[2018] UKFTT 641 (TC)

TC06789

Appeal number: TC/2017/05938

NATIONAL INSURANCE CONTRIBUTIONS – missing years in contribution record – whether Class 3 voluntary contributions may be made after the time limit – whether due care and diligence exercised by appellant – whether earnings from two employments may be aggregated – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOUISE WILLMOTT **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
JOHN ROBINSON

Sitting in public at City Gate House, 185 Dyke Road, Brighton on 21 August 2018 with post hearing submissions on 10 and 17 September and 10 October 2018.

Mr Richard Grout for the Appellant

Ms Amy Biney for the Respondents

DECISION

1. This was an appeal by Miss Louise Willmott[1] ("the appellant") against a decision by an officer of the respondents ("HMRC") that the appellant had paid National Insurance contributions ("NICs") under Class 1 and Class 3 in the amounts and for the tax years set out in a tabular schedule as follows:

Tax Year	Class 1 Contributions paid	Class 3 Contributions paid
1989-90	£43.56	£0
1991-92	£13.41	£0
1993-94	£7.47	£0
1999-00	£22.55	£0
2000-01	£5.80	£0
2001-02	£23.40	£0

Appended to the table was the statement:

> "I have not included any credited contributions as HMRC does not have any jurisdiction over the award of credits."

Facts

2. From the correspondence with attachments in the bundle we find the following undisputed facts.

3. On 17 October 2014 the appellant wrote to the Department for Work and Pensions about a pension statement she had received. She was concerned that it was much less than she had expected and asked to add some qualifying years to increase it. She was referred by DWP to HMRC's National Insurance Contributions Office for more information about Class 3 NICs.

4. On 20 May 2015 she wrote to HMRC to say that her State Pension Summary showed that she qualified for 22 years contributions credit for her pension and that she had written to the Future Pension Centre asking which years had gaps and which could be purchased as qualifying years, and what the cost would be, but she had received irrelevant replies and had subsequently been told to contact HMRC. She repeated her request.

[1] DWP, HMRC and the Tribunal have, inconsistently, misspelt the appellant's surname as "Wilmott".

5. On 17 October she wrote to her MP to say that HMRC had made a mistake with her NICs in 2012-13 and she was concerned that other years may be wrong. HMRC replied to the appellant and agreed there seemed to be information missing from the record. In the follow up the appellant included a letter from her employer, Grace & Compassion Benedictines, to her explaining that they had been operating two payroll systems but were amalgamating them.

6. In a letter of 8 January 2016 HMRC agreed that 2012-13 now contributed towards the appellant's state pension. They explained further that her record showed she had 25 qualifying years up to 5 April 2015 and if she thought she should have more she should write to HMRC.

7. On 29 January 2016 the appellant did write to HMRC setting out that there were 6 years, the years on the table at §1, for which she had been given no credit towards her pension. She asked HMRC to check and amend if necessary.

8. On 27 February 2016 the appellant responded to a letter of HMRC which is not in the bundle. She had obviously been asked to provide all P60s for the years concerned. She replied that she could not find any P60s and could not recall full details of where she worked as she had a number of jobs. She pointed out however that HMRC's own records show that in the relevant years her earnings exceeded the NICs threshold and the she should receive a full credit. She showed the "LEL" (lower earnings level) for each year, her Class 1 NICs for each year (agreeing with the table figures) and under a heading "Exceeded LEL" she has added "yes" for each year.

9. On 14 March 2016 HMRC explained that

> "for pension purposes the figure taken into account when assessing entitlement is the earnings on which contributions were paid, not the actual gross pay. Any earnings you received in any weeks/months that fell below the LEL in each employment are disregarded as contributions would not have been paid on those earnings.
>
> In each tax year a person is required to earn over the LEL in each week or month to make their earnings count for pension purposes.
>
> It would appear that in the weeks or months during the relevant tax years your earnings for both Employers fell below the LEL (they are not added together) and therefore earnings in these tax years were not high enough to make the year qualifying for pension purposes."

They refused to amend their records.

10. On 17 March 2016 the appellant replied expressing her disappointment and saying that she had no idea she had fallen below the LEL during the tax years in question, and that until the pension forecast she received in 2015 she had received no correspondence from HMRC alerting her to the gaps in her record. She now wished to make up the gaps.

11. HMRC responded on 31 May 2016. This letter informed the appellant that Class 3 (voluntary contributions) must "normally" be paid within 6 years of the end of the

relevant tax year "in which they were due". And if paid after the end of the second year in which they were due, they are payable at a higher rate.

12. The letter went on to add that the time limit for making Class 3 NICs for 1996-97 to 2001-02 inclusive was extended to 5 April 2009.

13. It also said that:

> "whilst the Department (sic) may make every effort to alert you to shortfalls in your contribution record, and to remind you of your obligations (sic) at the year end, it has no statutory obligation to do so."

