Neutral Citation Number: [2026] UKUT 5 (AAC)
Appeal No. UA-2024-001364-CSM

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

NW

Appellant

- v -

Secretary of State for Work and Pensions

First Respondent

-and-

NH

Second Respondent

Before: Upper Tribunal Judge Robinson
Decided on consideration of the papers

Representation:
Appellant: Unrepresented
First Respondent: Lauren Foody, DMA, Department for Work and Pensions
Second Respondent: Unrepresented

On appeal from:
Tribunal: The First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC238/22/00520
Tribunal Venue: Bristol
Decision Date: 26 January 2024

SUMMARY OF DECISION

CHILD SUPPORT – calculation of income

When determining a non-resident parent's income for the purposes of a child maintenance calculation, losses from a self-employed business cannot be offset against income from employment.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 26 January 2024 under number SC238/22/00520 did not involve the making of any error of law.

REASONS FOR DECISION

Introduction

1. This case concerns the child maintenance liability of the Appellant (the "non-resident parent" in the terms of the child support legislation) in respect of two children of whom he is the father. The Second Respondent, who is the mother of the children, is the "person with care". I will refer to them in this decision as the "NRP" and the "PWC", respectively. The First Respondent is the Secretary of State for Work and Pensions, acting through the Child Maintenance Service ("CMS").

2. The appeal hinges on a narrow point of statutory interpretation relating to the calculation of a non-resident parent's income for the purpose of determining their child maintenance liability. The question is whether losses incurred in the course of a self-employed business can be 'offset' against other types of income. I conclude that they cannot.

3. The NRP has requested an oral hearing of the appeal. Under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), the Upper Tribunal has the power to make any decision without a hearing, but must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter. With regard to his reasons for seeking an oral hearing, the NRP states: "*The Respondent [the PWC] has stated she refuses decision without reason yet will not engage in the process. The Respondent Secretary of State wants decision without reason. I have no desire for oral hearing but all parties are not in agreement*". The parties have set out their arguments in writing, and the fact that they are not in agreement is not sufficient reason to merit an oral hearing. I have decided that I can properly determine the appeal without an oral hearing, and that it would not be proportionate to hold one.

Legal framework

Child Support Act 1991 and Child Support Maintenance Calculation Regulations 2012

4. The child maintenance payable by the NRP is governed primarily by the Child Support Act 1991 and the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677, the "2012 Regulations"). The starting point for determining a non-resident parent's income for the purpose of the maintenance calculation is set out in regulations 34 to 36 of the 2012 Regulations:

> "**The general rule for determining gross weekly income**
>
> 34(1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.
>
> (2) The non-resident parent's gross weekly income is to be based on historic income unless—
>
> (a) current income differs from historic income by an amount that is at least 25% of historic income; or
> (b) no historic income is available; or
> (c) the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC.
>
> (2A) [*omitted*]
>
> (3) For the purposes of paragraph (2)(b) no historic income is available if HMRC did not, when a request was last made by the Secretary of State for the purposes of regulation 35, have the required information in relation to a relevant tax year.
>
> (4) "Relevant tax year" has the meaning given in regulation 4(2).
>
> (5) [*omitted*]
>
> **Historic income – general**
>
> 35(1) Historic income is determined by—
>
> (a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;
> (b) adjusting that figure where required in accordance with paragraph (3); and
> (c) dividing by 365 and multiplying by 7.
>
> (2) A request for the HMRC figure is to be made by the Secretary of State—

(a) for the purposes of a decision under section 11 of the 1991 Act (the initial maintenance calculation) no more than 30 days before the initial effective date; and

(b) for the purposes of updating that figure, no more than 30 days before the review date.

(3) [*omitted*]

Historic income – the HMRC figure

36(1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year—

(a) under Part 2 of ITEPA [the Income Tax (Earnings and Pensions) Act 2003] (employment income);
(b) [*omitted*];
(c) [*omitted*]; and
(d) under Part 2 of ITTOIA [the Income Tax (Trading and Other Income) Act 2005] (trading income).

