as that type of information did not exist, the Tribunal could not accept how the Department believed that JB was or had been continuously self employed.

5 90. HMRC say that the election could also be allowed to continue throughout the period because the Department believed she had satisfied the conditions to allow her to do so.

91. The CF9 declaration states that a married woman had either read the leaflet NI1 (or had it explained to her). JB says she did not read the leaflet but merely signed the form.

10 92. AG says that the issue of the married women's reduced rate liability would have been explained in some detail. Part 1 of the NI1/April 1984 leaflet states at Part 1 "Reduced Liability – How long reduced liability lasts" and says "a choice of reduced liability lasts until you are 60 unless;

- you choose full liability; or
- 15 ▪ your marriage ends in divorce or is annulled; or
- for a period of 2 consecutive tax years at any time after 5 April 1978 you were neither employed in a job in which contributions were payable nor self-employed (This is known as the 2-year test)."

20 93. The Tribunal accept that in view of the two year test JB's election had lapsed which is consistent with what JB was originally told when she sought to have her contributions reduced in 1984.

25 94. As the election had lapsed after 11 May 1977, it was not possible for a new election to be made and, if as HMRC say, the Department's procedures were followed, the two year test would have been explained, which would have meant that the election from 6 April 1975 must have been shown or reinstated in error, as suggested by HMRC in their letter of 11 October 2010, and was therefore unlawful.

30 95. As HMRC concede it is possible that the election was reinstated and entered onto JB's record after the Department were satisfied that her election should have been continued after 6 April 1975 under Regulation 100 of the Social Security (Contributions) Regulations 1975. The Tribunal conclude that the Department satisfied themselves incorrectly and the reinstatement of the election was made in error. JB should not have been allowed to pay reduced rate contributions from 1984 and should not have been given a refund of £238.59 for overpaid contributions in the three year period 1984/5 to 1986/7. However she should have qualified for Home
35 Responsibilities Protection.

96. The Tribunal allows the appeal and decides that JB should pay the difference between reduced rate contributions and full rate contributions from 1984 to 1998, including the £238.59, plus interest, wrongly refunded. JB should thereafter receive an increased pension and HRP, as applicable, as if she had paid full rate contributions.

5 97. 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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**W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE**

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RELEASE DATE: 13 May 2013