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Commissioner's File: CP/045/90

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

Decision

1. My decision is that the decision of the social security appeal tribunal dated 5 June 1990 is erroneous in law for the reasons given in paragraph 22. My substituted decision is, however, to the same effect namely that the decision of the adjudication officer issued on 9 July 1986 and set out in paragraph 12 below is confirmed.

Representation

2. I held two oral hearings of this appeal. At both of them, the claimant (who did not appear) was represented by Mr D.A Dunford, certified accountant. Mr P. Stevens of the Chief Adjudication Officer's Office represented the adjudication officer at the first hearing and Mr J. Heath of the Solicitor's Office, Departments of Health and Social Security, represented him at the second.

Nature of the appeal

3. The point raised in this appeal relates to the calculation of a partnership share for the purposes of regulations 5 and 6 of the Social Security Benefit (Computation of Earnings) Regulations 1978. So far as regards the earnings of Category A or B retirement pensioners, to whom section 30(1) of the Social Security Act 1975 applied, these regulations have no application in respect of any day falling after 30 September 1989, because the earnings rule as regards such pensioners was abolished as from that date. But the regulation continues to apply to adult dependants. So its construction is of continuing importance.

4. The issue so far as regards the present claimant is whether she has been overpaid Category A retirement pension and should be required to repay the excess. During the period in question

(7 April 1983 to 11 April 1984) her retirement pension was liable to adjustment under the earnings rule then in force in relation to such pensions. (Social Security Act 1975 section 30(1)). Because the amount of her earnings were not immediately ascertainable, she was throughout that period paid interim payments on account of pension.

5. (1) If the claimant's earnings have been properly calculated in the way laid down in regulation 5 of the 1978 Regulations, the weekly interim payments that were made in respect of the above-mentioned period exceed the claimant's pension entitlement for the relevant weeks and are recoverable under regulation 6.

(2) It is not in dispute that the calculations made by the adjudication officer are mathematically correct. The point in dispute is whether the adjudication officer correctly applied regulation 5(4)(a) when he made them on the basis of partnership accounts setting out the profit made by the claimant and her husband for the period 1 April 1983 to 31 March 1984. Mr Dunford, on behalf of the claimant, submits that these accounts do not relate to the claimant's relevant "accounting period" in terms of regulation 5(4)(a) for the purpose of determining whether there has been an overpayment for the weeks falling within 7 April 1983 to 23 November 1984.

The relevant statutory provisions

6. These are set out in the Appendix to this decision.

The facts

7. The claimant attained age 60 on 16 May 1979. She retired on that date from and including 17 May 1979. She was awarded a Category A retirement pension. She continued to work after her retirement trading as a partner with her husband. It is not in dispute that she was entitled to one half of the partnership profits.

8. An adjudication officer decided that the claimant's earnings were not immediately ascertainable. The Secretary of State accordingly directed, pursuant to regulation 6 of the 1987 Regulations, that payment of her retirement pension be suspended until her earnings could be calculated by an adjudication officer and that in the meantime there be paid to the claimant interim payments at a rate equivalent to the retirement pension entitlement.

9. On 4 November 1983 Mr Dunford wrote, on behalf of the partnership, to HM Inspector of Taxes at Tunbridge Wells with reference to the 1983/4 assessment dated 4 October 1983 in the estimated sum of £5,000.00. He stated that the amount of net profit was £5,399.00. The revised sum was agreed with the Inspector of Taxes who issued a revised assessment, now in the case papers, accepting this sum as the revised partnership profit.

10. On 19 June 1986 Mr Dunford wrote to the Central Pensions Branch DHSS in respect of the claimant saying:

"With reference to your recent letter we can confirm that the Inland Revenue have now agreed profits as follows for the years ended - 31.3.81 £1,991; 31.3.82 £2,025; 31.3.83 £2,699; and 31.3.84 £3,907."