[*(2) and (3) omitted*]

(4) The amount identified as income for the purposes of paragraph (1)(d) is to be taken after deduction of any relief under section 83 of the Income Tax Act 2007 (carry forward trade loss relief against trade profits).

(5) Where, for the latest available tax year, HMRC has both information provided in a self-assessment return and information provided under the PAYE Regulations, the amount identified for the purposes of paragraph (1) is to be taken from the former."

5. Regulation 4 defines "latest available tax year" and "relevant tax year":

"4(1) In these Regulations "latest available tax year" means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income) or regulation 69 (non-resident parent with unearned income), is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.

(2) In this regulation a "relevant tax year" is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1)."

6. Current income, rather than historic income, can be used to determine a non-resident's parent's gross weekly income only where one of the circumstances specified in regulation 34(2)(a), (b) or (c) applies. In such cases, current income is determined in accordance with regulations 37 to 42. Regulation 37 provides:

> **Current income – general**
>
> 37(1) Current income is the sum of the non-resident parent's income—
>
> (a) as an employee or office-holder;
> (b) from self-employment; and
> (c) from a pension,
>
> calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42.
>
> (2) [*omitted*]"

7. Regulations 38 and 39 provide, respectively, for the determination of the non-resident parent's current income as an employee or office-holder, and from self-employment. Regulation 39 provides as follows:

> **Current income – from self-employment**
>
> 39(1) The non-resident parent's current income from self-employment is to be determined by reference to the profits of any trade, profession or vocation carried on by the non-resident parent at the effective date of the relevant calculation decision.
>
> (2) The profits referred to in paragraph (1) are the profits determined in accordance with Part 2 of ITTOIA for the most recently completed relevant period or, if no such period has been completed, the estimated profits for the current relevant period.
>
> (3) The weekly amount is calculated by dividing the amount of those profits by the number of weeks in the relevant period.
>
> (4) In paragraphs (2) and (3) the "relevant period" means a tax year or such other period in respect of which the non-resident parent should, in the normal course of events, report the profits or losses of the trade, profession or vocation in question to HMRC in a self-assessment return.
>
> [*(5) and (6) omitted*]"

Income Tax Act 2007

8. The relevant provisions of the Income Tax Act 2007 for the purposes of this case are sections 23, 64 and 83:

> **"The calculation of income tax liability**
>
> 23. To find the liability of a person ("the taxpayer") to income tax for a tax year, take the following steps.
>
> *Step 1*
>
> Identify the amounts of income on which the taxpayer is charged to income tax for the tax year.
>
> The sum of those amounts is "total income".
>
> Each of those amounts is a "component" of total income.
>
> *Step 2*
>
> Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year.
>
> See sections 24A and 25 for further provision about the deduction of those reliefs.
>
> See also section 24B which provides that a taxpayer's net income is taken to be £0 in certain cases.
>
> The sum of the amounts of the components left after this step is "net income".
>
> [*steps 3 to 7 omitted*]
>
> **Deduction of losses from general income**
>
> 64(1) A person may make a claim for trade loss relief against general income if the person—
>
> (a) carries on a trade in a tax year, and
>
> (b) makes a loss in the trade in the tax year ("the loss-making year").
>
> (2) The claim is for the loss to be deducted in calculating the person's net income—
>
> (a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years.

(See Step 2 of the calculation in section 23.)

[*(3) to (8) omitted*]

Carry forward against subsequent trade profits

83(1) A person may make a claim for carry-forward trade loss relief if—

(a) the person has made a loss in a trade in a tax year, and

(b) relief for the loss has not been fully given under this Chapter or any other provision of the Income Tax Acts or under section 261B of TCGA 1992 (use of trading loss as a CGT loss).

(2) The claim is for the part of the loss for which relief has not been given under any such provision ("the unrelieved loss") to be deducted in calculating the person's net income for subsequent tax years (see Step 2 of the calculation in section 23).

