[2016] UKFTT 0792 (TC)

TC05517

Appeal number: TC/2015/03789

NATIONAL INSURANCE CONTRIBUTIONS–entitlement to state pension - married woman's election – reduced rate contributions –whether election made – whether contributions made by or on behalf of taxpayer – accuracy of records – if contributions not paid, whether voluntary Class 3 contributions can be made – whether non-payment due to ignorance or error – whether ignorance or error due to failure to exercise due care and diligence

FIRST-TIER TRIBUNAL
TAX CHAMBER

MS BETH PORTER **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MR NIGEL COLLARD

Sitting in public at Merevale House, 42-46 London Road, Tunbridge Wells on 5 October 2016

Mr James Rivett instructed by Burges Salmon LLP for the Appellant

Mrs Linda Gordon, presenting officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. *Introduction*

2. Ms Beth Porter was a successful actress and journalist, performing in experimental theatre as well as mainstream television and films, and latterly working for the BBC. This case concerns her entitlement to the state pension which turns on whether National Insurance Contributions were made by her or on her behalf for certain periods during her working life. At the hearing, Beth indicated her dislike of titles and requested that she be addressed as Beth and that is how we will refer to her in this decision.

3. This appeal is against the decision of HMRC (as varied) issued on 6 August 2015 concerning Beth's National Insurance Contribution record. The decision was that:

- Beth had made a "married women's election" and so was not liable to pay National Insurance Contributions ("NICs) between 26 February 1971 and 5 April 1975
- She was liable to pay reduced rate NICs between 6 April 1975 and 5 April 1980
- As a consequence, she was not entitled to pay voluntary Class 3 NICs for the period up to 5 April 1980
- She was liable to pay full NICs from 6 April 1980 but did not pay NICs for three periods: 6 April 1980-5 April 1981, 6 April 1993-5 April 1995 and 6 April 1998-5April 1999 ("the disputed periods").
- The failure to pay NICs for the disputed periods was attributable to Beth's ignorance or error and that was the result of her failure to exercise due care and diligence. Accordingly, she was not entitled to have any Class 3 contributions backdated to make up her contribution record.

4. In order to receive a full state pension, one must have a certain number of "qualifying years". A "qualifying year" is one in which a sufficient amount of NICs have been paid. If an individual has insufficient qualifying years, they will receive only a reduced state pension. HMRC contend that because of Beth's National Insurance record as set out above, she does not have sufficient qualifying years for a full state pension.

5. Despite her successful career, Beth's financial means are very limited. Her sole income is her £85 a week pension and Counsel and instructing solicitors are acting on her behalf *pro bono*. If Beth succeeds in her appeal, she will have 35 "qualifying years" for National Insurance purposes which will increase her weekly income to £155, making a significant difference to her standard of living.

6. We must decide two issues:

- Whether, as Beth contends, she made, or had made on her behalf, full National Insurance Contributions for the periods 26 February 1971-5 April 1980, 6

April 1980-5 April 1981, 6 April 1993-5 April 1995 and 6 April 1998-5 April 1999.

- If we find that she did not make such contributions, whether her failure to pay voluntary Class 3 NI Contributions in the three periods from April 1980 within the prescribed time limits was attributable to her ignorance or error and such ignorance or error was not a result of her failure to exercise due care and diligence. If we so find, Beth would be able to make additional NI Contributions which would give her further qualifying years and so increase her pension.

7. We were informed that if Beth is permitted to make the additional contributions, the sums required, which were not large, were likely to be funded by a charity.

8. The determination of this case depends on events occurring more than four decades ago which raises obvious evidential difficulties. We were assisted by the comprehensive bundles of documents presented at the hearing and witness evidence from Beth herself and Mrs Lesley Crawford, an Officer of HMRC.

9. *The Law*

10. The law is not in dispute although it is complex and has changed a number of times over the period under consideration.

11. We are indebted to Mr Rivett for the account of the relevant statutory provisions relating to the married women's election which are set out in the Appendix to this decision.

12. The legal position in relation to NI Contributions as they affect Beth may be summarised as follows.

13. Beth entered the National Insurance regime in February 1971. At that time, NI contributions were payable at a flat rate under the National Insurance Act 1965 which replaced the National Insurance Act 1948. The National Insurance (Married Women) Regulations 1948 SI 1948/1470, made under the 1948 Act enabled an employed married woman to elect not to pay NI Contributions. A married woman who made a "married women's election" was not liable to pay NI contributions, though she remained liable for industrial injury contributions of a trivial amount under the Industrial Injuries Act. An election once made continued indefinitely unless cancelled by the woman.

14. The 1948 Regulations were replaced by the National Insurance (Married Women) Regulations 1973 which were in similar terms (so far as relevant) and contained transitional provisions which meant that a married woman who had made an election under the 1948 Regulations would be treated as having made an election under the 1973 Regulations.

15. The Social Security Act 1975 and the Social Security Pensions Act 1975 made radical changes to the National Insurance regime. National Insurance Contributions became earnings related, NICs were collected along with income tax under PAYE and the record system was computerised. It was no longer possible for a married woman to elect not to pay National Insurance contributions. Instead, she could elect to pay contributions at a reduced rate. The Social Security (Contributions) Regulations 1975 SI 1975/492 provided that where a woman had made a married women's election, it was to be treated as an election to pay contributions at the reduced rate.

16. The 1975 Regulations were in turn replaced by the Social Security (Contributions) Regulations 1979 SI 1979/591 which provided for an existing reduced rate election under the 1975 Regulations to be treated as a reduced rate election under the 1979 Regulations.

17. The 1979 Regulations also provided that a reduced rate election would cease to have effect at the end of the second consecutive year after 6 April 1978 in which the woman was not earning.

18. So *if* Beth had made a married women's election in 1971 not to pay NICs, that would have continued as an election to pay reduced rate NICs from 1975 and that election would continue unless and until she has not earned for two consecutive years after 1978.

19. A married woman who had not made the election would have been obliged to pay NICs, first at the flat rate, then from 1975, at the earnings related rate.

20. For completeness, we mention that the default position for a self-employed woman in 1971 was that she was not obliged to pay NICs. If she wished to pay, she had to elect to do so.

21. The significance of paying or not paying NICs is that a woman who was paying the full rate of NICs was eligible for a full state pension (among other benefits), subject to having contributed for a sufficient number of years. A woman who had made a married women's election to pay no, or reduced rate, NICs would only be entitled to a reduced state pension.

22. Class 1 and 2 NICs are payable by employed and self-employed individuals respectively. The Social Security regime also makes provision for the payment of voluntary Class 3 NICs, which enable an individual who has paid insufficient contributions to "top up" the amount of contributions so as to maintain their entitlement to full benefits. There are time limits within which Class 3 contributions may be made and it is accepted by Beth that she is out of time to pay them.

23. However, Regulation 6 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001(which replaced equivalent provisions in Regulation 41 of the Social Security (Contributions) Regulations 1979) provide for late payments to be back-dated in certain circumstances.

24. We consider this later in this decision, but essentially, if an individual has failed to pay the right amount of NICs through "ignorance or error" which was not due to a "failure to exercise due care and diligence", contributions can be treated as having been made at any time in the past.

25. There is no time limit to the back-dating, but Class 3 contributions cannot be made in respect of a period when a married women's election/reduced rate election was in force.

26. *The facts*

27. The critical question is whether Beth made a married women's election in 1971.

28. Given the lapse of time, it is difficult to provide evidence of what actually happened and, inevitably, memories may be cloudy. We were assisted at the hearing by the witness evidence from Beth herself and from Mrs Crawford, who has been employed by HMRC since 2000.

29. *Beth's background*

30. Beth was born in the US on 23 May 1942. She began her professional acting career at the age of 12 and in the 1960s she became involved with an alternative theatre group in New York called La MaMa. Beth first came to the UK with La MaMa in 1967 when the group toured Europe and performed at the Edinburgh Festival and in London's West End.