11. But on 9 July 1986, that Office replied:

"The Adjudication Officer has considered the information you have given about your profit for the periods ending 31 March 1981, 31 March 1982 and 31 March 1983 and has decided that:

Retirement pension is not reduced by earnings from 10 April 1980 to 6 April 1983 (both dates included) because the claimant's weekly earnings for the assessment periods 1 April 1980 to 31 March 1981, 1 April 1981 to 31 March 1982, 1 April 1982 to 31 March 1983 (all dates included) were £38.28, £38.94 and £51.90 respectively. The total amount of retirement pension payable from 10 April 1980 to 6 April 1983 (both dates included) is £1607.31 comprising 33 weeks at £8.62 per week and 52 weeks at £10.05 per week and 52 weeks at £10.95 per week and 19 weeks at £12.15 per week. I direct that £1607.31 paid to the claimant as interim payments from 10 April 1980 to 6 April 1983 (both dates included) is to be treated as having been paid on account of the retirement pension now awarded from this period.

No balance is therefore due.

(Social Security Act 1975 Section 30(1) and the Social Security Benefit (Computation of Earnings) Regulations, regulations 5 and 6).

The Adjudication Officer has considered the information you have given about your profit for the period ending 31 March 1984, and his decision is set out in full at the end of this letter.

The Adjudication Officer's decision means that you have received £562.95 too much pension for the period ending 31 March 1984. As you will see from the decision, you are required to repay the sum mentioned.

The adjudication officer's decision

12. On 9 July 1986 an adjudication officer issued the following decision (which was that set out at the end of the letter set out in paragraph 11 above):-

"Retirement pension is not payable from 7 April 1983 to 23 November 1983 (both dates included) and is payable at the reduced weekly rate of £4.50 from 24 November 1983 to

11 April 1984 (both dates included) because the claimant's weekly earnings for the assessment period 1 April 1983 to 31 March 1984 (both dates included) were £75.13. The total amount of retirement pension payable from 7 April 1983 to 11 April 1984 (both dates included) is £90.00 comprising 20 weeks at £4.50 per week. Of the amount £652.95 paid to the claimant as interim payments from 7 April 1983 to 11 April 1984 (both dates included) I direct that £90.00 is to be treated as having been made on account of retirement pension now awarded for this period.

Repayment is required of the excess payment of £562.95.

(Social Security Act 1975, Section 30(1) and the Social Security Benefit (Computation of Earnings) Regulations, regulations 5 and 6.)"

13. On 26 September 1986 Mr Dunford wrote to the Central Pensions Branch as follows:

Re: MRS JOAN DUNFORD

With reference to your letter of 9th July we have to point out that our client's profit for the income tax year 1983/84 is £2,699 based on the business year ended 31.3.83. Therefore you have not overpaid our client retirement pension. The profit for 1984/85 is £3,907."

14. On 9 June 1989 the claimant lodged a late appeal against the adjudication officer's decision of 9 July 1986. Leave to bring this late appeal was granted on 26 January 1990 on the ground that there were special reasons for the delay (rule 3) (Social Security (Adjudication) Regulations 1986).

The appeal tribunal's decision

15. The appeal tribunal's decision of 5 June 1990 was:

"Appeal disallowed.
Excess of £562.95 to be repaid."

16. The recorded findings of fact were:

- "1. The Assessment Period is the claimants accounting period.
2. The Accounting Period under review is 1st April 1983 to 31st March 1984.
3. The Tribunal had a copy of the letter dated 4th November 1983 to Inspector of Taxes which shows a balance of £5399 which Mr. Dunford allocates as to half to Mr. Dunford and half to Mrs. Dunford.
4. Claimants profit for 1982/83 is the figure of £2699 shared with her husband.
5. Claimants profit for 1983/84 is £3907."

17. Their recorded reasons for that decision were:

"The wording of Regulation 5 refers to that assessment period for both calculating profits and being engaged in employment. It is not of any concern to the Tribunal to decide on the relevance of the preceding year basis for calculating income tax on a Schedule D basis.