(3) But a deduction for that purpose is to be made only from profits of the trade.

[*(4) to (6) omitted*]"

Factual background

9. The NRP and the PWC have two "qualifying children" for child support purposes, who were aged 3 and 5 at the effective date of the maintenance calculation which is the subject of the appeal.

10. The PWC applied to the CMS on 16 February 2022 for a calculation of the NRP's child maintenance liability. On 17 February 2022 the CMS contacted HMRC to obtain the "HRMC figure" required to determine the NRP's historic income. The figure provided was £48,100, in relation to the NRP's income in the 2020/21 tax year (the most recent year for which HMRC had received the necessary information from the NRP).

11. On 16 March 2022 the CMS calculated the NRP's child maintenance liability using an annual income figure of £48,106 (it is unclear why a slightly different figure was used from that provided by HMRC), resulting in a decision that the NRP was liable to pay £101.93 per week (taking into account the shared care arrangements in place between him and PWC) from the effective date of

23 February 2022. The CMS notified the NRP and PWC of the decision on 17 March 2022.

12. On 21 March 2022 the NRP requested mandatory reconsideration of the decision notified on 17 March 2022. The NRP argued that the decision was wrong because (a) the information regarding his income in the 2020/21 tax year was out of date, and his employment income had subsequently reduced; (b) he no longer had income from his property rental business as the property had been sold; and (c) that his self-employed business losses should have been taken into account. On 25 March 2022 he provided the CMS with a copy of his self-assessment tax return ("SATR") for the 2020/21 tax year. On 11 April 2022 the NRP provided the CMS with a copy of his SATR for the 2021/22 tax year, which he had submitted to HMRC on 8 April.

13. The NRP's SATR for 2020/21 showed income from employment of £48,100 and losses from self-employment of £17,607 (resulting from no business income and allowable expenses of £17,607). It appears that the NRP claimed trade loss relief under section 64 of the Income Tax Act 2007 in respect of the whole loss of £17,607, thereby reducing the net income on which his income tax liability was calculated for that year.

14. The NRP's SATR for 2021/22 showed income from employment of £43,480 (£43,560 minus allowable expenses of £80) and losses from self-employment of £45,264 (business income of £2676 minus allowable expenses of £47,940). It appears that the NRP claimed trade loss relief under section 64 in respect of £30,911 of that loss, while the remainder of the loss (£14,353) was carried forward.

15. On 11 April 2022 the CMS notified the NRP and PWC that it had reconsidered but had not changed the maintenance calculation notified on 17 March 2022. The NRP submitted his appeal to the First-tier Tribunal on 20 April 2022.

First-tier Tribunal and Upper Tribunal proceedings

16. On 8 March 2023 the First-tier Tribunal Judge gave directions on the appeal, which required the NRP to provide various additional evidence in relation to his financial affairs, and required the First Respondent to provide a submission with further information in support of the proposition that trading losses could not be offset against employment income. The First Respondent submitted a supplementary response to the appeal on 31 March 2023, and the NRP submitted the further evidence requested on 13 April 2023.

17. The First-tier Tribunal hearing was held on 26 January 2024 by video, and was attended by the NRP and PWC as well as a Presenting Officer on behalf of the First Respondent. The Tribunal allowed the appeal in part and directed the CMS to recalculate the NRP's child maintenance liability using an annual income figure of £48,100 instead of £48,106. It rejected the NRP's argument that the losses of his self-employed business could be offset against his other income in determining either his historic or current income for child support purposes.