31. She returned to the UK in September 1968 with her British fiancé, Peter Reid. After a period in the UK on a visitor's visa when she did not work, Beth applied for indefinite leave to remain in 1969. Leave was granted on 4 June 1969. On the same day, she married Peter Reid. She has been resident in the UK ever since.

32. She and Peter separated in 1974 and they divorced in 1979 although they remained on amicable terms and stayed in touch until Peter's death in 1995.

33. Beth contends that throughout her working life, since her arrival in the UK, she satisfied all her financial obligations including those relating to tax and National Insurance. She denies that she made a married women's election and contends that throughout the periods in dispute NICs were paid by her or on her behalf by various means.

34. For many years, National Insurance Numbers (NINOs) have been issued automatically to young people as they attain the age of 16. In the 1960s, NINOs were not issued automatically and an individual had to apply to the Department of Health and Social Security to get one. At that time, National Insurance was administered separately from the tax system.

35. *The processes*

36. Mrs Crawford gave evidence about the processes involved in acquiring a National Insurance Number and how records were dealt with in the days before computers. She also helped to interpret such documents as were available. Mrs Crawford's evidence was based on her experience as an Officer of HMRC in relation to National Insurance and her researches for her role as a Technical Coach on such matters. She was not, of course, involved in dealing with Beth's specific records, so whilst we accept her evidence as to process and her account of how NI records were supposed to be dealt with, it cannot be regarded as evidence that Beth's NI affairs were in fact dealt with in that way.

37. Mrs Crawford said that an individual coming from abroad would be required to register for a NINO. Initially she said that it would have been necessary for the individual to have attended in person at a Social Security office, but it was conceded that the application could have been done by post or by another person on the individual's behalf.

38. The individual would have had to fill in a Form CF8 Application for a National Insurance Card. A married woman would also have been given Booklet NI 1 which set out the special National Insurance arrangements for married women and the options to pay or not pay NICs and the consequences of each choice. Form CF9 was attached to booklet NI 1 and included the election to pay or not pay contributions. It was not always necessary to complete form CF9. Form NI 1 stated "You do not need to complete form CF9 if your first choice following marriage (a) as an employed person to pay contributions or (b) as a self-employed or non-employed person to pay contributions. Mrs Crawford said that this was only the case where the woman already had a National Insurance Card. If she did not, because for example, she had arrived in the UK from abroad, she would have had to complete form CF9 because this included a declaration that the woman had read leaflet NI 1 or had it explained to her and that she understood her choices. In this case, form CF9 served as an application for a National Insurance card as well as a record of the woman's choice whether or not to pay NICs.

39. The information on the CF8/9 would be transcribed to another form-RF1-which also contained information about the individual's contribution record. The forms were

sent to the Records Branch of the DHSS in Newcastle-upon-Tyne where they would be reviewed and the RF1 retained as a permanent record. The contribution record would be updated annually on a date determined by the last letter of the NINO.

40. Where a woman had elected not to pay NICs, the CF9 would be retained for six years and then destroyed, but the RF1 would be retained and updated.

41. HMRC guidance at the time indicated that members of touring companies or troupes were usually employed by the manager or proprietor of the company under a contract of service.

42. Before computerisation, an individual would be issued annually with a physical card which they gave to their employer who would affix stamps to the card on a weekly basis by way of payment of the NICs. It was (and remains) the employer's obligation to pay NICs and we must assume that an employer would have carried out those obligations.

43. A married woman who had made a married women's election would have been issued with a special "exempt rate card" which would have alerted the employer to the fact that no NICs were due.

44. At the end of the tax year, the employer would submit the card to the Department of Health and Social Security (DHSS) and a new card would be issued. If the card (not being an exempt rate card) showed that insufficient NICs had been paid for the year to constitute a qualifying year, the DHSS would have written to the employee and given them the opportunity to make voluntary Class 3 contributions so as to maintain their payment record. This continued after records were computerised but at all times there were time limits within which the Class 3 contributions had to be made.

45. In 1975, the information on the paper records was transferred onto the government's computer system and the administration of NICs for employed earners came under the aegis of HMRC along with the collection of income tax under the PAYE system. HMRC would make an annual return to the DHSS to enable the contributions records to be updated.

46. The physical NI cards were done away with for employees and an employer no longer had to affix stamps. The employer of an employed person (whether a married woman or not) paid NICs directly to HMRC and deducted the employee's contributions from his or her pay. An individual could now pay both Class 1 (employed) and Class 2 (self-employed) contributions.

47. Before 1975 it had not been possible to pay both classes of NICs. If a person was both employed and self-employed, the employment took priority for NI purposes.

48. Flat rate Class 2 NICs for the self-employed could be made either by continuing to stamp a physical card or by direct debit. From April 1993 contribution cards were abolished and if the individual did not pay by direct debit, HMRC would send out

quarterly bills for Class 2 NICs. If the bills were not paid, HMRC could take enforcement action to recover the debt.

49. *The documentation*

50. It is scarcely surprising that, after this length of time, there is little physical evidence about Beth's personal position. The CF8 and CF9 which Beth is alleged to have signed were not available and Mrs Crawford indicated that these forms would normally have been destroyed after six years, although the information on them would have been transferred to the RF1 which would have been retained.

51. Beth denied that she had ever applied for a NINO or signed a married women's election. She stated that the only NINO she was aware of ever having had was one she obtained around 1980; number WP702844D (the "WP number"). Beth does not recall having applied for a NINO in 1980 and does not know how the number came to be issued to her. The Respondents indicated that NINOs beginning with the letters WP had not been issued before 1978, which is consistent with the WP number having been issued to Beth in the tax year 1980-81. It also follows that she must have had an earlier NINO if, as she says, she had previously been paying NICs. HMRC said that it was not uncommon for a person to forget they had a NINO and apply for a new one. HMRC would search to see if there was an earlier record, but if there were discrepancies in the details, an earlier record might not be picked up. There was no evidence whether a check had been made to see if Beth had another NINO when the WP number was issued.

52. HMRC's records in relation to the WP number show that the number belongs to Miss Beth Porter, that she had previously been employed or self-employed in the UK, her date of birth was 23 May 1942 and her "date of entry" (into the National Insurance system, not the date of immigration to the UK) was 1September 1968.

53. We were shown a copy of an RF1 which related to another NINO; YX068435A (the "YX number"). Beth denied that she had ever applied for or been issued with the YX number. The name on the RF1 is "(Mrs) Beth Jane Reid". Beth stated, and we accept, that she has always been known by her maiden name, Porter and that she has never used her married name, Reid, for any purposes, personal or official.

54. The address shown matches the address where she was living at the time (in 1971) and was updated in 1972 to show another address she had occupied. There were no further updates of address, though Beth said that those dealing with her affairs had always notified HMRC of her changes of address. We note the Respondent's comments that until 1975 NICs were dealt with solely by the DHSS and even after that there was little communication between the departments, so a notification of a new address to HMRC would not necessarily have found its way to the DHSS.

55. The RF1 for the YX number also set out the following information which Mrs Crawford interpreted for us:

- The date when the CF8 was signed was 24 March 1971.

- The local office code indicated that the form had been completed in London. At that time, Beth was touring and could not have attended the office in person, but HMRC conceded at the hearing that the form could have been dealt with by post or by someone else on her behalf.
- She had arrived from the USA on 1 October 1970 and had previously spent time in the UK in 1967 and between September 1968 and June 1970.
- She had entered into the NI regime on 10 March 1969.
- Her date of birth was 25 May 1942 and this had *not* been verified (by the production of a birth certificate)
- She had married a Peter Brian Reid on 4 June 1969. Mr Reid's NINO was stated. Mrs Crawford showed us a copy RF1 for the Mr Reid whose NINO was stated on the RF1 for the YX number and the details on that form indicated that that Mr Reid was Beth's husband.
- The contributions record shows 11 credits in the tax year 1958-9 but states there were no contributions between 6 April 1969 and 5 April 1972. An individual is entitled to NI credits for the period from the start of the tax year in which they attain the age of 16 until their 16th birthday, which explains the credits for 1958-9.
- Under the heading "notes" the RF1states "MW1/NP/26.2.71". Mrs Crawford explained that that meant she was a married woman who was non-paying from 26 February 1971. In other words, the person to whom the YX number related had made a married women's election and was not obliged or entitled to pay NICs.

