Appeal No. CTC/2925/2016

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Bristol on 25 April 2016 under reference SC188/16/00318 involved the making of an error on a point of law.

That decision is set aside.

I remake the decision in the following terms:

> **The proceedings before the First-tier Tribunal are struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.**

REASONS FOR DECISION

Introduction

Representation

1 In these proceedings, the claimant appeals against the above decision of the First-tier Tribunal. He is represented by Ty Arian Limited, solicitors trading as T. A. Law.

2 The Commissioners for Her Majesty's Revenue and Customs ("HMRC") are the respondent to the appeal. They are represented by Mr Eland of HMRC Solicitor's Office and Legal Services.

Oral hearing

3 Neither T. A. Law, nor Mr Eland, have asked me to hold an oral hearing of the appeal and I do not consider that a hearing would assist me to decide the issues—which are exclusively legal—fairly and justly. I have therefore reached my decision on the basis of the parties' detailed written submissions.

Overview of the tax credit decision-making process

4 It will help to explain my decision if I begin by summarising how decisions about tax credits are made. I appreciate that I am not the first Upper Tribunal Judge to offer such an explanation: in particular, Upper Tribunal Judge Wright has recently given a more detailed account in *HO v HM Revenue & Customs (TC)* [2018] UKUT 105 (AAC). Nor, I suspect, will I be the last. However, the circumstances of this appeal show that the explanation will bear repetition.

5 The primary legislation governing the tax credit decision-making process is set out in sections 14-18 of the Tax Credits Act 2002 ("the Act"). So far as is relevant to this appeal, I have reproduced the text of those provisions in an Appendix to this decision.

6 The amount of a claimant's entitlement to tax credits is assessed by reference to his circumstances during the whole of a particular tax year, *i.e.,* the period from 6 April in one year to 5 April in the next, both dates included. (In what follows, when I say "year" I will always be referring to tax years.)

7 One consequence of that basis of assessment is that—in marked contrast to the position for many social security benefits—all decisions about *entitlement* to tax credits are retrospective. Such decisions can only ever be made after the end of year to which they relate: the claimant's financial circumstances for the year as a whole cannot be known definitively until that year is over.

8 However, some decisions about tax credits must be taken during or before the year to which they relate. If they were not, tax credits could only be paid after the end of the relevant year. I will refer to such decisions as "in-year decisions". They are made under sections 14-16 of the Act, although section 15 is not relevant to this appeal.

9 In-year decisions are not about *entitlement*. Rather, they are about how much tax credit a claimant (or joint claimants) should be *awarded* for*,* and therefore paid during, that year.

10 Decisions about *awards* are made on the basis of an estimate of what the claimant's circumstances for the year as a whole will probably be. To that extent, in-year decisions are always preliminary. The amount awarded and paid during the year may or may not be the same as the amount to which the claimant is finally found to be entitled.

11 Another way of looking at it—although neither the legislation nor HMRC describe it in these precise terms—is to think of tax credits that are awarded and paid to a claimant during a particular year as if they were payments on account of any tax credits to which those claimants might be found to be entitled following the year end.

Section 14

12 The initial decision for each year is an in-year decision taken under section 14 of the Act. That section requires HMRC to decide whether to make an award of the tax credit that has been claimed and, if so, to decide the rate at which to award it.

13 Section 14(3) provides that the power to decide the rate at which to award a tax credit "includes power to decide to award it at a nil rate".

Section 16

14 A decision under section 16 is also an in-year decision. It is about the circumstances in which an award of tax credit—not, importantly, *entitlement* to tax credit—can be changed during the year to which it relates.

15 Regulation 16(1) provides that HMRC "may decide to amend or terminate the award" where they have "reasonable grounds for believing" that the rate at which tax credit has been awarded differs from the rate at which the claimant is likely to be entitled or that the claimant has ceased to be, or has never been, entitled to tax credit for the period of the award.

Sections 17 and 18

16 Once a given tax year has ended, section 17 requires HMRC to issue a notice to the claimant whenever a tax credit has been "awarded for the whole or part of" that tax year. It is unnecessary for the purposes of this decision to go into further detail about the terms of that notice and what a claimant may be required to do in response to it.

17 The final decision is made under section 18 and—for the first time—establishes the claimant's *entitlement* to tax credits for the year that has passed.