The evidence of the letter of 4th November 1983 clearly establishes that £2699 should be attributed to 1982/83 as contended by the Department and not as contended by Mr. Dunford. Adjusting this "slippage" the earnings for 1983/84 are £3907."

18. The claimant's appeal against that decision is brought with my leave.

The arguments on appeal

19. Before me, Mr Dunford accepted that if 1 April 1983 to 31 March 1984 was the appropriate basic period for calculating the claimant's weekly earnings under regulation 5, the calculations of the adjudication officer set out in his decision of 9 July 1986 were correct and there was an overpayment of £562.95 in respect of the weeks falling within 7 April to 11 April 1984.

20. But Mr Dunford says that the wrong accounting period has been taken. In his submission of 13 July 1991 he says:

"2. At all relevant times the Claimant was engaged in partnership with her husband.

3. The accounting period of the partnership ran from 1st April to 31st March in the subsequent year and that of the Claimant from 6th April to 5th April in the subsequent year i.e. the Income Tax year.

4. The profits of the partnership for its accounting year ended 31.3.83. were not capable of computation until the following Income Tax year i.e. 1983/84.

5. On such computation of the profits (referred to in 4 above) the Claimant was paid her share of same i.e. £2,699 which amount there-fore fell into her accounting year ended 5.4.84.

6. It is therefore contended that the assessment period in question runs from 6th April 1983 to 5th April 1984 when the Claimant's relevant earnings amounted to £2,699 not £3,907 as contended by the Adjudication Officer who seeks ultra vires to impose a different assessment period.

7. It is further contended that as the Claimant's earnings in the assessment period 6.4.83 to 5.4.84 were below the earnings limit therefor no refund of interim payments received by the Claimant is due."

On 17 September 1991, he comments:

- "3. The assessment period for the purposes of Regulation 5 is the accounting period of the Claimant in accordance with Regulation 5(4) and not the accounting period of the partnership as contended by the AO (3.5).
4. Contrary to the statement of the AO for 1984/85 as in previous years the Income Tax assessment was made on the partnership which then paid the Claimant her net share of the profits. The Claimant was then able to recover the tax paid on making investments under the Business Expansion scheme. This is a similar system to the tax credit system outlined by the AO in 2.2 (3.7).
5. The Commissioner's decision R(P) 1/73 dealt with a sole trader and is not relevant to this appeal which involves a partnership (4.1 and 4.2). In addition Income Tax law and practice have changed."

He repeated these arguments at the oral hearings before me.

21. Mr Heath supports the adjudication officer's decision. In his submission an "assessment period" in the case of a self-employed earner means his accounting period and this, for the purpose of regulation 5, is the accounting period of the partnership (1 April to 31 March of the following year) in so far as the earnings under consideration are the claimant's share of the profits of the partnership.

Was the appeal tribunal's decision erroneous in law

22. Yes, it was. The claimant says that he raised the partnership issue before the appeal tribunal. No useful purpose would be served by enquiring of the chairman or members as to whether they accepted this since, whether or not the point was in fact raised, it was incumbent on the tribunal, in giving reasons for their decision, to consider the claimant's position as a partner and the fact that the assessment to income tax in respect of a partnership is a joint assessment in the partnership name. The failure to do so was an error of law; and accordingly I set aside their decision. My reasons for my substituted decision follow.

The "assessment period" for determining a self-employed person's earnings under regulation 5

23. This is defined in regulation 5(4)(a) as "his accounting period". In respect of any week in which the specified person (a class which includes a retirement pensioner) is engaged in gainful employment in Great Britain (regulation 5(1)(a)) and the employment is such that the earnings derived from it for that week are not immediately ascertainable (regulation 5(1)(b)) his accounting period is one in which

(1) a return or statement of the emoluments or gains from that employment covering the period in which that week ends has been "delivered to the Inland Revenue for tax purposes" and

(2) it has been "determined or agreed as the basis for an assessment to income tax" (regulation 5(1)(c)).