14. After this the appellant made complaints to HMRC and the Adjudicator's Office. On 11 August she had a telephone conversation with a Complaint Handler from HMRC, Joanne Reay, who told her that the best way to resolve her dispute about the time limits for paying Class 3 NICs was to go through the decision and appeal route.

15. On 16 August 2016 HMRC wrote to the appellant repeating word for word much of the letter of 31 May 2016. But it added that as all time limits for payment of Class 3 NICs had passed payment could no longer be accepted.

16. After further desultory correspondence, on 27 January 2017 HMRC gave a substantial reply to the appellant's request for a decision.

17. This letter explained that liability for Class 1 arises once a person's earnings exceed a minimum level, the LEL. But where a person has worked for a number of employers during a specific tax year their earnings must reach the LEL in each employment before they become liable to pay Class 1 NICs in each employment. The earnings are not amalgamated, so that a person had to earn at least the LEL in each employment before Class 1 NICs are deducted.

18. HMRC then set out a table which showed for each relevant tax year the employers and the Class 1 paid in relation to each as follows:

Tax Year	Employer	Class 1 paid
1989-90	Odds and Ends Ltd	£43.56
1991-92	East Sussex County Council Odds and Ends Ltd	£0.00 £13.41
1993-94	Sussex Housing Association Mr G Balman	£0.00 £7.47
1999-00	Mr & Mrs P Madrigafera Grace & Compassion Benedictines	£14.20 £8.35
2000-01	Mr & Mrs P Madrigafera Grace & Compassion Benedictines	£0.00 £5.80
2001-02	Mr & Mrs P Madrigafera Grace & Compassion Benedictines	£0.00 £23.40

19. After the table was the statement:

> "As you can see your NI record shows that either you did not pay or paid a small amount of NICs in these employments. As explained you need to have earned and paid NICs on earnings at least above the LEL for the tax year to qualify for SP [State Pension we assume] purposes."

20. The letter further explained about Class 1 statements aka deficiency notices ("DNs"). DNs, it said, were issued around 18 months after the end of a tax year to the address on record. The NICO records show that DNs were sent to the appellant for all years 1989-90 to 2001-02 except 1990-91, 1997-98 and 1998-99.

21. Those records also show that the appellant contacted HMRC about Class 1 NICs in 2002 and 2004. The first contact was to ask about the deficiency in 1992-93. The second was to send the appellant a form to apply for a pension forecast and as a result a refund of Class 3 NICs was made for 1997-98 which was offset against 1992-93. The 2004 contacts were to give another form for applying for a pension forecast and to send a letter explaining voluntary contributions. No further contact was made, the letter said, until May 2015.

22. After this the letter went on to explain that NICs that have been paid late may be treated as having been paid on an earlier date if it can be shown to the satisfaction of an officer of HMRC that the failure to pay was attributable to ignorance or error on the part of the person and that ignorance or error was not due to any failure on their part to exercise due care and diligence. Having explained this and that some previous appeal cases have given guidance on the matter, Mrs Gordon, the writer of the letter, said that she had considered the appellant's circumstances and agreed that the failure to pay Class 3 NICs for the relevant years was due to her ignorance or error.

23. Mrs Gordon ended by enclosing "a formal decision on your NI record" and telling the appellant of her appeal rights. The decision is set out in §1.

24. On 12 January 2017 the appellant registered her disagreement, saying that she was horrified that amalgamation was not possible and maintaining that she did not receive DNs. She asked for records relating to her under the Data Protection Act.

25. On 23 March 2017 HMRC informed her that they could not supply copies of the DNs sent to her as no copies are kept by NICO. The records they had showed that DNs were issued for 1989-90, 1991-92 and 1993-94. But the annual DN exercise did not take place for 1995-96 to 2001-02 inclusive following the introduction of NIRS 2 computer system. Because of this the Inland Revenue conducted a one-off exercise to allow customers to pay Class 3 NICs outside normal time limits, and the time limit was extended to 5 April 2008. Inland Revenue issued a Press Release about this in April 2003. The letter then said that Mrs Gordon had not changed her mind and the appellant could either ask for a review or go to the Tribunal.

26. On 16 April 2017 the appellant asked for a review. In her request she said that she did not receive DNs and that the address used from 14 January 1998 to 1 July 2002 contained the wrong postcode.

27. On 29 June 2017 HMRC gave the conclusion of the review which was to uphold the decision.

28. On 22 June 2017 the appellant notified her appeal to the Tribunal.

Law

29. At the hearing we admitted to some confusion about what HMRC had said to the appellant about liability to pay Class 1 NICs. On the one hand they said that she had not reached the LEL in any employment, but they also produced records which showed the appellant had paid Class 1 NICs in one or both employments in the relevant years. We accordingly asked HMRC for further submissions to explain the legal position, which we received on 10 September 2018. They explained that a person is only entitled to have a particular year counted towards entitlement to a state pension if the earnings for the year are equal to or more than the qualifying earnings factor, which is the weekly LEL multiplied by 52.