18 By virtue of section 18(11), that decision can only be changed by certain specified mechanisms and is otherwise "conclusive as to the entitlement of [the claimant], to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year.

19 Under section 18(1), the obligation (and also the power) to make a decision about entitlement only arises "[a]fter giving a notice under section 17".

20 It follows that there can be no entitlement to tax credits where no in-year award has been made under section 14. Without such an award, no section 17 notice can be given and, in the absence of a section 17 notice, no section 18 decision can be made.

21 It is for that reason that section 14(3) allows an award to be made "at a nil rate". Even though the claimant will not be paid anything during the year, the existence of the award requires HMRC to issue a section 17 notice at the end of the year and then to make a section 18 decision. The result is that a claimant's entitlement to tax credits will be calculated on his financial circumstances as they in fact were during the year rather than on what they were expected to be at the beginning of the year.

22 Section 16 may seem to sit uneasily with the need for there to have been an award during the tax year before the section 17 and 18 procedures can operate.

23 HMRC's powers under section 16 to "amend" or "terminate" the award reflect the different criteria that HMRC must have reasonable grounds for believing. So, if HMRC reasonably believe that the rate at which a tax credit has been awarded is

incorrect, the correct thing for them to do is to amend the award. If they reasonably believe that the claimant has ceased to be entitled to a tax credit, the appropriate thing to do is to terminate the award with effect from the date on which they believe entitlement ceased.

24 But what happens if HMRC reasonably believe that the claimant has never been entitled to the tax credit that has been awarded? Consistently with the previous paragraph, the correct thing to do would seem to be to terminate the award from the beginning. But, if that course is taken, does it have the effect that tax credit has no longer "been awarded for the whole or part of a tax year", so that the power to issue a notice under section 17, and therefore the power to make a decision on entitlement under section 18, is lost?

25 As the First-tier Tribunal did not in fact terminate the award from the beginning in this case—even though it should perhaps have done so—it is unnecessary for me to decide the point, and I do not do so.

26 However, my provisional view is that the termination of an award at a later date—even a termination from the outset of the award—does not affect the fact that, before the termination, and during the tax year, the award existed and that that is sufficient to trigger the section 17 duty.

27 Moreover, if I am wrong about that, the problem can be avoided because section 16(1), taken together with section 14(3), permit HMRC—and, on appeal, the First-tier Tribunal—to "amend" the award by reducing it to nil, as an alternative to "terminating" it.

Background

28 This appeal is ultimately against a decision made by HMRC on 22 December 2015.

29 The substantive question is whether the claimant's award of working tax credit ("WTC") for the 2015/16 tax year should continue. HMRC say that—subject to one qualification: see paragraphs 38-41 below—the answer to that question is no, because the claimant was not engaged in qualifying remunerative work.

30 The claimant disputes that.

31 The First-tier Tribunal refused the appeal and (ultimately: see paragraphs 44-46 below) confirmed HMRC's decision. The claimant now appeals to the Upper Tribunal against the First-tier Tribunal's decision with the permission of Upper Tribunal Judge Wikeley.

32 For reasons that I hope will become clear, it is undesirable that I should say anything more about the substantive issue. I have reached the decision set out above because of the procedural history, which is as follows.

Procedural history

The section 14 decision

33 The claimant was awarded WTC in the 2014/15 tax year—and possibly also in earlier tax years—as a single person.

34 On renewal, he was originally awarded £4,933.68 in WTC for the 2015/16 tax year.

The section 16 decision

35 On 22 December 2015 (*i.e.,* during the 2015/16 tax year) HMRC decided under section 16, that the appellant was not engaged in qualifying remunerative work.

36 Section 10 provides that it is a condition of entitlement to WTC that (in the case of a single claimant) he should be so engaged.

37 Therefore, on the basis that HMRC's view was correct, they should have decided to terminate or amend the award for the 2015/16 year so as to remove it entirely.

38 However—for reasons which I hope are at least understood by those who wrote the software—once an award of tax credits has been made for a particular year, HMRC's computer system is unable to substitute a decision that the claimant should not be awarded tax credits for that year.

39 That is unfortunate because section 16 plainly confers power on HMRC to make such a decision in an appropriate case. Nevertheless, HMRC's submissions to the First-tier Tribunal regularly assert that their computer system is limited in that way, and I am prepared to accept that it is.