18. The NRP applied to the First-tier Tribunal for permission to appeal and was refused on 14 August 2024 (issued 21 August 2024). He applied to the Upper Tribunal for permission to appeal on 13 September 2024. On 24 February 2025, Upper Tribunal Judge Sutherland Williams granted the NRP permission to appeal. In his reasons for granting permission the Judge commented as follows:

> "5. I have given permission because there is a realistic prospect that the decision involved the making of an error on a point of law. Specifically, I am concerned about the following element of the tribunal's decision:
>
> > "23. The appellant's case is that any losses arising from his self-employed status should be taken into account in calculating his income for the purposes of child maintenance. He provides evidence to suggest losses in the 20/2021 and 21/2022 tax years, that should be taken into account and off set against earned income, to achieve his correct income. His argument is set out in the appeal grounds and addition E in particular
> >
> > 24. The DWP argued that the regulations dealing with employed income and self-employed income are separate regulations and that they cannot simply be offset against each other, for the purposes of the CSCMR 2012 in particular. They argue the losses within self-employment cannot be offset against earned income and indeed that the assessment was made solely on the basis of earned income anyway. There are grounds for this are set out within the DWP response and addition D in particular.
> >
> > 25. The tribunal considered both lines of arguments and preferred the view of the DWP. It considered the appellant's argument did appear to attract a level of internal logic and was well developed but it did not find it as persuasive as the reason and specific information put forward by the Respondent.
> >
> > 26. To prefer the appellant's suggestion would create a potentially significant gap, whereby persons in the appellant's position could manipulate income figures by making choices of how to present self-employed income so as to offset employed income.
> >
> > 27. The tribunal considered this interpretation would create too much inconsistency and was not in accordance with the natural reading of the CSCMR 2012. On both issues of historic and current income the tribunal accepts the approach put forward by the DWP and determined it was bound to proceed in accordance with that conclusion."

6. In short, the appellant submits: '*If the self-employed loss is to be ignored and not included in the sum for total income then surely*

conversely if there is a profit then this will also be ignored…, I cannot be at a detriment both ways.'

7. I am not necessarily persuaded by that, but do have other reservations, that can be summarised as follows:

a. The appellant argued that the losses arising from his self-employment for the tax years 2020/2021 and 2021/2022 should be offset from his income from employment for the purpose of child support maintenance. His arguments are set out in Addition E of the FTT bundle (and the grounds of appeal to the Upper Tribunal) – see paragraphs 23, 52, 53. The offset figure in the appellant's submission was that of £12,449.81, which would bring his income to £32,444.26 for the tax year 2021/2022 – paragraph 53 of the FTT decision.

b. The tribunal at first-instance did not agree to offset any loss from the appellant's self-employment income – paragraphs 38, 52, 54, 56. The FTT found that any property income had to be disregarded and would only fall for any variation – paragraph 52.

c. Regulation 36 of the Child Support Maintenance Regulations 2012 explains the Historic Income figure.

d. On one view, the CMS appear to have assessed the non-resident parent's income based on the gross taxable income as reported to HMRC. Regulation 36(4) provides that the amount identified as income for the purpose of paragraph 1(d) – trading income, is to be taken after deduction of any relief under section 83 of the Income Tax Act 2007 (carry forward trade loss relief against trade profits).

e. Section 83(3) refers to relief that maybe deducted and provides that a deduction of a loss from trading could be made only from profits of the trade.

f. It is arguable that the loss from self-employment (trading) should therefore be offset against the profits from self-employment (but not against any income from employment,) if that adjustment has not already taken place."

8. Without deciding the matter, the appellant is therefore entitled to argue that the FTT erred in law in that they should have accepted the appellant's overall lower income resulting from offsetting the loss brought by his self-employment against his income from employment.

9. By way of balance, I note, but no more, that the rules about offsetting loss against profit are HMRC (tax) rules not the CMS/DWP rules (see DWP response and addition D.) Regulations 39(1) and (2) refer to taxable profits that are used to determine current income for the non-

> resident parent who is self-employed. "Profits" means the profits of the non-resident parent's trade, profession or vocation as determined by HMRC for the most recently completed relevant period, or if no such period has been completed, the estimated profits.
>
> 10. For these purposes, I remind myself and the reader of paragraphs 8-11 of *FQ v SSWP* [2017] AACR 24 where, Upper Tribunal Judge Jacobs summarises the law of how the non-resident parent's liability is calculated; and *DT v SSWP (CSM)* [2023] UKUT 175 (AAC) where at paragraph 22 and onwards, Upper Tribunal Judge Roland has also provided an analysis on determining a person's gross weekly income for the purpose of making a child support assessment, (see also the decision of Judge Jacobs in *SH v SSWP and HMRC* [2019] AACR1, paragraphs 2 to 12, in which Judge explained the law on a non-resident parents' liability to calculate child support (in particular, paragraph 11.))"