30. The law relating to Class 3 contributions in primary legislation is in the Social Security Contributions and Benefits Act 1992 ("SSCBA"):

> "**13 Class 3 contributions**
>
> (1) [Regulations shall][2] The Treasury shall by regulations provide for earners and others, if over the age of 16, to be entitled if they so wish, but subject to any prescribed conditions, to pay Class 3 contributions; and, subject to the following provisions of this section, the amount of a Class 3 contribution shall be £x.
>
> (2) Payment of Class 3 contributions shall be allowed only with a view to enabling the contributor to satisfy [contribution] conditions of entitlement to benefit by acquiring the requisite earnings factor for the purposes described in section 22 below.
>
> (3) [Regulations may] The Secretary of State may by regulations provide for Class 3 contributions, although paid in one tax year, to be appropriated in prescribed circumstances to the earnings factor of another tax year.
>
> (4) The amount of a Class 3 contribution in respect of a tax year earlier than the tax year in which it is paid shall be the same as if it had been paid in the earlier year and in respect of that year, unless it falls to be calculated in accordance with subsection (6) below or regulations under subsection (7) below.
>
> (5) In this section—
>
> "the payment year" means the tax year in which a contribution is paid; and
>
> "the contribution year" means the earlier year mentioned in subsection (4) above.

[2] Passages in [ ] show the wording before the transfer of responsibility for NICs from DWP to Inland Revenue in 1999

(6) Subject to subsection (7) below, in any case where—

(a) a Class 3 contribution is paid after the end of the next tax year but one following the contribution year; and

(b) the amount of a Class 3 contribution applicable had the contribution been paid in the contribution year differs from the amount of a Class 3 contribution applicable at the time of payment in the payment year,

the amount of the contribution shall be computed by reference to the highest of those two amounts and of any other amount of a Class 3 contribution in the intervening period.

(7) The [Secretary of State] Treasury may by regulations provide that the amount of a contribution which apart from the regulations would fall to be computed in accordance with subsection (6) above shall instead be computed by reference to the amount of a Class 3 contribution for a tax year earlier than the payment year but not earlier than the contribution year.

13A Right to pay additional Class 3 contributions in certain cases

(1) An eligible person is entitled, if he so wishes, but subject to any conditions prescribed by regulations made by the Treasury and to the following provisions of this section, to pay Class 3 contributions in respect of a missing year.

(2) A missing year is a tax year not earlier than 1975-76 in respect of which the person would under regulations under section 13 be entitled to pay Class 3 contributions but for a limit on the time within which contributions may be paid in respect of that year.

(3) A person is not entitled to pay contributions in respect of more than 6 tax years under this section.

(4) A person is not entitled to pay any contribution under this section after the end of 6 years beginning with the day on which he attains pensionable age.

(5) A person is an eligible person if the following conditions are satisfied.

(6) The first condition is that the person attained or will attain pensionable age in the period—

(a) beginning with 6th April 2008, and

(b) ending with 5th April 2015.

(7) The second condition is that there are at least 20 tax years each of which is a year to which subsection (8) or (10) applies.

(8) This subsection applies if—

(a) the year is one in respect of which the person has paid or been credited with contributions that are of a relevant class for the purposes of paragraph 5 or 5A of Schedule 3 or been credited (in the case of 1987-88 or any subsequent year) with earnings, and

(b) in the case of that year, the earnings factor derived as mentioned in subsection (9) is not less than the qualifying earnings factor for that year.

(9) For the purposes of subsection (8)(b) the earnings factor—

(a) in the case of 1987-88 or any subsequent year, is that which is derived from—

(i) so much of the person's earnings as did not exceed the upper earnings limit and upon which such of the contributions mentioned in subsection (8)(a) as are primary Class 1 contributions were paid or treated as paid or earnings credited, and

(ii) any Class 2 or Class 3 contributions for the year, or

(b) in the case of any earlier year, is that which is derived from the contributions mentioned in subsection (8)(a).

…"

31. The relevant regulations are in the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 (SI 2001/769)

"***4 Treatment for the purpose of any contributory benefit of late paid contributions***

(1) Subject to the provisions of regulations 5 and 6 below … for the purpose of entitlement to any contributory benefit, paragraphs (2) to (9) below shall apply to contributions ("relevant contributions")—

(a) paid after the due date; or

(b) treated as paid after the due date under regulation 7(2) below.

(2) Subject to the provisions of paragraph (4) below, any relevant contribution other than one referred to in paragraph (3) below—

(a) if paid—

(i) after the end of the second year following the year in which liability for that contribution arises,

(ii) following the due date for that contribution in the case of a contribution which a person is entitled, but not liable, to pay,

shall be treated as not paid;

(b) if paid before the end of the said second year, shall, subject to paragraphs (7) and (8) below, be treated as paid on the date on which payment of the contribution is made.

