[2012] UKFTT 578 (TC)

TC02255

Appeal number TC/2009/11434

National insurance contributions – Class 3 voluntary contributions – whether appellant paid and HMRC received contributions – whether late payment of contributions now permissible

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM BRIAN LANGTHORNE **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID WILLIAMS
ANTHONY HUGHES

Sitting in public at 45 Bedford Square, London WC1 on 19 January 2012

The Appellant appeared in person

Lisa Storey, officer of Revenue and Customs, for the Respondents

DECISION

1 This appeal is unusual for this jurisdiction. It is about voluntary payments, not compulsory taxes or contributions. And it is about payments that the appellant, Mr Langthorne, considers that he made many years ago but that the respondents (HMRC) consider were never received by them. The payments in question were for Class 3 National Insurance (NI) contributions payable under the predecessor to what is now the Social Security Contributions and Benefits Act 1992. Mr Langthorne is concerned about this. This is because, if he is right and the payments were made, he is – and has for some time been – entitled to a greater level of weekly state retirement pension than he is currently receiving and a refund of another payment.

2 This decision is concerned only with the question whether the contributions were paid and received. It is also concerned whether, if the contributions were not paid, they can in law now be paid if Mr Langthorne wishes to pay them. It is not concerned with any decision about entitlement to the state retirement pension.

3 The specific issues before the tribunal are:

(a) Did the appellant pay, and did HMRC receive, Class 3 voluntary contributions in respect of the contributions years 1986-87 and 1987-88?

(b) If not, is the appellant now entitled to make those contributions?

(c) Did the appellant pay, and did HMRC receive, Class 3 voluntary contributions in respect of the contribution year 1989-90 when he maintains that he first paid them (and without prejudice to the later payment)?

4 During the relevant period, the appellant was living and working in Spain. He moved there in 1978. He has remained there since he retired in 1995 (aged 65). It is common ground that he was therefore under no obligation to pay either Class 1 or Class 2 NI contributions in the United Kingdom from 1978. It is also common ground that any Spanish social security contributions paid were not relevant to the current appeals.

Proceedings and evidence

5 The tribunal held a hearing of the appeal at which the appellant attended and gave evidence, assisted by his wife. HMRC was represented by Ms Storey. HMRC produced a full bundle of documents and a witness statement by Alan Greenshields, an officer with considerable experience about contribution records and procedures based at the HMRC NI Contributions Office. Mr Greenshields attended and gave evidence to the tribunal.

6 The tribunal had before it a decision of the First-tier Tribunal Tax Chamber made following a hearing on 8 02 2010. This was an appeal by the appellant against a decision of HMRC that the appellant was not entitled to pay Class 3 voluntary

contributions from 26 09 1955 to 23 07 1967. However, the issues considered in that decision, although they relate directly to the two parties to this decision and to the law relevant to this decision, do not assist this tribunal on any issue of fact about the years in question here.

Contribution years 1986-87 and 1987-88

7 The formal decision for HMRC was made on 18 01 2011. It was that the Class 3 voluntary NI contributions received for both those years totalled nil. Further, this was attributable to the ignorance or error of the appellant and it was decided that it was now too late for those contributions to be received.

8 The appellant reached the age of 65 in the 1995-96 contribution year. The tribunal had before it a copy of the computer record of NI contributions made by the appellant. These were in the form of an RD18 statement of account for the appellant. These showed contributions paid in each of the years from 1978-79 to 1994-95 save for the years 1986-87 and 1987-88. 1994-95 is the last year in which the appellant was liable or entitled to pay contributions. This record was issued on 6 07 2011 and is up to date for the purposes of this appeal.

9 The tribunal also had before it a "technical copy of account" – an older form of the same record – issued on 29 01 2009. This had no entry for the years 1986-87 or 1987-88. Against each of the years 1985-86, 1988-89 and 1989-90 it had the note "Vol conts notice to abroad payer".

10 Mr Langthorne's view was that he would have received a formal notice asking for payment of his contributions for each year in which he could pay them, and that when he received that notice he would have paid the required amount. He would have paid it by a cheque drawn on a specific bank which he named. But he had not kept records going back that far, and neither had his bank, so he could produce no documentary evidence to support that view.

11 Mr Langthorne also suggested that the omission of the years 1986-87 and 1987-88 from the technical record showed that there was an error in the records and that there should have been entries for those years. Mr Greenshields gave evidence that in that form of record there would be no entry for a year if no contributions were paid. The record in the newer form RD18 did state the full recorded position for a year whether or not there were contributions received. The tribunal emphasises that the essential point is whether HMRC received the payments for the contributions and credited them to the appellant as contributions made, not whether the appellant offered payment for the contributions regardless of whether the payments were or were not received.