19. The First Respondent and PWC were given one month in which to submit responses to the appeal, following which the NRP was given one month in which to reply.

20. The PWC submitted her response on 1 May 2025 and the First Respondent's representative submitted a response on 30 May 2025. Both oppose the appeal, and neither seeks an oral hearing.

21. The NRP submitted his reply on 19 August 2025. His arguments can be summarised as follows:

    a. the reference in regulation 36(4) of the 2012 Regulations to the Income Tax Act 2007 "means losses properly claimed under section 83 ITA 2007 must be reflected in the income figure", and that the First-tier Tribunal "erred by treating employed and self-employed income as entirely separate and refusing to consider statutory loss relief";

    b. the decisions of the Upper Tribunal in *FQ v SSWP* [2017] AACR 24, *DT v SSWP (CSM)* [2023] UKUT 175 (AAC) and *SH v SSWP and HMRC* [2019] AACR1 "show that the FTT and Secretary of State cannot ignore statutory loss relief where it applies";

    c. the approach advanced by the First Respondent and accepted by the First-tier Tribunal results in unfairness and inconsistency, because "self-employment losses are ignored, but profits are included" in the determination of a non-resident parent's income for child support purposes;

    d. the First Respondent was incorrect to submit that the NRP would need to apply to HMRC to carry forward trade loss relief against any trade profits, in order for this to be reflected in the child maintenance calculation, because the NRP's SATRs already reflected the losses.

Analysis

Historic income

22. The correct approach to determining a non-resident parent's income for the purposes of a child maintenance calculation can only be established through a careful consideration of the provisions of the 2012 Regulations. As the NRP's gross weekly income in this case was determined on the basis of his historic income, I will begin by considering regulation 36, and whether it permits losses from self-employment to be deducted from other income for the purposes of determining historic income.

23. As Upper Tribunal Judge Sutherland Williams noted in granting permission to appeal, the decision of Upper Tribunal Judge Jacobs in *FQ v SSWP* [2017] AACR 24 provided helpful guidance on the interpretation of regulation 36 and its interaction with tax legislation. In *FQ*, Judge Jacobs held that the First-tier Tribunal had erred in law when it deducted the non-resident parent's income tax personal allowance in reaching his historic income figure. Judge Jacobs noted the significance of the precise terminology used in regulation 36, which refers to "the sum of the income on which the non-resident parent was charged to tax for the latest available tax year" (my emphasis) under the provisions of tax legislation listed in paragraphs (a) to (d) of regulation 36(1). That reflects the terminology used in section 23 of the Income Tax Act 2007 (the "ITA"), which sets out the process for determining the liability of a person to income tax. At step 1 of that process, the "amounts of income on which the taxpayer is charged to income tax" (my emphasis) are identified and added together to find the taxpayer's "total income". It is not until step 2 of the process that any reliefs are deducted, including those relating to trade losses. The reliefs applied at step 2 include trade loss relief against general income, under section 64 of the ITA, and carry-forward trade loss relief, under section 83 (see section 24).

24. Regulation 36(4) of the 2012 Regulations expressly provides for any carry-forward trade loss relief under section 83 of the ITA to be deducted when identifying the amount of trading income which is to be included in the HMRC figure, and therefore in a non-resident parent's historic income, under section 36(1)(d). However, section 83 does not allow trade losses to be deducted from other types of income (such as income from employment). While trade loss relief under section 64 of the ITA allows a person's trade losses to be deducted from their general income when calculating their net income for income tax purposes, there is no reference to relief under section 64 of the ITA in regulation 36 of the 2012 Regulations, and nothing else in that regulation, or elsewhere in the 2012 Regulations, to allow trade losses to be deducted from other forms of income for child maintenance purposes.