(3) Subject to the provisions of paragraph (4) below, … any relevant Class 3 contribution payable in respect of a year after 5th April 1982—

(a) if paid—

(i) after the end of the sixth year following the year in which liability for that contribution arises,

(ii) following the due date for that contribution in the case of a contribution which a person is entitled, but not liable, to pay,

shall be treated as not paid;

(b) if paid before the end of the said sixth year, shall, subject to paragraph[ ] (7) … below, be treated as paid on the date on which payment of the contribution is made.

(7) Notwithstanding the provisions of paragraphs (2) [and] (3) … above, in determining whether the relevant contribution conditions are satisfied in whole or in part for the purpose of entitlement to any contributory benefit, any relevant contribution which is paid within the time specified in paragraph (2)(b) [or] (3)(b) above shall be treated—

(a) for the purpose of entitlement in respect of any period before the date on which the payment of the contribution is made, as not paid; and

(b) … for the purpose of entitlement in respect of any other period, as paid on the date on which the payment of the contribution is made.

6 Treatment for the purpose of any contributory benefit of contributions under the Act paid late through ignorance or error

(1) In the case of a contribution paid by or in respect of a person after the due date, where—

(a) the contribution is paid after the time when it would, under regulation 4 or 5 above, have been treated as paid for the purpose of entitlement to contributory benefit; and

(b) it is shown to the satisfaction of the Inland Revenue that the failure to pay the contribution before that time is attributable to ignorance or error on the part of that person or the person making the payment and that that ignorance or error was not due to any failure on the part of such person to exercise due care and diligence.

the Inland Revenue may direct that, for the purposes of those regulations, the contribution shall be treated as paid on such earlier day as the Inland Revenue may consider appropriate in the circumstances, and those regulations shall have effect subject to any such direction.

(2) This regulation shall not apply to a Class 4 contribution."

32. Other relevant regulations are in Part 5 of the Social Security (Contributions) Regulations ("SSCR") 2001 (SI 2001/1004):

"**Part 5**

Exception from Liability for Class 2 Contributions, Provisions about Class 3 Contributions, and Reallocation and Refund of Contributions (other than Class 4)

50 Class 3 contributions not paid within prescribed periods

(1) If—

(a) a person ("the contributor")—

(i) was entitled to pay a Class 3 contribution under regulation 48, 146(2)(b) or 147; and

(ii) failed to pay that contribution in the appropriate period specified for its payment; and

(b) the condition in paragraph (2) is satisfied,

the contributor may pay the contribution within such further period as an officer of the Board may direct.

(2) The condition is that an officer of the Board 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.

50A Class 3 contributions: tax years 1996-97 to 2001-02

(1) This regulation applies to Class 3 contributions payable in respect of the tax years 1996-97 to 2001-02 ("the relevant years").

(2) If a person ("the contributor")—

(a) was entitled to pay a Class 3 contribution in respect of any of the relevant years under regulation 48, 146(2)(b) or 147;

(b) had not, before the coming into force of these Regulations, paid that contribution; and

(c) had not, before 1st November 2003, received notice—

(i) in the case of a contributor in Great Britain, from the Department for Work and Pensions, the former Department of Social Security or the Board, or

(ii) in the case of a contributor in Northern Ireland, from the Department for Social Development, the former Department for Health and Social Services for Northern Ireland or the Board,

that he was entitled to pay a Class 3 contribution for that relevant year;

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 24th October 2004, on 5th April 2010; and

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

(4) Nothing in this regulation limits the application of regulation 50 or 50B."

33. As to amalgamation, the law requiring each employment to be considered separately is, said HMRC, s 6(5) SSCBA:

> "Except as provided by this Act, the primary and secondary Class 1 contributions in respect of earnings paid to or for the benefit of an earner in respect of any one employment of his shall be payable without regard to any other such payment of earnings in respect of any other employment of his."

Submissions

Class 3

34. The appellant says that she did not receive any DNs and none have been produced by HMRC. She was unaware of any shortfalls until 16 August 2015.

35. HMRC say that the appellant was not ignorant of the need to pay Class 3 NICs but was in error in not paying them when she was made aware of shortfalls in her record. They point to the facts that:

(1) DNs were sent to the appellant

(2) She made enquiries to HMRC in 2002 and 2004 and was sent forms to get a pension forecast, but put off following this up (in her own words)

(3) She asked to reallocate overpaid Class 3 NICs from 1997-98 to 1992-93.

(4) She had previously paid Class 3 NICs in 1994-95 to 1997-98 include.

36. HMRC say that the error was a result of the appellant's failure to exercise due care and diligence in terms of regulation 50(2). They referred to *George Allan v HMRC* [2011] UKFTT 115 (TC) ("*Allan*") in support.

Amalgamation

37. The appellant says:

(1) Her two employments in the disputed years were not amalgamated. She had to work for two employers to make ends meet being paid at the minimum wage.