24. The earnings from that employment for the week in question are then calculated (subject to regulation 5(3) which excludes pre-pension entitlement days) by dividing the total amount of the determined or agreed emoluments profits or gains in the account by the number of weeks in the accounting period in which that person has been engaged in that employment (regulation 5(2)).

25. (1) Actual earnings for the relevant accounting period must be used for the above calculation. The language of the regulation admits no other interpretation.

(2) This is well settled. The Chief Commissioner (Sir Robert Micklethwait Q.C.) considered the point in relation to regulations 6 and 7 of the National Insurance (Computation of Earnings) Regulations 1967, which differ from the 1978 Regulations in no material respects on this point. In decision R(P) 1/73 (reported) at paragraph 33 he said:

"On a point raised by the accountants and mentioned by the claimant's representative, in my judgment the earnings to be used for the purpose of regulation 7 are the earnings for the actual year as determined or agreed for the basis of a tax assessment. Even if the sum which the claimant in fact earned in 1968/9 as determined for tax purposes is used for those purposes as the basis for his tax assessment for 1969/70, that sum constitutes his earnings for retirement pension purposes for 1968/9 and not 1969/70."

Decision R(P) 1/89 on the present Regulations is to the same effect.

(3) This conclusion is not only unavoidable on the language of regulation 5. It is also entirely reasonable. The purpose of regulations 5 and 6 is to ensure that claimants whose earnings are not readily ascertainable do not have to wait for benefit, in the case of payments subject to adjustment by the earnings rule, until the amount of the earnings is known, before any payment is made. So the claimant receives interim payments. They are then adjusted, as soon as accounts relating to the weeks immediately preceding those in respect of which payments have been made are available, and determined or agreed with the Inspector, to correspond with actual entitlement for the weeks in question. The use of an actual year basis for calculating earnings, rather than a preceding year basis, ensures that the claimant receives his full pension entitlement for the relevant weeks, no more and no less.

Partnership earnings: income tax

26. Mr Dunford does not accept that the above conclusion applies in the case of partnership earnings, where he submits that there are differences in the accounting dates of the partner concerned and the partnership and the legal distinction which he submits exists for income tax and for earning rule purposes. I do not accept these submissions.

27. Income tax is jointly assessed on a partnership in the partnership name: see section 152 of the Income and Corporation Taxes Act 1979, set out in the Appendix and re-enacted by section 111 of the 1988 Taxes Act. The share of a partner relating to partnership income is deemed by statute to be the share to which he is entitled during the year to which the claim relates in the partnership profits, such profits being estimated according to the provisions of the Income Tax Acts [section 26 Taxes Act 1970, now section 277 Taxes Act 1988]; that is, on the income tax assessment on the firm for that year in respect of such profits: see Gaunt v I.R.C. [1913] 3 K.B. 395 and Halsbury's Laws of England, 4th Edition, Volume 23, para. 1276.

28. Lord Oliver, in his opinion in the case of Mackinlay v Arthur Young & Co [1990] A.C. 239 explains, at page 249, the way in which these provisions work in practice:

"Before turning to the facts of the instant case, I ought, perhaps, to say a word about the position, both generally and in relation to income tax of partners in a firm. A partner working in the business or undertaking of the partnership is in a very different position from an employee. He has no contract of employment for he is, with his partners, an owner of the undertaking in which he is engaged and he is entitled, with his partners, to an undivided share in all the assets of the undertaking. In receiving any money or property out of the partnership funds or assets, he is to an extent receiving not only his own property but also the property of his co-partners. Every such receipt must, therefore, be brought into account in computing his share of the profits or assets. Equally, of course, any expenditure which he incurs out of his own pocket on behalf of the partnership in the proper performance of his duties as a partner will be brought into account against his co-partners in such computation. If, with the agreement of his partners, he pays himself a "salary", this merely means that he receives an additional part of the profits before they fall to be divided between the partners in the appropriate proportions. But the "salary" remains part of the profits.