56. There were discrepancies between the records for the WP number and the YX number. First, the surnames were different (although the first names were the same). "Reid" was the name of Beth's husband but Beth told us she had never used that name for any purpose. The dates of birth were different. We note that the date of birth on the RF1 for the YX number had not been verified and we consider it more likely than not that this was a simple transcription error with the clerk writing "25" instead of the correct "23". The dates of entry into the NI system were also different. The WP number date of entry was 1 September 1968 and the date for the YX number was 10 March 1979.

57. Beth states that she never applied for or had a NINO other than the WP number and that she never made the married women's election.

58. However, the RF1 for the YX number shows the correct first names, correct addresses (even though they had not been updated beyond 1972), date of marriage and husband's name and his RF1 was consistent with him being Beth's husband. Despite the discrepancies between the records, we consider it more likely than not that this record belonged to Beth. We find as a fact that Beth had been issued with the NINO YX068435A in 1971 and we note that the RF1 states that Beth had made a married women's election and had not paid any NICs between 1969 and 1972.

59. The discrepancies in the record would explain why there was no record of an earlier NINO when the WP number was issued in 1980. The YX number was discovered only when Beth applied for her pension in 2002. The two records were then amalgamated under the WP number with the entry date 1 September 1968. It is

uncertain why this number was used, but it may have been because there were more NICs recorded against this number.

60. We were also taken to copies of the records of payment of contributions (RD 19) for both the YX number and the WP number. We were also shown the Statement of Account (RD18) for the amalgamated WP number which set out the contribution totals for the years from 1975-6 to date. These were prints of computer records. Mrs Crawford stated that the information on the computer for the period before 1975 would have been derived from the previous paper records. Once the information had been transferred to the computer, the records would have been destroyed.

61. The RD19 for the YX number showed the information on the RF1 set out above including the name Reid, the old address and the incorrect (but unverified) date of birth and the date of entry into the system of 10 March 1969. It showed the 11 credits under the note "data taken-on from record sheet". The take on date ie when the data was entered was 29 November 1981. It stated there were "no contributions on the account". The RD18 showed similar information.

62. The RD19 for the WP number showed the name "Porter", various old addresses, the correct date of birth and the date of entry as 1 September 1968. The RD18 showed the correct address and showed 24 credits under "data taken from record sheet"

63. The RD18./RD19 for the WP number showed no contributions up to and including tax year 1979-80 and a very small Class 1 contribution for 1980-81 (the first disputed period). Contributions were made from 1981-82 except in the other disputed periods. Both Class 1 and Class 2 contributions were made. In 1983-4, a Class 2 "Deficiency Notice" was issued to say that insufficient contributions had been made for that to be a "qualifying year". Beth paid a Class 3 contribution in that year to ensure it was a qualifying year. A Deficiency notice also appears to have been issued in 1985-6, but no Class 3 contribution was made.

64. Class 1 contributions were paid by deduction from salary. Until 1993, Class 2 contributions could be paid by stamping a card, or by direct debit. Once stamped cards were abolished, payment was by direct debit or by payment on the issue of quarterly bills.

65. HMRC's computer printouts show that Beth paid by direct debit for three periods. The record shows when payment started and when it was cancelled. The first period was from 8 April 1984 to February 1985, the second was from June 1986-April 1993 and the third from November 1997 onwards.

66. HRMC's computer records show that between April 1993 and November 1997, quarterly bills were issued, but no payments were made until August 1996, from which time, the bills were paid, until the direct debit re-commenced. HMRC could have taken action to recover the unpaid NICs but it is not known if any such action was taken. The period when the bills were not paid, according to these records coincides with the second disputed period.

67. A direct debit was in force during 1998-9, which was the third disputed period. It appears there was a problem with the direct debit. HMRC's decision letter dated 19 May 2015 stated that HMRC had written to Beth on 11 June 2012 explaining that there had been a problem and advising that she could pay Class 2 NICs which would be treated as paid on time, which would give her an extra qualifying year for pension purposes. The letter said that HMRC wrote to Beth again on 24 August 2012 explaining that payment could not be accepted if paid after 19 October 2012. No payment was made.

68. *Beth's evidence*

69. We found Beth a candid and straightforward witness She is clearly an intelligent woman, but her expertise is in the fields of theatre and journalism, not National Insurance and pensions. We accept that she had always sought to fulfil her financial obligations to the state and that she believed she had done so, or rather that others, to whom she had delegated such tasks had done so on her behalf.

70. Beth was a US citizen by birth and when she moved to the UK she was unaware that the system was different here. When she became aware of her obligations, she acknowledged that "they were well beyond my understanding of procedure or custom and practice. I made every effort throughout my career to devolve all such matters to my personal managers and advisors who were recommended to me by trusted friends and acquaintances." The advisors included various personal managers and accountants and her bank manager who dealt with all the correspondence which arrived whilst she was touring.

71. Initially, she was advised by a Mr Henshaw, a former tax inspector who offered to deal with the financial obligations of the La MaMa group on her behalf.

72. All of these individuals are, unfortunately now deceased so we cannot obtain any first hand evidence about what they did. Beth had a telephone conversation with the former assistant of one of her personal managers who confirmed that it was custom and practice for producers and production companies to make the proper NI contributions on behalf of an entertainer before passing payments to the entertainer's manager who would deduct their own fees and pay the balance to the entertainer. This is consistent with HMRC's guidance which Beth produced. The date of the guidance is not stated but we may infer that in the period before 2003, a professional performer would normally be treated as an employee for NIC purposes (so that the obligation to deduct and pay NICs was the employer's) even if the performer was in fact self-employed.

73. From 1980-81, she was both employed and self-employed and her employers would have deducted NICs in relation to her employment and her Class 2 contributions were made by a variety of methods on her behalf. She did not know how they had been paid as she had left that to her agents.

74. In the early days, she and her husband (a musician) were "hippies" and the only papers she read were those connected with her work and "hippy magazines". Neither

she nor her husband took any interest in current affairs and they did not read mainstream newspapers or magazines.

75. Beth believed that her agent or manager or accountant or bank manager from time to time was doing everything necessary so far as her financial obligations were concerned. Beth made no enquiries herself about what her tax or NI obligations were: these were simply not things which she concerned herself with, having devolved the burden to others. She has not retained, and so has been unable to produce, any documentation from the disputed periods, in particular, any payslips or statements from her managers or agents.

76. Whilst she does not remember signing any specific documents, she agreed that she may well have signed things. If any paperwork was given to her by her agent or accountant or the BBC (her employer), she would have signed it although she would not necessarily have read it. As Beth put it "I could read the words, but they did not mean anything".

77. Beth asserts that the YX number does not belong to her. The only NINO she is aware of having is the WP number. She denies applying for any number. She stated that she did not attend a local office in 1971 and was in Edinburgh when she is alleged to have applied for the YX number and made the married women's election. HMRC had originally insisted that she could only have obtained a NINO by personal attendance, but at the hearing agreed it could have been done by post. Whilst Beth denied having applied for a NINO herself, she agreed that Mr Henshaw might have registered her in the NI scheme to enable NICs to be paid on her behalf. She states that she never used the YX number and was unaware of its existence until HMRC discovered it in 2010 when they were investigating her NI history after she queried her state pension.

78. Nor does she recall applying for the WP number but thinks it just appeared on a form at some stage.

79. Beth disputes the accuracy of the RF1. Among other things, it showed the name of Reid when she never used her married name in any personal or professional capacity. She only ever used the name "Porter". The date of birth was incorrect. It showed only a very out of date address when changes to her address had always been notified to HMRC. We have noted that at that time, NI was dealt with by the DHSS and there was very little communication between that department and HMRC.

