IN THE UPPER TRIBUNAL **Case No.** CTC/1954/1955/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: In refusing to admit Ms K's child tax credit appeals, the decisions of the First-tier Tribunal, taken on 1st August 2014 and 27th January 2015 (tribunal references *SC 312/15/00245* & *SC 921/14/02038*) contained errors on points of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I do not set aside the Tribunal's decisions. This is because H.M.R.C. have now revised the decisions under challenge in Ms K's favour.

REASONS FOR DECISION

Introduction

1. The legislation conferring rights of appeal against tax credits decisions has proven problematic (see *J.I. v H.M.R.C.* [2013] UKUT 199 (AAC)). As from 6th April 2014, the legislation was amended with a view, at least in part, to clarifying the legal position.

2. This case involved two attempted appeals by Ms K, one against a H.M. Revenue & Customs (HMRC) decision taken before, and another taken after, 6th April 2014. The First-tier Tribunal refused to admit both appeals but in doing so seemed to mix up the relevant appeal rules.

Why the First-tier Tribunal erred in law in refusing to admit appeal 1

3. On 29th April 2013, H.M.R.C. acting under section 14(1) of the Tax Credits Act 2002 ("2002 Act") decided that on Ms K's claim for child tax credit for tax year 2013/14 her son was not a child or qualifying young person for whom she was responsible.

4. Ms K attempted to appeal to the First-tier Tribunal against H.M.R.C's decision but the Tribunal refused to admit the appeal. The Tribunal decided that it had no jurisdiction to admit the appeal because H.M.R.C. had not issued a review notice (commonly referred to as 'mandatory reconsideration'). In refusing to admit Mrs K's appeal the Tribunal erred in law.

5. Section 38(1) of the 2002 Act confers a right of appeal against a certain H.M.R.C. decisions including a decision under section 14(1) of the Act.

6. With effect from 6th April 2014, subsection (1A) was inserted in section 38 of the 2002 Act (by the Tax Credits, Child Benefit and Guardian's Allowance Reviews and Appeals Order 2014 (S.I. 2014/886) ("the 2014 Order")). Subsection (1A) provides:

> "(1A) An appeal may not be brought by virtue of subsection (1) against a decision unless a review of the decision has been carried out under section 21A and notice of the conclusion on the review has been given under section 21A(3)."

7. Section 21A was also inserted in the 2012 Act, as from 6th April 2014, by the 2014 Order. Section 21A requires H.M.R.C. to review a decision carrying a right of appeal under section 38(1) where they duly receive a written application to do so. Once the review has been carried out, section 21A(3) requires H.M.R.C. to give the applicant notice of their conclusion on the review. This is the mandatory reconsideration process.

8. In applying the legislation inserted in the 2002 Act by the 2014 Order, it is important not to overlook article 1(5) of the Order. Article 1(5) provides that "any amendment made by this Order only has effect in relation to an HMRC decision made on or after the amendment comes into force". It is clear, therefore, that the restriction on appeal rights contained in section 38(1A) cannot have applied to Ms K's appeal. She sought to appeal a HMRC decision made on 29th April 2013, about a year before the 2014 Order amendments came into effect. The Tribunal erred in law by refusing to admit Ms K's appeal on the ground that she had not been issued with a mandatory review notice. The Tribunal was clearly misled by a H.M.R.C. letter in which they said they refused to accept Ms K's late application for a review of the decision of 29th April 2013.

Why the First-tier Tribunal erred in law in refusing to admit appeal 2

9. Mrs K's second appeal concerned a decision taken in August 2014. This appears to have been a final child tax credit entitlement decision for tax year 2013/14 taken under section 18 of the 2002 Act and, in it, H.M.R.C. decided that Ms K's son was not a child or qualifying young person for whom she was responsible.

10. The Tribunal refused to admit this appeal on the basis that it was out-of-time, having been made more than 30 days after notice of the decision was given to Mrs K

11. This decision was taken after 6th April 2014 and so the review/mandatory reconsideration provisions of the 2002 Act did apply. However, there is no evidence that the decision was reviewed under section 21A. Therefore, the Tribunal should either have refused to admit the appeal because Ms K had not been issued with a review notice under section 21A(3) or adjourned to investigate whether such a notice had been issued.

12. The Tribunal also overlooked the fact that, since 6th April 2014, the primary tax credit appeal time-limit has not operated by reference to the date on which notice was given of H.M.R.C's decision. Since that date, it has instead operated by reference to the date on which a review / mandatory reconsideration notice is given under section 21A(3). As from 6th April 2014, section 39(1) of the 2002 Act has read:

> "(1) Notice of an appeal under section 38 against a decision must be given in the prescribed manner within the period of thirty days after the date on which notice under section 21A(3) was given of the conclusion on the review of the decision."

Resolution of the appeals

13. I granted Ms K permission to appeal to the Upper Tribunal against the First-tier Tribunal's decisions.

14. The underlying issue in these appeals was whether Ms K's son was a child or qualifying young person for whom she was responsible during tax year 2013/14 (which is the child tax credit entitlement condition in section 8(1) of the 2002 Act). H.M.R.C. now accepts that Ms K's son was a child or qualifying young person during 2013/14 and that she was responsible for him. It is not at all clear why but H.M.R.C. had previously taken the view that Ms K did not meet this entitlement condition.

15. In the light of H.M.R.C's acceptance that Ms K was in fact responsible for a child or qualifying young person during tax year 2013/14, they have considered whether to revise their earlier decisions on the ground of official error.

16. Section 21 of the 2002 Act authorises regulations to provide for certain decisions, including decisions under sections 14 and 18, to be "revised in favour of the person or persons to whom it relates if it is incorrect by reason of official error (as defined by the regulations)". The relevant regulations are the Tax Credits (Official Error) Regulations 2002 (S.I. 2013/692).

17. Regulation 2(1) defines "official error" as "an error relating to tax credit made by (a) an officer of the Board [i.e. H.M.R.C]…to which the claimant…did not materially contribute". Regulation 3(1) allows a decision to be revised if "it is incorrect by reason of official error" unless more than five years have elapsed since the decision was taken (regulation 3(3)).

18. H.M.R.C. have decided under regulation 3(1) to revise their earlier decisions and replace them with decisions that, during tax year 2013/14, Ms K's son was a child or qualifying young person and that she was responsible for him. That brings these proceedings to an end. While the First-tier Tribunal's decisions refusing to admit Mrs K's appeals involved errors on points of law, if her appeals were validly made they either lapsed as a result of H.M.R.C's decision to revise their earlier decisions or no useful purpose will be served in setting them aside. This explains the decision given at the start of these reasons.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
26th February 2016