So far as concerns the assessment of partnership profits to tax, I do not think that I can improve on the analysis in the instant case of Vinelott J. [1986] 1 W.L.R. 1468, 1474-1475, which I will both quote and adopt:

"There are, in effect, three stages. First, the profits of the firm for an appropriate basis period must be ascertained. What has to be ascertained is

the profits of the firm and not of the individual partners. That is not, I think, stated anywhere in the Income Tax Acts, but it follows necessarily from the fact that there is only one business and not a number of different businesses carried on by each of the partners. The income of the firm for the year is then treated as divided between the partners who were partners during the year to which the claim relates - the year of assessment in one of the many senses of that word: see the proviso to section 26 of the Income and Corporation Taxes Act 1970. That is the second stage. The tax payable is then calculated according to the circumstances of each partner - that is, after taking into account on the one hand any personal allowances, reliefs or deductions to which he is entitled and any higher rate of tax for which he is liable. The Acts do not provide for the way in which personal allowances, reliefs and deductions are to be apportioned between the partnership income and other income. I understand that in practice they are deducted from the share of the partnership income if that was the partner's main source of income. When the tax exigible in respect of each share of the partnership income has been ascertained the total tax payable is calculated. Section 152 (formerly rule 10 of the Rules applicable to Cases I and II of Schedule D) provides that the total sum so calculated is to be treated as 'one sum ... separate and distinct from any other tax chargeable on those persons ... and a joint assessment shall be made in the partnership name.' That is the third stage."

Calculation of partnership earnings under regulation 5

29. Mr Dunford suggested that a partner might not be a "self-employed earner" in terms of regulation 5(4). I disagree. A partner is clearly not an employed earner in terms of that regulation. For he is not an employee at all: see Mackinlays case, cited above. Now a person who is gainfully employed in Great Britain otherwise than in employed earner's employment is defined in section 2(1)(b) of the Social Security Act 1975 as a "self-employed earner" and that definition is incorporated in the Computations of Earnings Regulations by regulation 1 (see the Appendix). It accordingly applies to regulation 5.

30. A partner's accounting period is the same as the accounting period of the partnership: see paragraphs 27 and 28 above. It is the period for which the partnership accounts are made up, that is to say the appropriate basis period for ascertaining the profits of the firm (stage 1 of the analysis quoted by Lord Oliver). This period will always end earlier than the commencement of the income tax year in respect of which the partnership return of profits etc. is made, since a partnership is taxed on a preceding year basis.

31. The income tax year in respect of which the partnership

assessment is made and the income tax year in respect of which a partner can claim his reliefs are the same: see paragraphs 27 and 28 above. But the adjudication officer is not concerned with income tax years at all. His concern, when interim payments have been made over a particular period, is to see partnership accounts which have been determined or agreed with the Inland Revenue (i.e. the Inspector of Taxes) as the basis of an assessment to income tax which covers weeks immediately preceding those over which such interim payments have been made. Pension entitlement is adjusted for each week by reference to the earnings of "the week ending last before any week for which he is entitled to the pension" (Social Security Act 1975 section 30(1)) and in respect of any such first-mentioned week not covered by the partnership accounts any interim payment for the last-mentioned week cannot be adjusted under regulation 6. It is necessary to wait for later agreed accounts before a calculation can be made in respect of such later weeks.

32. In the present case, the relevant partnership accounts agreed with the Inspector of Taxes are those which cover the accounting period 1 April 1983 to 31 March 1984. All the weeks in respect of which interim payments are in issue (7 April 1983 to 11 April 1984) fall to be adjusted by reference to earnings made during this accounting period, which is the accounting period both of the partnership and the claimant's partner, as explained above, and is the claimant's assessment period (i.e. "his accounting period") in terms of regulation 5(4)(a). It is not in dispute that the claimant's partnership share of profits to which those accounts relate (1 April 1983 to 31 March 1984) was £3,907.00 and that on the basis of this figure the claimant has been overpaid the £562.95 referred to in the adjudication officer's decision.