80. Importantly, Beth denies having made the married women's election and asserts that she would not have made one. Beth produced a copy letter dated 5 April 2013 from the Department for Work and Pensions (DWP), the successor to the DHSS, to her MP, which stated "we have no record of [Beth] opting to pay the Married Women's Stamp and this is not the reason she receives a reduced State Pension". We note, however, that at this time, the records would have been with HMRC so DWP would not have had the records.

81. Beth also disputes the accuracy of the RD 18s and RD 19s for the YX number and the WP number which repeat some of the above inconsistencies and mis-state other matters such as her date of arrival in the UK.

82. Beth carried out a great deal of research which led her to believe that the NI records on which HMRC's decision was based are inaccurate and unreliable.

83. In particular, she provided us with extracts from Hansard and the press in relation to three matters:

- Certain records, including her own records relating to the WP number had been destroyed following contamination by a broken sewerage pipe
- Parliamentary reports questioned the efficiency and reliability of the government's computer systems as records were transferred from the original 1975 system to a new digitised system in 1998-9. These problems led to the inaccurate allocation of NICs to some people's contribution records.
- Further confusion and uncertainty about data arose during the demolition and reconstruction of the DWP headquarters in Newcastle in the early 2000s which was when her pension was calculated.

84. *The Burden of Proof*

85. It will be convenient to deal with the burden of proof at this point as there is some dispute about it.

86. HMRC submit that the normal onus in tax matters applies: it is for the Appellant to prove on the balance of probabilities that she did not make the married women's election, that the NICs were paid by her or on her behalf and that she acted with due care and diligence to ensure her NIC record was maintained.

87. Mr Rivett argues that whilst the starting point is that the Appellant must prove their case, they are not expected to prove a negative and once the Appellant has made a prima facie case that NICs were paid (which he submits, the above evidence does) the burden passes to HMRC to prove that Beth did make the married women's election and they have failed to discharge that burden.

88. In support of this shift in the evidential burden, Mr Rivett cited the case of *Wood v Holden* [2006] STC 443 where the Court of Appeal said:

"The judge noted that the Special Commissioners had expressed their conclusion as to the central management and control of Eulalia … in terms which suggested that they had based that conclusion on what they saw as the taxpayers' failure to discharge the onus which was placed upon them by s 50(6) TMA 1970. As the Special Commissioners had put it: 'the Appellants have failed to satisfy us that the central control and management was not in London from 18 July 1996 when CIL became its

shareholder'. The judge accepted that the Special Commissioners had been correct, in principle, to approach the matter on the basis that it was for Mr and Mrs Wood to show that the amendments made to their self assessments in October 2001 had been wrongly made. He said this, at para [59] of his judgment:

'[59] I wish to say more about the way in which the Commissioners have based their decision on what they see as the failure of Mr and Mrs Wood to discharge the burden of proving a negative. I accept, despite a submission of Mr Goldberg to the contrary, that, when an Inspector of Taxes makes an adjustment to a taxpayer's self-assessment and the taxpayer appeals against the adjustment, the statutory burden on appeal rests on the taxpayer to show that the adjustment is wrong. That is the effect of s 50(6) of the Taxes Management Act 1970:

"If, on an appeal, it appears to … the Commissioners … by evidence—… (c) that the appellant is overcharged by an assessment … the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good."'

But he went on:

'However, there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue.'

The judge's conclusion at para [63] must be read with those observations in mind.

***[31]** At para [63] of his judgment the judge said this:*

'[63] … in so far as the Commissioners decided this appeal against Mr and Mrs Wood on grounds relating to the burden of proof (and the opening part of para SC145 suggests that those were the critical grounds for the decision), I consider that they were in error.'

He could not have been intending to suggest, in that paragraph, that the Special Commissioners had been wrong in principle to approach the matter on the basis that it was for Mr and Mrs Wood to show that the adjustments to their self-assessments had been wrongly made. Rather, I think, he was stating his conclusion that the Special

Commissioners had been wrong in failing to appreciate that the evidential burden had passed to the Revenue in the present case."

89. This is supported by Halsbury's Laws of England Fifth Edition Volume 11 paragraph which states "*It has been said that the evidential burden shifts from one part to another as the trial progresses according to the balance of evidence given at any particular stage, but is may be more accurate to say that it is the need to respond to the other party's case that changes.*", citing as authority *Joseph Constantine Steamship Company Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154. Mr Rivett says that on the balance of probabilities, NICs were paid by or on behalf of Beth throughout the 1970s and 1980s and the evidential burden has passed to HMRC to prove the married women's election was made and it has not done so.

90. *Wood v Holden* was applied in a case before the Special Commissioners, *Gutteridge v Revenue and Customs Commissioners* [2006] STC (SCD) 315. This case is very much in point as it concerns whether the Appellant, Mrs Gutteridge, had or had not made a married women's election. The Special Commissioner, commented on the onus of proof as follows:

"Mr Williams said that the reg 10 of the 1999 Regulations placed the onus of proof upon the appellant because it required evidence to be adduced which would cause the Commissioners to vary the decision. Fairly, he pointed out however that in this case this would put the appellant in the position of having to prove a negative

[2006] STC (SCD) 315 at 328

ie that she had not made an election. The respondents therefore accepted the onus of proof.

93. Section 50(6) Taxes Management Act 1970 contains language similar to that in reg 10. It provides:

'If, on an appeal, it appears to … the Commissioners … by … evidence— … (c) that the appellant is overcharged by an assessment … the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good.'

94. This provision was recently considered by the High Court and the Court of Appeal in Wood v Holden (Inspector of Taxes) [2006] EWCA Civ 26, [2006] STC 443. It was accepted that the effect of this provision was to place a burden on the taxpayer to show that the assessment was wrong, but that 'there plainly comes a point where the

taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue'— when the taxpayer could say we have done enough to raise a case, what more can commissioners expect from us? The burden must pass to the Revenue to produce some material to support their case.

95. In Wood v Holden the Court of Appeal referred to Lord Brendan's statement in Rhesa Shipping Co SA v Edmunds [1985] 1 WLR 948 at 955–956 that a judge is not bound, always, to make a finding one way or the other on the facts asserted by the parties, but 'has open to him a third alternative of saying that the party on whom the burden of proof lies has failed to discharge it'. But that is not a course which should be adopted unless 'owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take'.

96. In this case Mrs Gutteridge asserts that she did not make an election. If the only evidence before me was Mrs Gutteridge's oral testimony I would consider what she said and how she said it. If my conclusion was that her evidence was unsatisfactory I would decide that she had not discharged the burden imposed by the regulations. If however I found her evidence satisfactory and believed that there was a reasonable likelihood that her recollections were accurate I would find for her.

97. In civil cases the burden of persuading a court or tribunal generally lies on the party who substantively asserts the affirmation of an issue. But as Lord Russell said in Joseph Constructive Steamship Line Ltd v Imperial Smelting Corporation Ltd [1942] AC 154 at 177: 'the proving of a negative, a task always difficult and often impossible, would be a most exceptional burden to impose on a litigant'. What is the affirmation depends on the substance of the issue and requires a measure of common sense to determine.

98. In this case one party is asserting that a document was signed and the other not. Were this a civil case then it seems to me that the burden would be on the respondents to show that it had been signed: in other words they could win only if they advanced evidence which in the teeth of the appellant's denial was persuasive that the form had been signed. They could not sit back and say 'show you did not sign it'.

99. It seems to me that in reality the civil law approach and the approach deriving from reg 10 lead to much the same result. If the respondents advanced no evidence that the form had been signed the tribunal would, if it found Mrs Gutteridge's evidence cogent, be likely to hold for her. But once the respondents advance evidence the tribunal's duty is to weigh the evidence of the parties.