(2) HMRC have provided no case law or other evidence to support their interpretation.

(3) HMRC's interpretation gives perverse effects eg a person could have six employments, each just below the LEL and would pay no NICs and get no contribution credits.

(4) It is not disputed that the appellant earned enough from her two employments to exceed the LEL when her earnings are added together.

38. The appellant submits that there can and should be amalgamation.

39. HMRC say that the legislation is strict and that s 6(5) prohibits amalgamation.

Discussion

Jurisdiction

40. Our jurisdiction in an appeal against a decision of HMRC in relation to NICs derives from s 8(1) Social Security Contributions (Transfer of Functions, etc.) Act 1999 which lists the appeals which may be made to the tribunal. The relevant ones seems to be:

> "**8 Decisions by officers of Board**
>
> (1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> …
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,
>
> (d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,"

41. The formal decision notice merely says that the appellant had paid National Insurance contributions ("NICs") under Class 1 and Class 3 in the amounts and for the tax years set out in the tabular schedule. Read with the lengthy letter accompanying it, as we think it must be, we consider that it is clearly wide enough to deal with the two issues the parties have made their submissions on.

Class 3 contributions

42. It is clear from what HMRC have said to the appellant that she would not have received DNs for the last three relevant years because they weren't sent out. She denies receiving any DNs for the earlier three relevant years, and HMRC have been unable to show that DNs were sent to her for these years.

43. But she paid Class 3 NICs in 1994-95 to 1997-98. She paid them by direct debit which is why there was a surplus in 1997-98 which was repayable and credited to 1992-93. But we did not have any evidence from her as to how she was aware of the need to pay them if she had not received a DN for 1994-95. What we do know is that in May 2002 she asked for an overpayment of Class 3 for 1997-98 to be set off against 1992-93. Again we do not know how she was in a position to know that could be done, though HMRC would have had the records to show that she could do it without her being previously aware of the deficiency.

44. However the fact that she did pay Class 3 NICs in 1994-95 without apparently seeking to make further payments for earlier periods when she had a deficiency suggests that she did indeed have no idea that there was a deficiency in those earlier periods, or she would have done something about it then.

45. We then find that on the balance of probabilities that the appellant did not receive DNs for the three earlier years.

46. We do not think that what the appellant did in 2002 and 2004 has any bearing on the matter. She has shown convincingly that her reference to "putting off following up" was lifted from her letter of 20 May 2015 and referred to a letter from the Pensions Service of 2014. We also accept that what she was told in pension forecasts then was only the number of years she had, not a breakdown or list.

47. HMRC have not suggested that the appellant would have seen HMRC's Press Release in 2003 about the extension of the deadline to 2009.

48. We find that the appellant was ignorant of the deficiencies in the relevant years. The question then is whether the ignorance was the result of her failure to exercise due care and diligence.

49. We have considered *Allan*. Typically, Anne Redston, then a presiding member, undertook a thorough examination of the case law cited to her, but stressed at [48] what had been said by the Court of Appeal in *Kearney v HMRC* [2010] EWCA Civ 288:

> "One of the conclusions of the Court of Appeal in *Kearney* is that decisions as to whether an Appellant exercised due care and diligence in the context of the test set out in these regulations must be considered 'on a case by case basis'. I thus find that the factual differences between these earlier decisions and Mr Allan's situation means they are likely to be of limited assistance."

50. It is noticeable that the cases examined by Anne Redston in *Allan* had very different fact patterns compared with those in this case. Many of them, including Mr Allan, involved people who went abroad for long periods, one involves someone who did not stamp his card for 9 years because he lost it and another a married woman who elected not to pay contributions. It appears that all the cases involve the pre-computerised system of cards being stamped and given to contributors, rather than the sending of DNs. In all the cases the plea of due care and diligence was not accepted.

51. Anne Redston did however also refer on her own initiative to a then recent FTT case *Goldsack* v HMRC [2010] UKFTT 530 (TC) (Judge Kevin Poole and Angela West). That was also a case of long service overseas but the Tribunal found that the appellant had exercised due care and diligence. The Tribunal concluded its decision:

> "**Balancing of the relevant factors and assessment/evaluation**
>
> 43. The main factor adverse to the Appellant in this case is that he did nothing by way of enquiry about his contribution options in the period leading up to his departure from the UK or while he was overseas. But this has to be considered in the context of our findings about what the Appellant actually knew about the National Insurance scheme at the time and the very "low key" and unspecific way in which it was brought to the attention of insured persons generally that there may be issues to consider if they went abroad.
>
> 44. Also, it must be borne in mind that the Appellant at the time was a young man in his early 20's, completing a lengthy period of training, study and work experience, who was finally about to achieve his long-

held ambition of serving overseas in the Colonial Civil Service. In the brief period between the completion of his academic studies at London University and embarking for Trinidad, he would quite understandably have been thinking of little more than the forthcoming adventure and completion of his course, and upon his subsequent return from Trinidad and almost immediate re-embarkation for a four-year tour of service in Kenya, he would no doubt have been in an even more excited and distracted frame of mind.