33. For the above reasons, my decision, which confirms that of the adjudication officer, is as set out in paragraph 1 above. It should be added that I have been informed that some of the sum of £562.95 has already been recovered. It is only the balance which is now recoverable.

(Signed) V G H Hallett
Commissioner

Date: 26 February 1992

THE APPENDIX

Part 1: Income tax provisions

Section 26 of the Income and Corporation Taxes Act 1970 provides, omitting the words repealed by Finance Act 1970:

26. Partners

The following persons having joint interests, that is to say -

- (a) coparceners, joint tenants, or tenants in common of the profits of any property, and
- (b) joint tenants,, or tenants of land or tenements in partnership, being in the actual and joint occupation thereof in partnership, who are entitled to the profits thereof in shares, and
- (c) partners carrying on a trade, profession or vocation together who are entitled to the profits thereof in shares,

may claim any relief under ... this Chapter according to their respective shares and interests, and any such claims which are proved may be dealt with in the same manner as in the case of several interests:

Provided that the income of a partner from a partnership carrying on any trade, profession or vocation shall be deemed to be the share to which he is entitled during the year to which the claim relates in the partnership profits, such profits being estimated according to the provisions of the Income Tax Acts.

Note: These provisions are now in section 277 Income and Corporation Taxes Act 1988. Section 152 of the 1970 Act provides:

152. Partnership assessments to income tax

Where a trade or profession is carried on by two or more persons jointly, income tax in respect thereof shall be computed and stated jointly, and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name.

Note: This section is now section 111 of the 1988 Act.

Part 2: Social Security provisions

(1) Section 2(1) of the Social Security Act 1975 respectively provide:

Categories of earners

2.-(1) In this Act -

(a) "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E; and

(b) "self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment).

(2) Regulation 1(1), 5 and 6 of the Social Security Benefit (Computation of Earnings) Regulations 1978 provide:

Citation, commencement and interpretation

1.-(1) These earnings may be cited as the Social Security Benefit (Computation of Earnings) Regulations 1978 and shall come into operation on January 1, 1979.

(2) In these regulations, unless the context otherwise requires:-

"the Act" means the Social Security Act 1975;

"earnings" means earnings derived from a gainful employment and, for the purposes only of sections 41, 44 to 47, 64 and 66 of the Act includes payments by way of occupational pension within the meaning of the Social Security (No. 2) Act 1980;

"employer" includes any person making a payment which is, or which falls to be, taken into account in the calculation or estimation of another's earnings;

"the determining authority" means, as the case may require, a Commissioner, a local tribunal or an insurance officer;

"gainful employment" means employment as an employed earner or self-employed earner and any employment which would be such employment if it were in Great Britain, and includes any such employment which, in accordance with the provisions of the Act and of any regulations made under the Act, is to be disregarded in relation to liability for contributions;

"specified benefit" for the purposes of regulations 5(1)(a), 6(1) and (2) and 7 below means contributory invalidity pension or severe disablement allowance or, as the case may be, unemployment supplement;

and other expressions have the same meanings as in the Act.

Calculation of earnings of certain retirement pensioners and adult dependants of pensioners

5.-(1) This regulation applies only where -

- (a) a person (being a person entitled to a retirement pension or an adult dependant of a person entitled to a retirement pension or a specified benefit) is in any week engaged in gainful employment in Great Britain;
- (b) that employment is such that the earnings derived from it for that week are not immediately ascertainable; and
- (c) the determining authority is satisfied that a return or statement of the emoluments or the profits or gains from that employment for an assessment period in which that week ends has been or will be delivered to the Inland Revenue for tax purposes.