100. The issue of the burden of proof arises if the appellant advances no evidence or if the appellant advances evidence but that evidence is so unsatisfactory as to leave the tribunal in real doubt as to whether it has any value. In such

[2006] STC (SCD) 315 at 329

circumstances, I believe that despite the authority of Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd [1942] AC 154, the tribunal would follow the guidance of the Court of Appeal in Wood v Holden and even in the absence of evidence from the respondents would have to dismiss the appeal. But given the comments of Lord Russell the weight of evidence necessary to raise the issue to a point at which the appellant would succeed unless the respondents advanced their own evidence would be light."

91. In essence, the approach in *Gutteridge* is that if the Appellant produces some cogent evidence, she will be likely to win unless HMRC can provide evidence of its case. If it does, the Tribunal must weigh the evidence of the parties. The issue of the burden of proof arises if the Appellant provides no evidence or evidence which is so unsatisfactory that the Tribunal has real doubts as to its value. In such circumstances the appeal would have to be dismissed.

92. We accept the approach to the evidential burden set out in *Wood v Holden* as expanded upon in *Gutteridge*.

93. *The Appellant's submissions on the first point: were NICs paid?*

94. The Appellant submits that she did not make a married women's election and that she did pay, or have paid on her behalf, NICs throughout the disputed periods.

95. HMRC's records, for the reasons set out above are inaccurate and unreliable.

96. The principle of continuity applies, so that on the basis that Beth was paying NICs after and/or before the disputed periods, it can be assumed that she also paid contributions in the disputed periods.

97. In Jonas v Bamford [1973] STC 519 which concerned a discovery assessment in relation to allegedly undeclared earnings, Walton J said *"Once the inspector comes to the conclusion that…the taxpayer has additional income…then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation…"*

98. *Jonas v Bamford* was considered and commented on by the First Tier Tribunal in *Guide Dogs for the Blind Association* [2012] UKFTT 687 (TC). The Tribunal said:

"In Jonas v Bamford *1973 51 TC 1, 1973 STC 519 Walton J observed, at page 25, that once an inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer. Such a presumption is not the exclusive preserve of HMRC but is also available to taxpayers. It is, however, only a presumption and may be rebutted. We agree with the observations of the Tribunal in* Dr I Syed v HMRC *[2011] UKFTT 315 (TC) on this point at paragraph 38 that:*

"In our view this quotation [from Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A, it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present."*

17. *In the case of Guide Dogs for the Blind Association ("GDBA"), we consider that if GDBA paid investment managers to provide investment management services in the years since Mrs Aarvold joined the organisation then there is a strong likelihood that GDBA paid such fees in earlier years."*

99. *The Respondent's submissions on the first point: were NICs paid?*

100. The Appellant could only have obtained a contribution card in 1971 if she had completed form CF8 and CF9.

101. Her record could only have noted that she had elected not to pay contributions if she had completed the appropriate form indicating her choice.

102. The information on the RF1 for the YX number could only have come from the Appellant. The error in the date of birth must have been a transcription error.

103. The election terminated on 5April 1980 as no contributions had been received for two tax years.

104. Beth has supplied no documentary evidence that she paid full NICs. She has provided no evidence to show how she paid them, when she paid them or what class of contributions she paid.

105. The original documents were properly destroyed in accordance with HMRC's document retention policies but the records were retained in other forms.

106. Although it is acknowledged that records are not perfect and that there had been difficulties with the computer systems, this had not affected the information relevant to this case.

107. *Discussion of the first issue: were NICs paid?*

108. We are mindful that we are dealing with events that occurred many years ago and that there are formidable problems in establishing what in fact did happen. On Beth's side we have her oral evidence about her recollections of what she did or did not sign 40 years ago. She supports this with her evidence as to how performers were treated for tax purposes and how their NICs would normally be dealt with, but that is not evidence that her NICs were dealt with in that way. She has provided evidence of problems relating to NI records and has pointed out the inconsistencies between the YX number records and those for the WP number.

109. HMRC have produced documentary evidence in the form of the RF1, the RD18s and the RD19s, but in the light of the lapse of time, the original documents are not available, nor are the people who actually dealt with Beth's case. Mrs Crawford's evidence as to the way the system worked and the processes involve is just that and we cannot assume that the system worked as it should have done in Beth's case.

110. With that in mind, we consider the evidence. Beth must have acquired a NINO in 1971 if, as she asserts, she paid NICs from that time. Despite the inaccuracies in the RF1 for the YX number, we have found that this was Beth's NI number. We accept that Beth herself may not have applied for it, but she has agreed that someone else, probably Mr Henshaw, her adviser at the time, could have applied for the number on her behalf. This could explain the name of "Reid" appearing on the RF1; whoever made the application may have assumed (wrongly) that Beth would use her married

name on official documents and completed it accordingly. By her own admission, Beth did not understand tax and NICs and took no interest in them. She devolved responsibility for dealing with her financial affairs to her trusted advisors and if they asked her to sign something, she would do so without, necessarily, reading or understanding it.

111. Beth has not produced any evidence that she paid NICs before 6 April 1980. She has asserted that, in accordance with the practice at the time, the production companies would have paid her NICs. However, if Beth had made a married women's election, then the production companies would have been acting perfectly properly in not paying any contributions on her behalf.

112. There is no evidence that Beth did pay NICs in the period up to 1980 and in the light of her own comments about her approach to financial matters, we must treat with caution her assertion that she did not make a married women's election. She may well have signed it without knowing what it was.

We do not consider that the Appellant has made even a prima facie case which would shift the evidential burden to the Respondent's. In terms of *Gutteridge*, *"The issue of the burden of proof arises if the appellant advances no evidence or if the appellant advances evidence but that evidence is so unsatisfactory as to leave the tribunal in real doubt as to whether it has any value. In such circumstances, I believe that …, the tribunal would … have to dismiss the appeal. But … the weight of evidence necessary to raise the issue to a point at which the appellant would succeed unless the respondents advanced their own evidence would be light."*

113. However light the Appellant's weight of evidence needs to be, we do not consider that she has reached even that low threshold.

114. Even if she has, the Respondents do have evidence of their own. Someone must have provided the information to enable the YX number to be issued and the RF1 which records that information clearly indicates that the election was made. The RD 18 and RD 19 records for the YX number show no contributions were made in the period up to 1980 which is consistent with the election having been made.

115. Weighing the evidence of both parties, we think it more likely than not that someone applied for a NINO on Beth's behalf, resulting in the issue of the YX number and that person ticked the box to make the married woman's election. This may or may not have been discussed with Beth, but we find that it is more likely than not that her advisor gave her the form to sign and she signed it.

116. It follows that no NICs or reduced rate NICs would have been paid during this period. In these circumstances it is not open to Beth to make Class 3 contributions in any event.

117.Mr Rivett submitted that the principle of continuity could be applied in the disputed periods; as Beth had paid NICs regularly it must be assumed that those payments had also been made during the disputed periods unless the situation changed, as set out in the *Guide Dogs for the Blind* case.

However, it was pointed out in the *Dr I Syed* case, quoted in the Guide Dogs for the Blind Association Case, that *"In our view … it would be quite wrong as a matter of law to say that because X happened in Year A, it must be assumed that it happened in the prior year. …. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present."*

118.In Beth's case there *were* changes. Beth was required to make both Class 1 and Class 2 contributions. This was a change from the previous situation. Between June 1986 and April 1993 Beth paid her Class 2 NICs by direct debit. The direct debit was cancelled on 11 April 1993. We do not know why this happened, but HMRC then issued quarterly bills which were unpaid until August 1996 when quarterly bills began to be paid. This continued until a further direct debit was instituted in 1997. This coincides with the second disputed period.

119.This is not a case where arrangements continued throughout a period and there was no evidence that anything had changed, so that it can be assumed that the same pattern of payments occurred throughout the period. Here there was an abrupt change. The direct debit was cancelled and HMRC's records show that no payments were made for an extended period from that point. We cannot apply the principle of continuity to assume that the quarterly bills were paid when there is documentary evidence that they were not.