12 Mr Greenshields also explained that the notice about "vol conts" was a reference to a standard letter sent out to voluntary contributors inviting them to contribute for a year when no other contributions were received. This was usually sent out shortly before the end of any contribution year to which it applied. However, as the appellant

was expressly told in a letter dated 23 09 1985 from the then Department of Health and Social Security to him in Spain:

> "Your application has been accepted and payment in respect of the current tax year (1985/86) will be requested shortly before 5 April 1986. In succeeding years you will be advised of the amount due shortly before the end of the tax year provided that payment is received in the Department within 6 months of the request being issued."

That letter was a formal acceptance by the NI Contributions Office of the appellant's application to pay Class 3 contributions. At that time the relevant regulation (the Social Security (Contributions) Regulations 1979 (SI 1979 No 591), regulation 27) provided that timely payment should be within the contribution year, and that late payment could be made up to two years later. The six month provision was therefore, in practice, a relaxation of the strict limit for timely payment.

13 Ms Storey took the tribunal to records that showed that the appellant's payments of voluntary contributions were rarely prompt and often untimely. His contributions for 1983-84 were paid in February 1986; those for 1984-85 in February 1987; and those for 1985-86 in April 1987. These were all significantly over six months after the due dates. They were accepted as valid contributions. But the lateness resulted in the appellant not receiving an automatic reminder of the amount due for the year 1986-87. Mr Grenshields confirmed in evidence that this followed the standard procedure of the NI Contributions Office throughout that period.

14 The tribunal explored these issues further with both parties. In particular, it asked both the appellant and Mr Grenshields about how cheque payments were or would be dealt with by them. Mr Langthorne confirmed that he paid by cheque for each year until he agreed to making payments by direct debit. He agreed with the record that that is how he paid from 1990-91. He suggested that for 1986-87 and 1987-88 it might be that his cheques had got lost somewhere in the Department and that he had not been credited with the payments he made. But he agreed that he could not recall any cheque being returned or remaining uncashed. Mr Greenshields explained the procedure for dealing with cheques that could not immediately be attributed to the record of a specific contributor. It would not be cashed but would be held while enquiries were made to establish if the correct account could be identified. If enquiries failed then in the end the cheque would be returned to sender.

15 The task of the tribunal is to decide in the light of all the evidence whether it was more likely than not that the contributions were paid or, rather, were received by HMRC in the proper way. It accepts that Mr Langthorne acted in good faith in making his submissions to the tribunal. But the evidence produced by HMRC clearly conflicts with his views. The records produced by HMRC were internally consistent. The tribunal accepted Mr Greenshields' evidence that they showed that the Office had followed standard procedure at the time. Further, if – as he contended – the appellant had paid a cheque but it had not been attributed to the correct account then, more likely than not, he would have received some warning of this. The cheque would have been returned to him and/or the sum for which it was drawn would not have gone

from his account. Furthermore, if the suggestion by Mr Langthorne was right, his cheques went missing not simply for one year but for two successive years. The tribunal considers that for a recurring error of this sort to go unnoticed was much less likely to happen than in respect of a single error.

16 Further, Mr Langthorne accepted that he was not aware of the shortfall in his contribution record until 2006, when the exchanges of correspondence between the parties that led to the current appeal started. This suggests both that he had not himself checked the position before that and that nothing had happened that put him, or should have put him, on warning about a failure to pay contributions or about a failure in the payment procedure up to that date. And, as emphasised above, that applies to two years not one.

17 There is also a sound explanation why Mr Langthorne had not been given notice to pay at the correct time for those years. As set out above, he had been notified of the procedure in place for giving such notices and of the time limit applying. But he had not, for his part, met that time limit. It would therefore, on the evidence, be in accordance with standard procedure that he did not receive any notice about contributing in those two years. Given the approach taken by the appellant to payment in previous years, the probable explanation is that the appellant was not given any notice of contributions due for 1986-87 or 1987-88 and did not himself take any initiative with regard to checking whether and when he should make a payment for those years. The result was that they were not paid.

18 For these reasons, the tribunal dismisses the appellant's contention with regard to 1986-87 and 1987-88 that the contributions were paid. The tribunal finds that they were not received by HMRC. Either they were not paid by the appellant or the payments were not properly received.

19 Can the appellant now pay them, if he wishes to do so?

20 The time limit for both timely and late payment of Class 3 contributions is provided in the relevant regulations, namely the Social Security (Contributions) Regulations 2001 (SI 2001 No 1004) – the regulations that apply to any current payment - and the predecessor, the Social Security (Contributions) Regulations 1979. Regulation 48(3) of the 2001 regulations sets a time limit of six years for the late payment of Class 3 contributions for any year from 1982-83. That clearly applies here. Where it applies, regulation 50 also applies. That provides:

> "Where a person was entitled to pay a Class 3 contribution … but he failed to pay that contribution in the appropriate period … and his failure is shown to the satisfaction of the Board to be attributable to ignorance or error on his part which is not due to any failure on his part to exercise due care and diligence, that contributions may be paid within such further period as the Board may direct."