45. Against that background he failed to follow up an obscure note on the back of his previous NI contribution cards (which he may or may not even have read, and which was certainly not couched in terms likely to attract attention to its potential importance) and he failed to apply his mind generally to the question of whether there was anything he should be doing in relation to the making of NI contributions while he was abroad. Did this amount to a failure on his part to exercise due care and diligence? In our view, in the circumstances outlined to us, it did not.

Conclusion

46. It follows that we find the Appellant's failure to pay NI contributions while he was overseas during the period from 1 September 1955 to 31 May 1964 was clearly attributable to ignorance or error on his part, but that the ignorance or error in question was not due to any failure on his part to exercise due care and diligence and accordingly his appeal must succeed."

52. In our view, weighing up all the factors including our findings about the DNs and the admitted lack of DNs in the three later years, about the Press Release and what the appellant did and could have been expected to do in her contacts with HMRC in 2002 and 2004, the appellant exercised due care and diligence in relation to the years in question.

Amalgamation

53. We had wondered before the hearing whether the situation on amalgamation was quite as stark as HMRC suggested. It did not take the tribunal long to find regulations 13 to 17 of the SSCR 2001, and in particular:

"***14 Aggregation of earnings paid in respect of different employed earner's employments by different persons and apportionment of contribution liability***

(1) Subject to regulation 7, for the purposes of determining whether earnings-related contributions are payable in respect of earnings paid to or for the benefit of an earner in a given earnings period, and, if so, the amount of contributions, where in that period earnings in respect of different employed earner's employments are paid to or for the benefit of the earner—

(a) by different secondary contributors who in respect of those employments carry on business in association with each other;

(b) by different employers, one of whom is, by virtue of Schedule 3 to the Social Security (Categorisation of Earners) Regulations 1978,

> treated as the secondary contributor in respect of each of those employments; or
>
> (c) by different persons, in respect of work performed for those persons by the earner in those employments and in respect of those earnings, some other person is, by virtue of that Schedule, treated as the secondary contributor,
>
> the earnings paid in respect of each of the employments referred to in this paragraph shall, unless in a case falling under sub-paragraph (a) it is not reasonably practicable to do so, be aggregated and treated as a single payment of earnings in respect of one such employment.
>
> (2) Where, under paragraph (1), earnings are aggregated, liability for the secondary contributions payable in respect of those earnings shall, in a case falling within paragraph (1)(a), be apportioned between the secondary contributors in such proportions as they shall agree amongst themselves, or, in default of agreement, in the proportions which the earnings paid by each bearer to the total amount of the aggregated earnings."

54. We find it very surprising that the decision maker and the review officer were either unaware of this regulation or were aware but had decided it did not apply and so did not mention it to the appellant. Because of this lack of mention in those two documents from which Ms Biney compiled HMRC's statement of case and her speaking notes, she was not in a position to refer us to it (something for which we do not blame her).

55. We brought this regulation to the parties' attention and asked for submissions from HMRC as to whether regulations to the same effect were in force before 2001 and as to the effect on the regulations on the facts of this case, and we also asked for any comments from the appellant on HMRC's submissions.

56. HMRC said that regulation 15 SSCR 2001 was "essentially" a rewrite of regulation 12 SSCR 1979. They said no more about regulation 15.

57. The appellant submitted that the two residential care homes were closely connected, one being based in Eastbourne and one in Heathfield[3].

58. Following these replies we made further directions:

> "1. HMRC must make submissions to the Tribunal to:
>
> (1) inform the Tribunal what meaning, if any, is given to the phrase "carry on business in association with each other" in regulation 15 of the Social Security (Contributions) Regulations 2001 and regulation 12 of the Social Security (Contributions) Regulations 1979 (SI 2001/1004),
>
> (2) if there is no statutory definition, inform the Tribunal how HMRC interprets that phrase in its guidance to staff or to the public,

[3] Heathfield is about 15 miles from Eastbourne.

(3) if the phrase has been considered by this Tribunal or any of its predecessors (including Social Security tribunals), provide a copy of those decisions.

2. The appellant must inform the Tribunal what she knows of the links of a legal or economic nature, if any, that there were between the two residential care homes she refers to. This includes common shareholdings or control, common directors and any other arrangements of an economic nature between them."

59. In response the appellant said:

"When I worked at the two care homes during the relevant period, the homes were both Catholic run homes and cooperated regarding the allocation of placements for catholic residents and the use of temporary staff. Working in the two homes enabled me enough hours to exceed the LEL."

60. HMRC said:

"As per the National Insurance Manual, which is internal guidance for HMRC and published on the internet and used by employers, agents and others, at page NIM10010 (Appendix 1) "business in association" is defined by neither legislation nor regulation nor is there any judicial interpretation of the term in regards to NICs liability.

