CTC/3617/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This appeal by the claimant succeeds**. In accordance with the provisions of paragraphs 2(2), 2(2A) and 2(2B) of Schedule 2 to the Tax Credits Act 2000 I set aside the decision of the First-tier Tribunal sitting in Fox Court (London) and made on 20th July 2016 under reference SC242/14/03683 and substitute my own decision. This is to the effect that the penalty to be imposed is reduced to £100. I refer the matter to HMRC for implementation as appropriate.

2. I held an oral hearing of this appeal at Field House (London) on 13th June 2017. The claimant attended in person but was not represented. Her Majesty's Revenue and Customs (HMRC) were not represented but I am satisfied that they were properly notified of the time and place of the hearing

Background and Procedure

3. This is the second occasion on which this matter has come before me for decision. The first decision was given on 17th May 2016 under reference SP v HMRC [2016] UKUT 0238 (AAC), CTC 1260 2015. It is convenient to reproduce in this decision some of what I said in that decision.

4. At the relevant times the claimant was claiming child tax credit ("CTC"). The amount of entitlement to this depends on the claimant's income and the number and circumstances of the claimant's children. Tax credit is dealt with in respect of tax years. At the start of entitlement HMRC make an initial decision based on estimated entitlement during the whole of a tax year (which is often based on that of the previous year), or during the rest of the tax year, depending on when the claim was made. A revised decision may be made during the tax year if circumstances change. A final decision is made after the end of the tax year when entitlement can be calculated on the basis of what actually happened rather than on what was predicted for the purposes of the initial decision.

5. I set out the facts as I understood them to be but if there is any conflict with the facts found by the First-tier Tribunal on 20th July 2016 ("the second tribunal"), the latter findings are to be taken as correct. The claimant is a woman who was born on 27th September 1970 and at the relevant times was a single parent caring for her two children. She was employed by a local authority in a permanent full time job paying an annual salary of about £36,000 until she was made redundant in late 2011. It seems that the claimant was awarded £7494.85 tax credit for the tax year 2012-2013. On 22nd May 2013 HMRC sent her a form asking her to confirm her circumstances for the tax year 2012-3. This was the "Tax Credits Annual Declaration – year ended 5

April 2013". On 25th June 2013 the claimant replied to the effect that her income during 2012-3 had been £11,000. The second tribunal took the view that this was probably a bad guess on the claimant's part. At some stage HMRC collated the information that it had received in respect of the claimant and on 3rd October 2013 wrote to her to say that it held information that her income for 2012-13 had in fact been £22,797 rather than £11,000. This consisted of £365 ESA in respect of a brief period of unemployment, and the income from three separate part time jobs. On 14th October 2013 the claimant had a phone conversation with an HMRC official during which she agreed with those figures. On 19th February 2014 HMRC wrote to the claimant to say "In our opinion, you were negligent when you made this claim [for tax credits for 2013-2014]. You underestimated your income when there was no basis for the amount of income declared". The letter indicated that a penalty of £1360 had been imposed and had to be paid by the claimant. This was in addition to any recoverable overpayment (which seems to have been about £4500 in respect of 2012-2013).

6. On 3rd March 2014 the claimant appealed to the First-tier Tribunal against the decision to impose a penalty. HMRC responded on 25th April 2014, declining to change its decision on the penalty, and again declined to do so in a letter of 14th May 2014, and the appeal continued. On 1st September 2014 the claimant wrote to the First-tier Tribunal to say that she would not be able to attend the hearing but that she had never knowingly falsified a tax credit claim, that the nature of the claim was to estimate income for the year and verify it after the end of the year, and that having three different jobs and a period of unemployment meant that when she made her claim she could not know accurately her projected income. The First-tier Tribunal considered the matter in the absence of both parties on 26th September 2014 ("the first tribunal") and confirmed the decision of HMRC. She appealed to the Upper Tribunal and I held an oral hearing of the substantive appeal on 12th April 2016. On 17th May 2016 I made the decision to which I have referred in paragraph 3 above. I set aside the decision of the first tribunal and referred the matter for a fresh hearing by a differently constituted panel of the First-tier Tribunal on the basis of guidance that I gave relating to the law governing penalties in such cases. The second tribunal allowed the claimant's appeal against HMRC in part, substituting a penalty of £500 for HMRC's assessment of £1360.

7. On 20th October 2016 the First-tier Tribunal judge refused the claimant permission to appeal to the Upper Tribunal against the decision of the second tribunal on the basis that "there has been no error of law". However, paragraph 2 of Schedule 2 to the Tax Credits Act 2000 provides a right of appeal to the Upper Tribunal against the amount of a penalty, such right being separate from and in addition to any right of appeal on the basis of an error of law. That additional right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal, but on such an appeal the Upper Tribunal has the same powers that are conferred by paragraph 2 on the First-tier Tribunal. Accordingly, on 15th December 2016 I gave the claimant permission to appeal "for the sole purpose of enabling the amount of the penalty assessed by the First-tier Tribunal to be reviewed by the Upper Tribunal". I took and take the view that there was no reasonably arguable error of law in the decision of the second tribunal. On one view the First-tier Tribunal judge should have considered whether to grant permission under paragraph 2 of Schedule 2 in addition to considering whether there was an arguable error of law, but to the extent necessary I

waive any irregularity in his failure to do so. On 24th April 2017 I directed that there be an oral hearing of this appeal against the decision of the second tribunal, and the hearing took place on 13th June 2017.