40 To minimise the resulting problems, HMRC adopts a workaround. When a decision is made under section 16 and that decision should be to terminate an award of tax credits for the current tax year from the date it took effect, or to amend the award by reducing it to nil, matters are arranged so that the computer instead awards the claimant tax credits, but only for the very first day of the year.

41 That workaround was adopted in this case. Accordingly, the outcome decision issued by HMRC's computer on 22 December 2015 was to award the claimant £13.48 in WTC for 6 April 2015, but to make no award in respect of the period from 7 April 2015 to 5 April 2016 (both days included).

42 That decision was confirmed on mandatory reconsideration on 27 January 2016.

The First-tier Tribunal's decision

43 The claimant appealed against that decision on 11 February 2016.

44 On 25 April 2016, the First-tier Tribunal heard that appeal and refused it. The wording of the decision notice is important. It stated:

> "1. The appeal is refused.
>
> 2. The decision of the Respondent [*i.e.,* HMRC] made on 22 December 2015 is confirmed.
>
> 3. [The claimant] is not entitled to Working Tax Credits *[sic]* from 6 April 2015 as he is not engaged in qualifying remunerative work. …"

45 The written statement of reasons for the First-tier Tribunal's decision understandably concentrated on why the First-tier Tribunal had accepted HMRC's view that the claimant was not engaged in qualifying remunerative work. However, the judge also noted (at paragraph 5) that:

> "… There is a slight error in the decision notice in that it states [the claimant] is not entitled to working tax credit from 6th April 2015. He is of course entitled to an award of £13.48 for that year and I therefore take the opportunity to amend the decision notice accordingly."

46 The decision notice was corrected on 5 July 2016. In its amended form, it read:

> "1. The appeal is refused.
>
> 2. [The claimant] is entitled to £13.48 Working Tax Credit from 6.4.15 to 5.4.16."

The section 18 decision

47 On 1 August 2016, HMRC issued a decision after final notice for the 2015/16 tax year (*i.e.,* under section 18) that the claimant was entitled to £13.48 in working tax credit for 2015/16, based on entitlement on the first day of that year only.

48 I do not know why the section 18 decision was in that form. It is possible that the error in the tax credits computer system referred to above, carries over into the final decision (*i.e.,* so that once a person has been awarded the tax credit under section 14 of the Act, the computer is unable to decide that he has no entitlement for that tax year). It is also possible that the decision was consciously made in that form so as to reflect the First-tier Tribunal's corrected decision upholding the section 16 decision.

49 I am told that the claimant has appealed to the First-tier Tribunal against the section 18 decision and that that appeal is not proceeding, pending the Upper Tribunal's decision on this appeal.

50 I can understand why that course was taken but—with hindsight, and in the light of the decision in *LS and RS* (see paragraph 53 below)—it would have been better if that appeal had been allowed to proceed. As soon as, the section 18 decision had been made everything about the section 16 decision became academic.

The appeal to the Upper Tribunal

51 On 12 August 2016, the Judge who had made the First-tier Tribunal decision refused the claimant permission to appeal to the Upper Tribunal.

52 On 14 November 2016, Judge Wikeley granted permission to appeal. Subsequently, on 6 March 2017 he stayed proceedings to await the decision of the three-judge panel in *LS and RS v Commissioners for Her Majesty's Revenue & Customs* [2017] UKUT 257 (AAC). This was necessary because, at the time, it was considered possible that the issue of the section 18 decision deprived the Upper Tribunal of jurisdiction to hear an appeal against the First-tier Tribunal's confirmation of the section 16 decision.

The decision in *LS and RS*

53 The decision in *LS and RS* was given on 15 June 2017. The three-judge panel decided that as soon as HMRC have made a decision under section 18 for a particular year, any decision made under section 16 for that year ceases retrospectively to have any operative effect. Therefore (and I am now paraphrasing) where a person appeals to the First-tier Tribunal against a (preliminary) decision under section 16 and HMRC subsequently makes a (final) decision under section 18 in respect of the same year, the appeal against the section 16 decision automatically lapses.

54 The main issue in *LS and RS* concerned the jurisdiction of the First-tier Tribunal to hear an appeal against a section 16 decision in those circumstances and of the Upper Tribunal to entertain an appeal against the First-tier Tribunal's decision if it did so.