Thus HMRC are obliged to interpret the words in the context of ordinary English words and to determine the intention behind regulation 15 of the Social Security (contributions) Regulations 2001 (and its predecessor regulation 12 of the Social Security (Contributions) 1979), applies to each individual case as they arise.

Association in the regulations is derived from the verb "to associate" which has as its primary meaning "to combine for common purpose". The secondary meaning of "have frequent dealings with" is too wide a meaning in this context. For HMRC purposes it is the concept of combining or uniting towards a common end.

Appendix 2 shows the questions that HMRC considers when deciding if two or more employers are carrying on business in association with each other.

It should be noted that for the purposes of Regulation 15 (and consequently Regulation 12) that "business in association" is dependent on the actual relationship between the companies. We do not use the shareholding as a yardstick.

In response to the directions there are currently no statutory nor do judicial interpretations of the phrase "carry on business in association with each other".

61. We have attached in an appendix, the extracts from NIM that HMRC attached.

62. Despite what HMRC said in the last paragraph of their reply, we did not have much difficulty in finding a very relevant decision of this tribunal, *Stephen Tracey v*

HMRC [2013] UKFTT 273 (TC) (Judge Charles Hellier and John Coles). In that case, the Tribunal said:

> "19. It will be seen from this that aggregation of earnings is required where the employers 'carry on business in association with each other'. We saw no definition of 'in association'. It seems to us that, in part at least, this may be an anti avoidance provision, preventing a single employer avoiding NIC liability by splitting an earner's work between various associated employers.
>
> 20. Further the use of 'shall' in the tailpiece of subsection (1) indicates that if the conditions are satisfied the provision is mandatory: no discretion is afforded to the employer.
>
> 21. Mrs Johnson [for HMRC] submitted that there was no evidence that the companies had in fact aggregated earnings. Our review of the figures supported her contention. But the issue is whether they should have done so: for if it is the case that, where the aggregate of earnings from more than one employer exceed the LEL, contributions would have become payable when they would not have done so absent aggregation, it may be that Mr Tracey should have had credited to his record the NIC so payable (subject, in the case of non-payment by the companies concerned to question of negligence etc).
>
> 22. In their additional submissions HMRC say: (1) that the onus is on the employer to show that aggregation is not reasonably practicable because it is the employer who is making the judgement; (2) that the duty to aggregate is an ongoing duty to be continually reassessed through the tax year; (3) the employer must be aware of the effect on the employee; (4) it is for the employer to decide whether to aggregate but HMRC may review that decision; (5) 'When considering aggregation employers will need to balance employee's interests against their own costs'; (6) when manual payroll systems were used aggregation would depend on contact between different payroll departments; aggregation may be more difficult with tailored IT systems.
>
> 23. It seems to us that the 'reasonably practicable' test is an objective one. It is not dependent upon an election – or even on consideration of the issue by an employer. We see little room in the test for consideration of the effect on the employee unless that manifests itself in other pressures on the business. We accept that the reasons which would persuade an employer that aggregation was or was not so practicable may be relevant to an objective appraisal of that question, but do not consider that an employer's decision would be determinative. Still less the failure to make any determination.
>
> 24. On the evidence of Mr Thompson and Mr Tracey recounted in Background above, it seems to us that these companies were likely to have been carrying on business in association. There was a common thread through their businesses, they employed a similar cohort of people, they were owned and run by persons in the same small group, and at least from 1987 they shared a common administrator, Jill Martin. We note that Mr Tracey lived in Aldershot and latterly in Farnham, and from the P14s in the bundle before us we note that in 1988, 1989, 1990

> and 1992 Sewerline Ltd, in 1988 MC Water Jettings, in 1989 and 1990, 1992 MTC Well Systems, and in 1991 and 1992 Gwenpier were all shown as sharing the same address, Mount Pleasant Road Aldershot. We think it unlikely that at that time (and with that number of employees) they would have employed computer payroll systems which would have made aggregation difficult. We conclude that it would not have been impractical for the companies to have aggregated earnings for NIC purposes. Thus aggregation was mandatory."

63. We have taken into account what the appellant has said about both the proximity of the two businesses and the relationship between them, the letter from Grace & Compassion Benedictines referred to in §5 and the HMRC guidance while recognising it is just that. We have also considered what is said in *Stacey*. In our view regulation 12 SSCR 1979 and regulation 15 SSCR 2001 applied to the two employers in the last three relevant years and that, as Stacey notes, it is mandatory for the two lots of earnings to be amalgamated.

64. We assume that that being so, there is not likely to be a need to make additional Class 3 contributions for these years.

Decision

65. The appellant's earnings from her employments with Mr & Mrs P Madrigafera and Grace & Compassion Benedictines in 1999-00, 2000-01 and 2001-02 must be amalgamated for the purposes of determining the Class 1 contributions due for those years and her entitlement to contribution credit for these years.