120.A direct debit *was* in force during the third disputed period in 1998-9. It seems from the decision letter of 19 May 2015 that there was a problem with the direct debit in this period and contributions were not collected. Beth was given the opportunity, in 2012, to make voluntary contributions of £247.65 at that time, to obtain an additional qualifying year. Mr Rivett indicated that Beth did not take it up because she did not accept there was a deficiency.

121.We were not provided with copies of the 2012 correspondence, but again, we cannot find that the principle of continuity applies when there is some evidence to show that contributions had not been paid or at least there was a dispute about whether they had been paid.

122.We turn to the Appellant's submissions about the reliability of HMRC's records. Although it appears that the RF1 for the WP number may well have been destroyed in the sewage pipe burst, the correspondence indicated that this document contained only basic information and did not contain any account details. By this time, all such information was computerised.

123.The evidence before the Public Accounts Committee in 1998 highlighted three problem relating to the self-employed. The first related to "customers" working abroad. The second related to self-employed customers who made NICs direct to the agency (ie not via a bank) and in some cases this resulted in contributions not being allocated to the correct account. Staff were investigating to "negate the potential impact". The third problem was that customers making monthly direct debit payments had been incorrectly issued with quarterly bills. Around 1,000 cases were affected.

124.There was also the confusion about the location and security of data during the rebuilding of the Ministry HQ.

125.Whilst we accept, and HMRC accepts, that record keeping will never be perfect, there is no evidence that the records in this case are inaccurate. We cannot assume that because there were some problems with some data, that the Appellant must in fact have paid NICs. During this period she is required to prove a positive, that on the balance of probabilities , she paid the NICs and there is no evidence that she did so. She left it to others to deal with matters and assumed that they were doing whatever needed to be done. To the extent that the third problem identified by the Public Accounts Committee might have affected her, it suggests that the direct debit payments which should have been made in 1998-9 were not made. But Beth turned down the opportunity to made good the payments.

126.In conclusion, we find that it is more likely than not that Beth did not pay NICs during the disputed periods.

127.*The Appellant's submissions on the second issue: can she now top up the payments?*

128. Regulation 6 of *The Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001*(which are the applicable regulations here) ("Regulation 6") provides:

"(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 [an officer 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.

[an officer of 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 officer considers] appropriate in the circumstances, and those regulations shall have effect subject to any such direction."

129. Mr Rivett submits that if, contrary to his primary case, we find that NICs were not paid in the disputed periods, Beth's failure to pay the top up contributions on time were due to her ignorance and that she *had* exercised due care and diligence. We had heard from Beth that she had at all time striven to meet all her obligations regarding tax and national insurance and had acted in good faith. She had relied on those whom she might reasonably expect to perform her obligations for her including an ex-tax inspector.

130. Beth was given the opportunity in 2012 to remedy the deficiency in one year but did not take it up because she did not believe there was a deficiency. This was a fresh instance of ignorance or error on her part.

131. Mr Rivett referred to the case of *Revenue and Customs Commissioners v Thompson* to suggest that if we found that the conditions in Regulation 6 were satisfied, as a fact, it would be open to HMRC to permit the late contributions.

132. *HMRC's submissions on the second issue*: *can Beth now top up the payments?*

133. In her decision letter of 19 May 2015, Mrs Crawford accepted that the failure to pay the Class 3 contributions within the time limit was due to ignorance or error, but that there was a failure to exercise due care and diligence because:

- Beth was aware of the UK NI scheme and the need to pay NI contributions to maintain her NI record for contributory benefit purposes; and
- She had previously paid Class 3 contributions for 1983-4 to make the year qualifying for pension purposes.

134. At the hearing , Mrs Gordon added the following points:

- Beth devolved her obligations onto third parties and did not know what she signed and made no attempt to find out.
- She took no action to check her NI affairs were in order

- There was not sufficient evidence that Beth had tried to ensure that her NIC obligations had been paid.

135. *Discussion on the Regulation 6 issue*

136. There have always been time limits within which NICs must be paid if they are to count for benefit purposes. Equally there have always been rules equivalent to Regulation 6 to mitigate the harshness of those time limits, which allow a late paid contribution to count as paid during an earlier period so that the earlier year can be a qualifying year in calculating benefits.

137. There are two conditions which must be met before HMRC can exercise their discretion to allow the retrospective payments. The Appellant must show:

- That the failure to pay the contribution within the time limit (that is the voluntary Class 3 contribution) was attributable to ignorance or error on the part of the payer; and
- *That ignorance or error* was not due to any failure on the part of such person to exercise due care and diligence. (our emphasis).

138. The words we have emphasised are important. Regulation 6 is not the equivalent of the "reasonable excuse" defence which appears in other parts of the tax code. The question is not whether the Appellant took reasonable care to comply with her NI obligations, but whether her ignorance or error which brought about her failure to pay voluntary Class 3 contributions in time arose from a failure to exercise due care and diligence.

139. HMRC have accepted that that although Beth was not ignorant of the NI scheme altogether, she made an error in not paying the contributions. We proceed on that basis.

140. There is some guidance in the case law as to when a person can be said to have exercised due care and diligence in relation to their NI affairs although the cases emphasise that it depends on all the circumstances in the individual case.

141. It is clear from the *Thompson* case that organisational and financial difficulties of the sort which might constitute a "reasonable excuse" are not relevant in considering due care and diligence in this context.

142. The case of *George William McDonald Allan* [2011] UKFTT 687 (TC) concerned a man who began work before the introduction of the NI scheme in 1948 and had been transferred into the scheme automatically, without registering. At the age of 18 he was called up for National Service and served in (what was then) Malaya during the Emergency. He worked in the UK for a period, when he paid NI contributions by way of his employer stamping his card and then served in the Kenyan Police Force during the Mau Mau uprising. He did not know that he could have paid voluntary NI contributions during his time abroad. The only reference to this was a brief comment on the physical contribution card that special contribution provisions applied to "men

who go abroad". Mr Allan would only have seen this, if at all, when his employer gave him the card to sign at the end of the year. HMRC submitted that doing nothing cannot be the exercise of due care and diligence.

143.The tribunal considered the Court of Appeal case of *Kearney v HMRC* [2010] EWCA Civ 288, where the facts were similar to *Allan*. In that case, HMRC submitted that it should follow the guidance set out in its Manual. That is, it should consider *"(i) the steps the contributor made to maintain their contribution record, (ii) any previous warnings about the consequences of late payment, and (iii) their ability to understand their obligation to pay NICs giving consideration to their age, health and intelligence.*" The tribunal went on to quote Lady Justice Arden who said:

"this guidance reflects the correct approach, which is to treat all relevant circumstances as factors which have to be balanced together to reach an assessment or evaluation on a case-by-case basis as to whether due care and diligence was exercised and, if not, whether the failure was the cause of the contributor's ignorance."

53. *She gave some guidance on the relevant factors at [35] to [37]:*

"I do not think it is possible to produce a definitive list of relevant factors. However, they would include the contributor's age and any relevant physical disability or incapacitation. Thus Mr Nawbatt accepted that a 19-year-old student might be in a stronger position to show that he had exercised due care and diligence when he took no action to pay contributions than an older person in employment....

Knowledge of the NIC scheme is also likely to be a very important factor, but it may have to be established what the source of his knowledge was and generally the degree of knowledge. Moreover, there cannot logically be an absolute rule that, if the contributor has knowledge of the existence of some aspect of the NIC scheme, he can never show that he exercised due care and diligence unless he made further enquiries about his rights or obligations. It must, as the judge recognised, all depend on the circumstances. Nonetheless, it will be an unusual case in which a person is able to show that, while he made no contributions even after learning the basic features of the NIC scheme, he nonetheless exercised due care and diligence.