25. The reference in regulation 36 to "income charged to tax" must also be read in light of the provisions of Part 2 of ITTOIA. Section 5 of ITTOIA provides that "income tax is charged on the profits of a trade, profession or vocation" and section 7 provides "Tax is charged under this Chapter on the full amount of the profits of the tax year". Therefore, the figure taken into account under section

36(1)(d) as representing a non-resident parent's "income charged to tax" under Part 2 of ITTOIA, which is to be added to any income the non-resident parent may have under paragraphs (a), (b) or (c) of section 36(1), can only be a figure representing profits, not a negative figure representing a loss. Either there was an amount of profit on which the non-resident parent was charged to tax under Part 2 of ITTOIA, or there was no profit, and nothing to take into account under section 36(1)(d).

Current income

26. Having concluded that, when determining historic income under regulation 36, losses from self-employment cannot be offset against employment income, it is now necessary to consider whether such offsetting is permitted when determining a non-resident parent's current income. If it is, then the difference between the NRP's current income and his historic income in the present case would exceed the 25% threshold at which current income is used for the maintenance calculation instead of historic income, under regulation 34(2)(a) of the 2012 Regulations.

27. Regulation 37(1) provides that a non-resident parent's current income is the sum of their income (a) as an employee or officer-holder, (b) from self-employment, and (c) from a pension. The drafting of that provision does not establish definitively whether the figure taken into account under section 37(1)(b) could be a negative figure representing a loss from self-employment.

28. However, the wording of regulation 39 (which provides for the determination of current income from self-employment) is more instructive. Regulation 39(1) provides that current income from self-employment "is to be determined by reference to the profits of any trade, profession or vocation carried on by the non-resident parent" (my emphasis). Paragraph (2) similarly refers to "the profits determined in accordance with Part 2 of ITTOIA", and paragraph (3) provides that "the weekly amount is calculated by dividing the amount of those profits by the number of weeks in the relevant period" (my emphasis in each case). There is nothing to suggest that the term 'profits' is intended to be read as referring to losses in cases where a non-resident parent's self-employed business activities have given rise to a loss rather than profit in the relevant period.

29. Further, it is notable that regulation 39(4), which defines "relevant period" for the purposes of paragraphs (2) and (3), states: "the "relevant period" means a tax year or such other period in respect of which the non-resident parent should, in the normal course of events, report the profits or losses of the trade, profession or vocation in question to HMRC in a self-assessment return" (my emphasis). The specific reference to 'profits or losses' in regulation 39(4) supports the view that the term 'profits' when used elsewhere in regulation 39 was not intended to be given a more expansive interpretation.

30. Therefore, in my view, regulation 39 requires a non-resident parent's current income from self-employment to be determined by reference only to profits, and not to losses. Either there are profits from a trade, profession or vocation which

are to be used to calculate a weekly amount under 39(3), or there are no such profits, and no income from self-employment to be included in the calculation of current income under regulation 37(1).

Conclusion

31. For the reasons set out above, I have concluded that the First-tier Tribunal did not err in law in its decision of 26 January 2024 by upholding the CMS's approach and deciding that the NRP's self-employment losses could not be deducted from his other income for the purposes of the child maintenance calculation effective from 23 February 2022.

32. The NRP submits that this approach creates unfairness and inconsistency because it means that any profits he makes from his self-employed business are included in his income for child maintenance purposes, but any losses he makes are ignored. However, the CMS, the First-tier Tribunal and the Upper Tribunal are required to interpret and apply the legislation as it stands, rather than to consider what the law should be. In my view the meaning of the relevant legislative provisions is clear, and they have been correctly interpreted and applied by the CMS and the First-tier Tribunal. Therefore I am dismissing the appeal.

Helen Robinson
Judge of the Upper Tribunal

Authorised by the Judge for issue on 2 January 2026