55 Those issues do not arise in this case because the First-tier Tribunal's decision was made before HMRC's decision under section 18. So there was no question of the appeal having lapsed or as to the First-tier Tribunal's jurisdiction over the appeal.

56 However, *LS and RS* is relevant to the following extent. The First-tier Tribunal's decision confirming the section 16 decision has the same legal status within the tax credits scheme as a section 16 decision (see *HO v HM Revenue & Customs (TC)* at paragraph 76). Therefore, even though the FTT's decision was not made without jurisdiction—and even if it was not otherwise wrong in law—the issue of the section 18 decision deprived the FTT's decision of all legal effect.

Jurisdiction of the Upper Tribunal

57 However, as *LS and RS* also decided, the fact that the First-tier Tribunal's decision is no longer effective does not deprive the Upper Tribunal of jurisdiction over the claimant's appeal against it. As the three-judge panel in that case stated (at paragraphs 41-42):

> "41. We have explained why the subject matter of an appeal differs in proceedings before the First-tier Tribunal and the Upper Tribunal. Both tribunals are under a duty to strike out

> proceedings in relation to which they have no jurisdiction. What makes the proceedings different in the Upper Tribunal from the First-tier Tribunal is that the decision under appeal is different. The decision under appeal to the Upper Tribunal is not a decision under the Tax Credits Act, but the decision of the First-tier Tribunal. That decision has sufficient existence to form the subject matter of an appeal, so the duty to strike out is not triggered.
>
> 42. It follows that, in proceedings before the Upper Tribunal, it does not matter *for the purposes of the Upper Tribunal's jurisdiction* whether the section 18 decision was given:
>
> - before the claimant made an appeal to the First-tier Tribunal;
> - during the course of the proceedings before that tribunal;
> - after the First-tier Tribunal made its decision; or
> - during the course of the proceedings before the Upper Tribunal.
>
> In all these cases, the Upper Tribunal had and retains jurisdiction to hear the case."

I must therefore decide how to dispose of this appeal.

Reasons for setting aside the First-tier Tribunal's decision

58 In *LS and RS* itself, the three-judge panel decided that the appropriate course where the First-tier Tribunal had decided appeals against section 16 decisions that had lapsed was to record that those decisions were in error of law but not to set them aside.

59 However, this appeal is different because the appeal to the First-tier Tribunal had not lapsed when the First-tier Tribunal made its decision.

60 Moreover, the First-tier Tribunal made an error of law that I consider requires to be corrected if only to avoid the impression that the Upper Tribunal endorses the form in which the corrected decision was given.

61 The First-tier Tribunal's original decision was that the claimant was not "entitled" to tax credit for the whole of 2015/16. As it had decided that the claimant had not been engaged in qualifying remunerative work at any point during that year, that decision was (just about) formally correct. As it was a decision on an appeal against the section 16 decision it would have been better if it had been phrased in terms of amending or terminating the claimant's award, rather than in terms of "entitlement". Also the decision notice was incorrect to say that the appeal had been "refused". That version of the First-tier Tribunal's decision changed the outcome decision made by HMRC and the Tribunal had no power to do that without first allowing the appeal, albeit to the claimant's detriment. However, the gist of the

decision—namely that, as the Tribunal had decided that the claimant was not in qualifying remunerative work, no working tax credit should be paid to him—was formally correct.

62 Unfortunately, the judge's "correction" introduced a legal error by making the form of the decision inconsistent with what the First-tier Tribunal had decided about the case. It did so by changing the terms of the decision to reflect HMRC's award of £13.48 of working tax credit for a single day, namely 6 April 2015.

63 As I have explained, the £13.48 figure did not represent a true estimate of the claimant's likely entitlement at the end of 2015/16. Rather, it was a workaround to avoid a software glitch.

64 If, as HMRC and the First-tier Tribunal both decided, the claimant had not been engaged in qualifying remunerative work during 2015-16, then it was wrong that he should be awarded working tax credit even for a single day.

65 I have accepted for the purposes of this appeal that, given HMRC's computer system, they cannot avoid giving decisions in that erroneous form.

66 Even so, it was wrong in law for the First-tier Tribunal to have reproduced that error in its "corrected" decision. The First-tier Tribunal is a judicial body. It does not suffer the disadvantage of having been programmed by HMRC's software engineers and can therefore—must therefore—make decisions that are consistent with the law.