The decision-maker also has to look at the circumstances as they stood at the time. People can now be expected in many parts of the world to have access to the internet or to mobile phones, but that would not have been the position in the 1960s."

144.The tribunal in *Allan* concluded that *"As a result of the decision in* Kearney, *HMRC's submission that Mr Allan's failure to act means he had not exercised due care and diligence cannot stand. Lady Justice Arden makes it clear that mere failure to act does not decide the matter. Instead, the Tribunal has to balance the relevant circumstances and then assess whether or not Mr Allan exercised due care and diligence."*

145.In the light of *Kearney*, the principles we must apply to Beth's case are:

- Mere failure to act is not conclusive of a failure to exercise due care and diligence
- The question requires us to balance all the relevant circumstances
- Knowledge of the NIC scheme is an important factor but "*there cannot logically be an absolute rule that, if the contributor has knowledge of the existence of some aspect of the NIC scheme, he can never show that he exercised due care and diligence unless he made further enquiries about his rights or obligations"*
- Other factors include the payer's ability to understand their obligation to pay NICs in the light of their age, health and intelligence.

146. *Kearney* and *Allan* both concerned young men whose knowledge of the NI scheme was limited, whose circumstances changed radically and who could not, in their particular circumstances have been expected to be aware of the possibility or need to make additional contributions.

147.Beth did not make any effort to find out about her obligations in relation to the NIC scheme, but, as noted, failure to act is not determinative.

148.Beth made it clear that she took no interest in financial matters, but once she became aware that she had obligations to the UK government, she devolved those responsibilities to others. She did not check or make enquiries about what those dealing with her affairs were doing. She simply assumed that it was all being dealt with. We accept that Beth did not have a detailed understanding of the NI scheme but she was aware that she had obligations, she made payments of NICs from 1980-81and was aware of the existence of the WP number. She was not in total ignorance of the NI scheme.

149.Taking account of Beth's particular circumstances, she is, as we have remarked, an intelligent woman who was clearly capable of understanding the basics of the NI scheme and was aware of the requirement to make contributions. She did, in fact, make contributions from 1981, except during the disputed periods, and we heard no evidence to suggest that her situation during the disputed periods was any different from her situation in the periods when she had been making payment. She did not, for example, go abroad as in *Kearney* and *Allan*. She must have been aware that payments were coming out of her bank account or that payments were being made in response to bills. If she had simply left it to others to deal with and had not taken any

notice of these payments, or their absence, it cannot be said that her ignorance/error arose despite her exercising due care and diligence over her NI affairs. If she noticed that payments had stopped and failed to query it with those who were dealing with such matters again she failed to exercise due care and diligence. As Lady Justice Arden said in *Kearney*, *"it will be an unusual case in which a person is able to show that, while he made no contributions even after learning the basic features of the NIC scheme, he nonetheless exercised due care and diligence."*

150. Beth paid Class 3 contributions in 1983-4, so should have been aware that contributions could be paid late. It appears she failed to make Class 3 contributions in response to a later deficiency notice in 1985-6. She was given the opportunity in 2012 to make good the deficiency for 1998-9 but failed to do so.

151. An intelligent and capable person who is aware that they have financial obligations but who devolves all responsibility onto others, assumes they are doing what they are supposed to and makes no checks or enquires as to whether the right things are being done cannot be said to be exercising due care and diligence. If, as a result, that person is ignorant of the fact that they need to make additional contributions or in error in this respect, that ignorance or error arises from a failure to exercise due care and diligence.

152. *Decision*

153. We find that Beth did make a married women's election and accordingly had no obligation to pay NICs or full rate NICs during the period up to 1979-80. As a result, she is not able to make Class 3 voluntary contributions in relation to this period.

154. We also find that no NICs were made by or on behalf of Beth during the disputed periods and, specifically, that the presumption of continuity does not apply in the circumstances for these periods.

155. Whilst accepting HMRC's decision that the failure to make the Class 3 payments in time was a result of Beth's ignorance or error, we have decided that that that ignorance or error *was* due to a failure to exercise due care and diligence, so that HMRC cannot now permit backdated contributions under Regulation 6.

156. We recognise the importance of this decision to Beth and it is with some regret that the law and evidence leads us to these conclusions.

157. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 02 DECEMBER 2016

APPENDIX
THE STATUTORY PROVISIONS ON THE MARRIED WOMEN'S ELECTION

The National Insurance Act 1946 and the National Insurance (Married Women) Regulations 1948, SI 1948/1470

1. The National Insurance Act 1946 provided for a liability for employees to pay flat rate national insurance contributions.

2. The provisions of s. 59 of the National Insurance Act 1946 gave the minister power to make regulations modifying the provisions of the National Insurance Act 1946 in their application to married women and to provide for excepting a woman if she so elected from insurance contributions.

3. Pursuant to the power in s. 59 National Insurance Act 1946 the provisions of Regulation 2(1)(a) of the National Insurance (Married Women) Regulations 1948 SI 1948/1470 provided as follows:

> '…(a) A woman may elect not to be, and thereafter (subject to the provisions of paragraph (2) of this regulation) shall not be, liable to pay contributions under the [National Insurance Act 1946] in respect of any employment as an employed person for any period during which she is married.'

4. The effect of Regulation 2(2) of the National Insurance (Married Women) Regulations 1948 SI 1948/1470 is that any election under Regulation 2(1)(a) of the National Insurance (Married Women) Regulations 1948 was required to be made in writing to the minister. Regulation 2(3)(a) provided for the issue of a certificate by the minister if an election had been made.

5. The effect of an election made under Regulation 2(2) of the National Insurance (Married Women) Regulations 1948 was to remove the woman's liability to pay contributions under National Insurance Act 1946. (A liability remained however to pay smaller amounts of industrial injury contributions under the Industrial Injuries Act.)

6. Regulation 2(2)(a) also provided that the election was operative from the beginning of the week next but one following the week in which it was given or from such earlier date as the minister might allow. Regulation 2(2)(b) permitted the election to be cancelled by notice in writing.

The National Insurance Act 1965 and the National Insurance (Married Women) Regulations 1973 SI 1973/693

7. The National Insurance Act 1965 replaced the National Insurance Act 1948.

8. The provisions of s. 102(2) of the National Insurance Act 1965 gave power to the minister to make regulations should she so elect from liability to pay National Insurance Contributions for any period during which she was married.

9. Pursuant to the power contained in s. 102 National Insurance Act 1965 the *National Insurance (Married Women) Regulations 1973 SI 1973/693* were made in the following terms:

‘1 (a) A woman may elect not to be and thereafter (subject to the provisions of paragraph (2) of this regulation) shall not be, liable to pay contributions under the [National Insurance Act 1965] in respect of any employment as an employed person for any period during which she is married.

(b) Nothing in this regulation shall relieve an employer of any liability imposed on him by the [National Insurance Act 1965] in relation to employer’s contributions.

2 (a) Any such election by a married woman not to pay contributions as an employed person may be made by her at any time by giving notice in writing to the Secretary of State to that effect, and the election shall be operative from the beginning of the week next but one following the week in which the notice was given or from such earlier date as the Secretary of State may allow.

(b) Any such election by a married woman may be cancelled by her at any time by giving notice to the Secretary of State to that effect, and such cancellation shall be operative from the beginning of the week next but one following the week in which the notice was given or from such earlier date as the Secretary of State may allow:

Provided that such cancellation shall be without prejudice to the right of the person concerned again to make any such election from time to time.

3 (a) A married woman who has elected not to pay contributions in accordance with the provisions of this regulation, and who is at the time of the election in an employed contributor’s employment or thereafter enters such employment, shall at that time or at the commencement of the subsequent employment, as the case may be, make application to the Secretary of State for a certificate of such election, which shall be issued to her by the Secretary of State on any such application, and the married woman shall produce such certificate to her employer forthwith.’