21 The appellant is aware of this rule because it was the basis of the decision made by the First-tier Tribunal in the other appeal about his contribution record that he made in respect of earlier years, referred to above. As there, the essential question is

whether the intending payer can show that he or she exercised due care and diligence with regard to payment.

22 As that decision discussed at some length, the test of "due care and diligence" was recently considered by the Court of Appeal in *HMRC v Kearney* [2010] EWCA Civ 288. The Court of Appeal emphasised in that decision that it was for an appellant to show that due care and diligence had been shown. The test was that "lack of care means lack of concern, whereas (lack of) diligence means a failure to apply oneself to the issue" (paragraph [27]). That is to be based on an assessment of all relevant facts.

23 In this case the tribunal is not satisfied that the appellant has shown the required care and diligence. We accept that initially the appellant had serious health problems, and that health problems continued. However, the record shows that he was aware at the time relevant to these payments of the need to pay voluntary contributions, and that he paid them erratically and late when aware of a specific need to pay for a year. It is due to the late payments that he was not sent a reminder by the Department. There is no clear evidence that he checked the ongoing position separately with any diligence in the sense that he did not follow up the need to pay systematically in respect of each year. He had been notified at the beginning of relevant time limits but he had not kept to them.

24 At that time the regulations gave him, along with other contributors, a generous time limit of six years in which to pay contributions late if they were not received before the proper time limit. But it was not until 2006 that the appellant realised that he had not been credited with contributions for 1986-87. Further, and of significance, this was a full ten years after he had started to receive his retirement pension. He received proper notification of his pension entitlement at the time it was awarded. He was told that this was being paid to him a less than the full rate. The formal notice of award, on 6 10 1995, stated: "The amount of basic pension awarded is a reduced amount. This is because not enough NI was paid for you to get the full amount of basic pension." So he knew or should have known that. In any event he continued to be paid his pension at less than the full rate, so was on notice of the problem on a continuing basis. Nonetheless he only realised that these contributions were missing from his record as a result of other enquiries.

25 To those considerations must be added the findings made by the tribunal about the absence of any payment for 1986-87 and 1987-88, in particular about the absence of any persuasive evidence that at that time the appellant checked on his assertion that he had paid by cheque and that he had been credited with contributions in respect of those cheques.

26 Further, even if the tribunal were to find that due care and diligence had been exercised at some stage, it would still need to be satisfied that it is appropriate to allow payment of contributions so many years after they were due, and so many years after the appellant's entitlement to a state retirement pension crystallised and the pension came into payment.

27 Taking all those factors into account, the tribunal does not accept in this case that the appellant had satisfied it that he now be permitted to make a late contribution for either 1986-87 or 1987-88 under regulation 50.

Contribution year 1989-90

28 The records show that the appellant paid contributions for this year after receiving a letter from HMRC dated 16 06 2010. The payment was received on 16 07 2010. The appellant has been credited with the relevant contributions. No issues therefore now arise about later payment of those contributions unless they had already been paid when that payment was made and received.

29 However, Mr Langthorne contends that he had already paid those contributions nearer the correct time. He should have been credited with paying the contributions in an earlier year, and he should be refunded the sum paid in 2010. But he had no specific evidence of that payment or of its receipt. He relied on the same assertions as made in respect of the earlier missing years discussed above.

30 This raises much the same issues as the question of payments for 1986-87 and 1987-88. The official records both show and explain that there was no more timely receipt of contributions and that there was nothing to trigger a more timely payment. Mr Langthorne could offer no more specific evidence than that he was sure that he had paid by cheque in the way used in earlier years. But again there was no specific evidence of such a cheque or any payment of the appropriate amount by cheque, or of a returned or lost cheque.

31 Here again the tribunal is satisfied that the official record was drawn up in accordance with standard practice, shows no evidence of deviation from standard practice, and is accurate. Further, the tribunal is entitled to, and does, take into account its findings about the years 1986-87 and 1987-88 in considering the submissions of the parties, and the available evidence, for this year. It finds that no earlier payment for contributions in 1989-90 was received before the payment that resulted in contributions being credited to the appellant for that year.

Conclusion

32 It follows that the tribunal must dismiss both appeals.

33 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.

DAVID WILLIAMS
TRIBUNAL JUDGE

RELEASE DATE: 11 September 2012