67 Whether or not the claimant was in fact engaged in qualifying remunerative work will now be decided in the appeal against the section 18 decision. But, given what the First-tier Tribunal decided about the issues in this appeal, its decision should either have been to terminate the claimant's award with effect from (and including) 6 April 2015 or to have amended that award by reducing it to nil.

68 I have not overlooked that that would have had the effect of depriving the claimant of a day's award of working tax credit or that such a decision would normally require the Tribunal to warn the claimant that this was a possibility and to offer him an adjournment in order to seek advice.

69 However, in my judgment, it was not necessary for the Tribunal to take those steps in this case. HMRC's response to the appeal stated in terms:

> "Due to limitations of the tax credits computer system it is not possible to completely remove an element from an award, for a year where it has ever been awarded. This is why the 2015/16 award notice issued on 24 December 2015 shows an entitlement to the tax credits for just one day."

Anyone reading those words, and particularly a software engineer such as the claimant, would realise that HMRC was saying that the award of £13.48 was not legally correct but that it was the closest thing to a legally correct decision that its systems allowed it to issue. The claimant can therefore have had no reasonable expectation that the First-tier Tribunal would come down on the side of the software glitch and maintain the incorrect decision, rather than apply the law and correct it.

70 Even though that is what in fact happened.

71 In my judgment, the First-tier Tribunal's decision cannot be allowed to stand in its "corrected" form. I have therefore decided to exercise my discretion under section 12(2)(a) of TCEA to set it aside.

Reasons for remaking the decision

72 Following the decision in *LS and RS*, Judge Wikeley invited the claimant to withdraw this appeal and directed that if the invitation were declined, the claimant should make representations as to why the appeal should not be struck out.

73 The claimant did not withdraw the appeal and has submitted that the Upper Tribunal should decide the issues identified by Judge Wikeley even though they have become academic in relation to the section 16 appeal because they will also arise in the section 18 appeal. Subsequently, Mr Eland has submitted on behalf of HMRC that the appeal should be dismissed.

74 As I have decided to set aside the First-tier Tribunal's decision, dismissing the appeal is no longer an option for me. And I decline to decide any issue that has now become academic in this appeal.

75 That is for a number of reasons. In no particular order:

(a) Deciding the other issues that have been raised in this appeal would inevitably take a considerable amount of scarce judicial time. As with the First-tier Tribunal's decision, any substantive decision I might make would have the same legal status in the tax credits scheme as a section 16 decision and would therefore be of no legal effect by virtue of the subsequent section 18 decision. In the circumstances, I doubt that any reasons I might give would be binding on the Tribunal that decides the section 18 appeal.

(b) As *LS and RS* makes clear, the power to decide academic issues is one that should be exercised with caution, and in limited circumstances. I do not regard this case as one in which it would be appropriate to exercise that limited power. It is not a case in which it would be possible to give guidance of general application as to the substantive law on qualifying remunerative work. The facts of the appeal are unusual. Moreover, the applicable law is well-established and the application of that law to the facts is a question of fact for the First-tier Tribunal, not for me.

(c) Some of the academic issues relate to regulation 4 of the Working Tax Credit (Entitlement and Maximum Credit) Regulations 2002. When granting permission to appeal Judge Wikeley pointed out that there was an overlap between the first and fourth conditions in that regulation. However, his point was that the First-tier Tribunal might not have kept the two conditions distinct and might therefore have confused the claimant might about the case he had to meet. That is a problem that should not recur because Judge Wikeley has now pointed it out and the Tribunal that hears the section 18 appeal will no doubt take care to deal with each condition separately. And, in any event, it is necessary for the claimant to satisfy **all** the conditions in regulation 4 in order to count as being in qualifying remunerative employment.

(d) The decision that the First-tier Tribunal took in this case was closely linked to the view it took of the facts. The Tribunal that decides the section 18 appeal may see those facts differently. If so, the section 18 appeal may not turn on any of the issues that have been raised in this appeal. I therefore judge it to be preferable for that appeal to go ahead as soon as possible. If either party is then unhappy with the outcome of that appeal, and if it can reasonably be said that an error of law may have occurred, then any issues that still arise can be considered in the context of what has actually been decided, rather than what might be decided, and of a decision that is legally effective.

(e) Finally, it is impossible for me to ignore the fact that it has been decided under section 18 that the claimant is entitled to £13.48 in working tax credit for the 2015/16 tax year.