The Relevant Law

8. So far as is relevant, section 31 of the Tax Credits Act 2002 provides as follows:

> 31(1) Where a person fraudulently or negligently –
>
> > (a) makes an incorrect statement or declaration in or in connection with a claim for tax credit or a notification of a change of circumstances given in accordance with regulations … or in response to [certain] notice[s], or
> >
> > (b) gives incorrect information or evidence in response to [certain] requirement[s] …
>
> a penalty not exceeding £3000 may be imposed on him.

9. Other provisions deal with the power of HMRC (sometimes referred to as "the Board") to impose the penalty and section 38 creates a right of appeal to the First-tier Tribunal in cases such as the present one. Schedule 2 to the 2002 Act empowers the First-tier Tribunal to set aside or confirm the penalty or reduce or increase the amount. On appeal to it, as I have indicated above, the Upper Tribunal may also change the amount, even in the absence of an error of law.

10. There is no statutory guidance as to how or on what basis HMRC should calculate the amount of a tax credit penalty, neither is there any specific statutory requirement on HMRC to formulate or adopt or publish such guidance in relation to penalties in tax credit cases. However, it has done so and a copy of the guidance was before the second tribunal (although it was not produced to the first tribunal). I understand that it is publicly available on the internet.

11. In SP v HMRC [2016] UKUT 0238 (AAC), CTC 1260 2015 I said (paragraph 25):

> 25. In summary the following propositions represent what, in my view, is the correct approach to tax credit penalties. This is not intended to be an exhaustive list and, of course, much will depend on the circumstances of the particular case. However, by following this kind of approach tribunals are less likely to fall into error of law.
>
> (a) The imposition of any penalty involves the exercise of a discretion whether or not to impose any penalty at all or a penalty of a particular amount.
>
> (b) It is proper for HMRC to adopt guidance even though there is no statutory requirement to do so.

(c) It is proper for the First-tier Tribunal to take that guidance as a starting point for the calculation of any penalty.

(d) In applying the guidance the First-tier Tribunal must be satisfied as to the underlying facts on which the calculation of the penalty is based, including the amount of any overpayment said to have been made. It must also be satisfied that any incorrect statement can in fact be attributed to the period in respect of which the penalty is being considered. A distinction will usually need to be made between past reports and future predictions – the design of HMRC forms is not always very helpful on this matter.

(e) In most cases it will be relevant for the First-tier Tribunal to find whether the claimant acted innocently and/or reasonably, or negligently (that is, with a lack of due care), or fraudulently.

(f) Having identified the amount of penalty that the guidance would produce, the First-tier Tribunal must consider whether there are any aggravating or mitigating factors and must take into account the principle that the maximum penalty is reserved for the worst offences.

(g) At each stage the First-tier Tribunal must give reasons for its conclusions.

The Second Tribunal Decision (of the First-tier Tribunal)

12. The second tribunal found that the claimant did "negligently make an incorrect statement or declaration in or in connection with a claim for tax credit" (paragraph 17 of its statement of reasons). She declared that her gross earnings were £11,000 when they were £22,434. The claimant had not used her P60s in making the calculation. She said that she thought it was OK to guess (paragraph 21) and that she knew that this figure would be used to calculate how much tax credit she would receive (paragraph 25). It was hard to see exactly what the figure of £11,000 was based on and the claimant could not explain it (paragraph 22). She acted with lack of due care and acted negligently (paragraph 27).

13. The tribunal noted that there was no suggestion that the claimant would be prosecuted and no allegation of fraud. The maximum penalty was reserved for the worst cases, possibly running into overpayments of tens of thousands of pounds. The only aggravating factor was that the figure of £11,000 "was just a guess. There was a complete lack of diligence in giving this figure (paragraph 32). The tribunal also took the claimant's personal circumstances into account (paragraph 31):

> "She was in a stressful position. She had been made redundant. She had children to support. She did well to find other work and get back into personal work. At the time in question here she was being prescribed antidepressants by her GP. She was well enough to work full time but had a couple of days off work for health reasons".

14. The tribunal took the view that £500 "marks the seriousness of the issue without being disproportionate" (paragraph 33).

Conclusions

15. In her appeal to the Upper Tribunal against the decision of the second tribunal the claimant stated (letter of 13th September 2016):

> "No mention in the statement was made of the fact that in this year in addition to redundancy and being a lone carer, my brother was dying from cancer and had a long painful and prolonged death during this period … I made the tribunal aware of this situation, which contributed to the lack of ability to sort through my finances and obtain P60s and accurate tax records for three different jobs and a period of unemployment".

The claimant also referred to confusion on the part of HMRC in relation to mixing up two separate London Boroughs for which she had done some work.

16. In refusing permission to appeal to the Upper Tribunal the judge of the First-tier Tribunal (who had constituted the second tribunal) indicated that he did remember the claimant referring to the above at the hearing and that he had taken all the circumstances into account even if not specifically mentioned in the statement of reasons.

17. HMRC made a written submission to the Upper Tribunal on 17th March 2017 setting out the background and supporting the decision of the second tribunal on the basis that it was properly explained and complied with the guidance set out in SP v HMRC [2016] UKUT 0238 (AAC), CTC 1260 2015.

18. When it comes down to it, it is a matter of judgment. The penalty imposed is in addition to the requirement to repay any overpayment. I agree that it is necessary to "mark the seriousness of the issue", but it is not necessary in a case that depends on negligence rather than fraud (and where there has been no previous such occurrence) to create additional hardship. A penalty of £500 seems to me to do that in the present case. A penalty of £100 is more than a nominal penalty but not so great as to be disproportionate or create inappropriate additional hardship. For that reason I allow the appeal and make the decision as set out in paragraph 1 above.

H. Levenson
Judge of the Upper Tribunal
14th July 2017