(2) For the purposes of sections 30(1), 45 to 49 (other than subsection (b) of section 49) and 66(4) of the Act the earnings of a person to whom paragraph (1) of this regulation refers, from the employment and for the week there specified, shall, subject to paragraph (3) of this regulation, be calculated by dividing the total amount of his emoluments, profits or gains from that employment for that assessment period, as determined or agreed as the basis for an assessment to income tax, by the number of weeks in that assessment period in which he has been engaged in that employment.

(3) In the calculation for the purposes of section 30(1) of the Act of the earnings of a person entitled to a retirement pension there shall be disregarded -

- (a) any days before the date on which he becomes entitled to that pension; and
- (b) any earnings derived from his employment on those days;

and the earnings so derived shall be calculated or estimated by the determining authority having regard to such information (if any) as may be available to it about the nature and circumstances of the employment and the nature and incidence of the earnings derived from the employment.

(4) In this regulation -

- (a) "assessment period" means in the case of an employed earner an income tax year and in the case of a self-employed earner his accounting period;
- (b) the reference in paragraph (1)(b) to earnings which are not immediately ascertainable shall be construed as including a reference to earnings which are not immediately ascertainable otherwise than by the application of regulation 7 below; and
- (c) "weeks" in paragraph (2) means successive periods of which the first begins with the first day of the assessment period and each of the subsequent ones begins with the seventh day after the seventh day after the beginning of the one which precedes it; but "week" is not to be construed accordingly.

Interim payments

6.-(1) Where the amount of a person's earnings for any week falls to be calculated in accordance with regulation 5 above and has not been determined, the Secretary of State may direct that, pending the determination of that amount, payment of so much of any benefit by way of retirement pension or increase of either a retirement pension or a specified benefit as may be affected by that determination shall be suspended.

(2) In any case in which the Secretary of State has given such a direction he may make such interim payments (not exceeding the amount of retirement pension or increase of either a retirement pension or a specified benefit which would be payable if there were no earnings) as he may think appropriate in the circumstances.

(3) After such interim payments have been made to a person for any period and the amount of the earnings in question has been determined -

- (a) if the determining authority determines that for that period benefit, or (if some benefit has already been awarded and paid) additional benefit, is payable to him, the determining authority shall direct that those interim payments shall, so far as they do not exceed that benefit or additional benefit, be treated as having been made on account of it;
- (b) if the determining authority determines that for that period there is payable to him -

(i) no benefit, or (if some benefit has

already been awarded and paid) no additional benefit, or

(ii) benefit, or (if some benefit has already been awarded and paid) additional benefit, which is less than the amount of those interim payments,

the determining authority shall require repayment of those interim payments or (as the case may be) of so much of those interim payments as exceeds that benefit or additional benefit.

(4) Where the amount of a person's earnings from any employment has been determined in accordance with regulation 5 above and subsequently the amount of his emoluments, profits or gains from it for any relevant period as determined or agreed as the basis for an assessment to income tax is varied, the determining authority may review its determination; and if, as a result of such a review, that determination is revised, the provisions of paragraph (3) of this regulation shall apply in respect and in consequence of an original determination.

(5) The provisions of the Act and of the regulations made under the Act shall apply to any interim payment required to be repaid by virtue of paragraph (3) or paragraph (4) of this regulation as if it had been a payment of benefit required to be repaid.

(6) The provisions of the Act and of the regulations made under the Act relating to -

- (a) the time and manner of payment of benefit.
- (b) the extinguishment of the right to sums payable by way of benefit which are not obtained within the prescribed time, and
- (c) the information to be given when obtaining payment of benefit,

shall apply to and in respect of any interim payment by virtue of this regulation as if it were a payment of the appropriate pension or increase of pension.

Note: The regulations are set out in the form in force in 1983. Subsequent amendments have not affected the points now in issue.