(f) I hope I am not trespassing on the territory of the Tribunal that will hear the appeal against the decision if I say that, in my view, it is clearly wrong. If the claimant was in qualifying remunerative employment, then it is wholly improbable that that state of affairs lasted only for a single day. He would therefore be entitled to working tax credit for a longer period and, possibly, the entire year. If, on the other hand, the claimant was not in qualifying remunerative employment that he is entitled to nothing at all—not even £13.48—despite the fact that HMRC's computer takes a different view of the matter.

(g) Nevertheless, as sections 19 and 20 of the Act are not relevant to this case; and as there has already been an in-time review under section 21A (thereby making section 21B irrelevant); and as the section 18 decision has not been revised under section 18(5) or (9); and as—although there is an appeal against that decision—that appeal is not before me, section 18(11) has the effect that the decision that the claimant is entitled to £13.48 for 2015/16 is currently conclusive as to the fact his entitlement for that year and as to the amount of the tax credit to which he is so entitled.

(h) As I have set aside the First-tier Tribunal's decision, section 12(2)(b) of TCEA requires me either to re-make it or remit the case. If I were to consider the substantive issues raised by this appeal, even on an academic basis, I would have to decide that, as the claimant is currently conclusively entitled to £13.48 in working tax credit for 2015/16, he should be awarded £13.48 on account of that entitlement. Such a decision would serve no purpose and might well contradict any view I were to express on the academic issues.

76 Therefore, instead of deciding the remaining issues in this appeal on an academic basis, I have decided to adopt the same procedure as I adopted in similar circumstances in *PW v HM Revenue & Customs (TC)* [2018] UKUT 12.

77 What I said in that case was as follows:

> "56 Having set the decision aside, I must then consider whether to remit the case to the FTT with directions for reconsideration or remake the FTT's decision.
>
> 57 Although no decision had been made under section 18 when the FTT gave the decision I have set aside, such a

> decision has been made now. Were I to remit the case, the resulting proceedings before the FTT would immediately lapse by virtue of the principles set out in *LS and RS* … and the FTT would therefore be obliged to strike them out. Remitting the case would therefore be pointless. The overriding objective is better served by my striking out those proceedings by way of remaking the decision: see *LS and RS* at paragraph 44. I have therefore done so."

78 Paragraph 44 of *LS and RS* states:

> "44. If the Upper Tribunal does not decide an issue as an academic one, its powers are set out in section 12(2) of the Tribunals, Courts and Enforcement Act 2007 depending on the circumstances of the case, the Upper Tribunal might consider it appropriate (i) not to set aside the decision of the First-tier Tribunal despite an error of law or (ii) re-make the decision, perhaps by substituting a decision striking out the proceedings on the appeal to the First-tier Tribunal for lack of jurisdiction."

79 As there has been some discussion in this appeal about the proper basis for any striking out, it may be helpful if I add by way of a gloss on paragraph 44 that when re-making a decision that has been set aside section 12(4)(a) of TCEA empowers the Upper Tribunal to "make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision".

80 If the First-tier Tribunal were re-making the decision that I have set aside then it would now be able—and obliged—to strike out the proceedings under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 because the appeal would now have lapsed. Therefore, by virtue of section 12(4)(a), the Upper Tribunal may also strike out the proceedings in the First-tier Tribunal under that Tribunal's procedural rules.

81 That conclusion is unaffected by the fact that, in the circumstances of this case, there is no power to strike out the proceedings in the Upper Tribunal under the Upper Tribunal's procedural rules.

82 The overall effect of my decision is that HMRC's section 16 decision has not been, and will not now be, set aside on appeal. However, it has been deprived of legal effect by the subsequent section 18 decision. The appeal against the section 18 decision should now proceed.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

12 July 2018

Corrected 23 July 2018

APPENDIX

Tax Credits Act 2002

Sections 14-18

Initial decisions

14.—(1) On a claim for a tax credit the Board[1] must decide—

(a) whether to make an award of the tax credit; and

(b) if so, the rate at which to award it.

(2) *[Omitted]*

(3) The Board's power to decide the rate at which to award a tax credit includes power to decide to award it at a nil rate.