10. The effect of Regulation 21 of National Insurance (Married Women) Regulations 1973 SI 1973/693 was on the face of matters to revoke the whole of the National Insurance (Married Women) Regulations 1948, but in the following terms:

> 21 (1) The regulations specified in column 1 of Schedule 2 to these regulations are hereby revoked to the extent mentioned in column 3 of that Schedule.
> (2) anything whatsoever done under or by virtue of any regulation revoked by these regulations shall be deemed to have been done under or by virtue of the corresponding provision of these regulations, and anything whatsoever begun under any such regulation may be continued under these regulations as if begun under these regulations.'

11. The effect of the legislative regime is that if contrary to Ms. Porter's case a valid married woman's election under the National Insurance (Married Women) Regulations 1948 was made, then Ms. Porter will have been treated by Regulation 21(2) of the National Insurance (Married Women) Regulations 1973 SI 1973/693 as having made an election under Regulation 2(1)(a) of the National Insurance (Married Women) Regulations 1973 SI 1973/693.

The Social Security Act 1975 and the Social Security (Contributions) Regulations 1975 SI 1975/492

12. In 1975 the legislative framework was changed. The amendments brought about by the Social Security Act 1975 and the Social Security Pensions Act 1975 were such that employees' National Insurance Contributions became earnings related, that contributions were collected under or alongside the PAYE arrangements and that the record system was computerised. The married woman's ability to elect not to pay National Insurance Contributions was replaced by an ability to elect to pay contributions at a reduced rate.

13. So far as is relevant the provisions of s. 5(2) of the Social Security Act 1975 provided as follows:

> 'A married woman… shall be liable to contribute at the reduced rate if she has elected, in accordance with regulations under section 130(2) of this Act, to contribute at that rate and has not revoked her election.'

14. So far as is relevant the provisions of s. 130(1) of the Social Security Act 1975 permitted the Secretary of State to:

> 'Make regulations modifying any of the following provisions of this Act, namely –
>
> Part I…
>
> In such manner as he thinks proper, in their application to women who are or have been married.

15. Section 130(2) provided that:

> '(2) Regulations under this section shall provide (subject to any prescribed conditions and exemptions) for enabling a married woman or widow to elect that in any tax year –
>
> (a) Her liability in respect of Class 1 contributions shall be a liability to contribute at the reduced, instead of the standard, rate;…
>
> And to revoke any such election.'

16. Regulation 91(1) of the Social Security (Contributions) Regulations 1975 SI 1975/492 provided that a married woman could make an election so that the liability to primary Class 1 contributions should be at the reduced rate. Regulation 92 of the Social Security (Contributions) Regulations 1975 SI 1975/492 provided that an election made in one year was to continue until revoked on the termination of her marriage or on the death of her husband. Regulation 93 of the Social Security (Contributions) Regulations 1975 SI 1975/492 provided that the election could be revoked by written notice.

17. The provisions of Regulation 100 of the Social Security (Contributions) Regulations 1975 SI 1975/492 provided that where as respects a woman there was '*current an election under regulation 2(1)(a) of the National Insurance (Married Women) Regulations 1973 SI 1973/693*' then that woman should be deemed to have made an election under Regulation 93 of the Social Security (Contributions) Regulations 1975 SI 1975/492.

18. The net effect of the regime was therefore that if contrary to Ms. Porter's case a valid election under the National Insurance (Married Women) Regulations 1948 SI 1948/1470 was made then that election would be deemed to have been an election for the purposes of the *National Insurance (Married Women) Regulations 1973 SI 1973/693*, which in turn was deemed by Regulation 100 of the Social Security (Contributions) Regulations 1975 SI 1975/492 to an election under Regulation 93 of the Social Security (Contributions) Regulations 1975 SI 1975/492.

***The Social Security Pensions Act 1975 and the Social Security (Contribution) Regulations 1979* SI 1979/591**

19. The provisions of s. 130(2) (but not s. 130(1)) of the Social Security Act 1975 (under which the 1975 Regulations were made) was repealed by s. 65(3) and Sch. 5 of the Social Security and Pensions Act 1975 with effect from 6 April 1977. Replacement provisions were in the Social Security Pensions Act 1975.

20. So far as is relevant the provisions of s. 3 of the Social Security Pensions Act 1975 provided as follows:

> '(1) The provisions of the principal Act whereby primary Class 1 contributions may be paid at a reduced rate and Class 2 contributions need not be paid by a married woman or widow shall cease to have effect.
>
> (2) As respects any woman who is married or a widow when subsection (1) above comes into force regulations shall provide –
>
> (a) for enabling her to elect that her liability in respect of primary Class 1 contributions shall be a liability to contribute at such reduced rate as may be prescribed: and
>
> (b) either for enabling her to elect that her liability in respect of Class 2 contributions shall be a liability to contribute at such reduced rate as may be prescribed or for enabling her to elect that she shall be under no liability to pay such contributions; and
>
> (c) for enabling her to revoke any such election.
>
> (3) Regulations under subsection (2) above may –

(a) provide for the making or revocation of any election under the regulations to be subject to prescribed exceptions and conditions;

(b) preclude a person who has made such an election from paying Class 3 contributions while the election has effect;

(c) provide for treating an election made or revoked for the purpose of any provision of the regulations as made or revoked also for the purpose of any other provision of the regulations;

(d) provide for treating an election made in accordance with regulations under section 130(2) of the principal Act as made for the purpose of regulations under this section…'

21. Pursuant to s. 3(3)(d) of the Social Security Pensions Act 1975 the provisions of Regulation 102 of the Social Security (Contributions) Regulations 1979 SI 1979/591 made provision for an election made under Regulation 91 of the Social Security (Contributions) Regulations 1975 SI 1975/492 to be treated as an election made under Regulation 100 of the Social Security (Contributions) Regulations 1979 SI 1979/591. Pursuant to Regulation 101 of the Social Security (Contributions) Regulations 1979 SI 1979/591 an election made under Regulation 100 would cease to have effect at the end of the second consecutive year after 6 April 1978 in which the woman was not earning.

22. The net effect of the regime was that if contrary to Ms. Porter's case an election under the National Insurance (Married Women) Regulations 1948 SI 1948/1470 was made, then that election would be deemed to have been an election for the purposes of the *National Insurance (Married Women) Regulations 1973 SI 1973/693*, which in turn was deemed by Regulation 100 of the Social Security (Contributions) Regulations 1975 SI 1975/492 to an election under Regulation 93 of the Social Security (Contributions) Regulations 1975 SI 1975/492, which in turn was deemed by Regulation 102 of the Social Security (Contributions) Regulations 1979 IS 1979/591 to be an

election made under Regulation 100 of the Social Security (Contributions) Regulations 1979 SI 1979/591.

Voluntary payment of NI contributions

23. Various different time limits have applied at different times for the payment of National Insurance Contributions (see the overview of the regime set out in paras. 4-6 of the judgment of Patten J in *HMRC v Thompson* [2007] STC 240). For present purposes if all relevant National Insurance Contributions were not in fact paid during the Disputed Periods, then on the face of matters the effect of the legislative regime(s) is such that Beth is now out of time to make National Insurance Contributions.

24. At all material times however the legislative regime has made provision to enable National Insurance Contributions that have been paid late to be treated as having paid on an earlier date.

25. With effect from 8 October 2002 the provisions of Regulation 6 of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 have provided as follows (so far as is relevant):

> 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 an officer 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,

> An officer of 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 officer considers appropriate in the circumstances, and those regulations shall have effect subject to any such direction.

(Equivalent provisions were contained within the provisions of Regulation 41 of the Social Security (Contributions) Regulations 1979 for earlier periods.)

26. In these circumstances if the Tribunal is not satisfied that all relevant National Insurance Contributions were paid during the Disputed Periods, and if it is satisfied that the deficiency is a consequence of ignorance or error on Beth's part as to the deficiency, and the ignorance or error was not due to a failure on her part to exercise due care and diligence, HMRC could exercise their power under Regulation 6 of the Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001 to permit her at this point in time to remedy that deficiency.