66. The appellant is permitted to pay Class 3 NICs for 1989-90, 1991-92 and 1993-94 and for any year referred to in §65 if the effect of our decision is not to give the appellant a contribution credit after amalgamation.

67. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 31 October 2018

APPENDIX

NIM10010 – Aggregation of Earnings: Definition of "business in association"

The term "business in association" is not defined in either the Social Security Acts or Regulations, nor is there any judicial interpretation of it in the context of NICs liability. Definitions of what is meant by being associated appear in other statutory contexts but they have no relevance outside the legislation in which they appear or into which they have been expressly imported. As a result, we are obliged to construe the words in their context as ordinary English words and to determine how the intention behind Regulation 15(1) (a) of the Social Security (Contributions) Regulations 2001 (SI 2001 No 1004) applies to each case as it arises. The purpose of this particular regulation is to prevent fragmentation of earnings reducing liability to contributions.

"Association" in Regulation 15 (1) derives from the verb "to associate" which has as its primary meaning "to combine for common purpose". It has a secondary meaning - "have frequent dealings with", but that would be too wide a meaning in this context. For our purposes, it is the concept of combining or uniting towards a common end.

Points to consider

Under the Income and Corporation Taxes Act 1970 the question of whether companies form a "group" or are "associated" for the purposes of sections 272 and 302 hinges on the shareholding and common directorship. "Business in association", for the purposes of Regulation 15, however, depends on the actual relationship of the companies. We cannot, therefore, merely use the shareholding as a yardstick.

To satisfy the condition companies must have some degree of common purpose, substantiated by the sharing of facilities, personnel, accommodation, customers, and so on. All these elements need not be present in a particular case but the greater the interdependence, the greater the likelihood of treating the companies as being in association. Companies may therefore be treated as being in association with one another where they share profits or losses or to a significant degree, resources. The sharing of profits or losses would be taken to mean that the companies' relationship should be such that the fortunes of one would be reflected in those of the other(s). Consequently, where two companies share expenses, for example, for staff, premises, and so on, this would tend to affect profits or losses of both.

The fact that two companies associate together for mutual aid, or that one or more directors are common to each, does not, of itself, cause those companies to be carrying on business in association with each other. If, however, two or more companies agree to carry on together a definite business project, say, one to manufacture goods and the other to sell them, all sharing in agreed proportion the overall costs and profits, the companies would then be regarded as carrying on business in association. Conversely, if one company manufactures goods and sells them to other companies which, in turn, markets them, each charging for and making its own profits, the businesses would not be regarded as being in association with each other.

To sum up, therefore, in each case it is an overall consideration of the businesses' relationships that is required. However, in carrying out such a consideration, the importance to be attached to the various factors will vary, and it is therefore not possible to provide a straightforward set of tests which will lead to a clear-cut decision in every case.

Example

Two companies share office facilities and have common directors, Company Secretary, and wages clerk. Is this enough or is further information needed?

The sharing of office facilities, common directors, and a common Company Secretary and wages clerk are far from decisive if there are no financial links between the companies. If they were decisive, any companies with common facilities would be trading in association.

You need to address questions to establish facts. Some of those questions include

- Do the companies carry on separate trades and have separate employees?
- Is there any inter-reliance and is the profit and loss of one company affected by the other?
- Do they have separate bank accounts, sales invoices and are they separately registered for VAT?
- Do they have different customers and trade independently?

It will also be helpful to know about the arrangements for the payment of the rent of the shared office facilities and the payment of rates, heating, lighting, and so on. In addition, we would want to know whether the (common) Company Secretary and wages clerk have a separate contract of service with each company, or just with one of them. It will be significant if the common employees have a contract of service with just one of the companies, and there is no inter-company billing for work done for the company with whom there is no contract of service.

NIM Appendix 3 (shown at Appendix 2) shows a list of questions which can be asked to help decide whether two or more employers are carrying on business in association.

Appendix 2

Business in association – List of questions to help decide whether two or more employers are carrying on business with each other

1. Premises

1. Are these shared?
2. If so, to what extent?
3. How are the charges for fuel, rates, water, etc., discharged?
4. Does one company pay or do each share a proportion of the cost?
5. What is the proportion for each company?
6. How is this decided?

2. Staff

1. Do the companies have staff in common?
2. If so, whom?
3. If staff are shared, are they aware of this?

4. By which company are they engaged or does their contract of service relate to all the companies, as appropriate?
5. By which company are they paid?
6. Are staff costs apportioned? If so, how?
7. If a person engaged by one company undertakes work for another, is the latter charged for the services?

3. Equipment

1. Does each company have separate equipment?
2. Is any equipment shared?
3. Do any of the companies own vehicles?
4. If so, are these used solely by the company which owns them or do the other companies also make use of them?
5. How is fuel purchased and the vehicles maintained?

4. Accounts

1. Are separate accounts prepared?
2. Does invoicing take place between the companies?

5. Clients

1. Do the companies have clients in common?