Revised decisions after notifications

15. *[Omitted]*

Other revised decisions

16.—(1) Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board have reasonable grounds for believing—

(a) that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period, or

(b) that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period,

the Board may decide to amend or terminate the award.

Final notice

17.—(1) Where a tax credit has been awarded for the whole or part of a tax year—

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[1] Under section 67(1) of the Act, "the Board" means the Commissioners of Inland Revenue. Section 5(1)(c) and (2) of the Commissioners for Revenue and Customs Act 2005 ("the 2005 Act"), transferred the functions of the Commissioners of Inland Revenue to the Commissioners for HM Revenue & Customs with effect from 18 April 2015. See also section 2 of the Act as amended by section 50 of, and paragraph 85 of Schedule 4 to, the 2005 Act.

(a) for awards made on single claims, the Board must give a notice relating to the tax year to the person to whom the tax credit was awarded, and

(b) for awards made on joint claims, the Board must give such a notice to the persons to whom the tax credit was awarded (with separate copies of the notice for each of them if the Board consider appropriate).

(2) The notice must either—

(a) require that person or persons must, by the date specified for the purposes of this subsection, declare that the relevant circumstances were as specified or state any respects in which they were not, or

(b) inform the person or persons that he or they will be treated as having declared in response to the notice that the relevant circumstances were as specified unless, by that date, he states or they state any respects in which they were not.

(3) "Relevant circumstances" means circumstances (other than income) affecting—

(a) the entitlement of the person, or joint entitlement of the persons, to the tax credit, or

(b) the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.

(4) The notice must either—

(a) require that the person or persons must, by the date specified for the purposes of this subsection, declare that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified or comply with subsection (5), or

(b) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (5).

(5) To comply with this subsection the person or persons must either—

(a) state the current year income or his or their estimate of the current year income (making clear which), or

(b) declare that, throughout the period to which the award related, subsection (1) of section 7 did not apply to him or them by virtue of subsection (2) of that section.

(6) The notice may—

(a) require that the person or persons must, by the date specified for the purposes of subsection (4), declare that the amount of the previous year income was the amount, or fell within the range, specified or comply with subsection (7), or

(b) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the previous year income was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (7).

(7) To comply with this subsection the person or persons must either—

(a) state the previous year income, or

(b) make the declaration specified in subsection (5)(b).

(8) The notice must inform the person or persons that if he or they—

(a) makes or make a declaration under paragraph (a) of subsection (4), or is or are treated as making a declaration under paragraph (b) of that subsection, in relation to estimated current year income (or the range within which estimated current year income fell), or

(b) states or state under subsection (5)(a) his or their estimate of the current year income,

he or they will be treated as having declared in response to the notice that the amount of the (actual) current year income was as estimated unless, by the date specified for the purposes of this subsection, he states or they state the current year income.

(9) "Specified", in relation to a notice, means specified in the notice.

(10) Regulations may—

(a) provide that, in prescribed circumstances, one person may act for another in response to a notice under this section, and

(b) provide that, in prescribed circumstances, anything done by one member of a married couple or an unmarried couple in response to a notice given under this section is to be treated as also done by the other member of the married couple or unmarried couple.

Decisions after final notice

18.— (1) After giving a notice under section 17, the Board must decide—

(a) whether the person was entitled, or the persons were jointly entitled, to the tax credit; and

(b) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.

(2) But, subject to subsection (3), that decision must not be made before a declaration statement has been made in response to the relevant provisions of the notice.

(3) If a declaration or statement has not been made in response to the relevant provisions of the notice on or before the date specified for the purposes of section 17 (4), that decision may be made after that date.

(4) In subsections (2) and (3) "the relevant provisions of the notice" means—

(a) the provision included in the notice by virtue of subsection (2) of section 17,

(b) the provision included in the notice by virtue of subsection (4) of that section, and

(c) any provision included in the notice by virtue of subsection (6) of that section.

(5) Where the Board make a decision under subsection (1) on or before the date referred to in subsection (3), they may revise it if a new declaration or statement is made on or before that date.

(6) If the person or persons to whom a notice under section 17 is given is or are within paragraph (a) or (b) of subsection (8) of that section, the Board must decide again—

(a) whether the person was entitled, or the persons were jointly entitled, to the tax credit, and

(b) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.

(7) But, subject to subsection (8), that decision must not be made before a statement has been made in response to the provision included in the notice by virtue of subsection (8) of section 17.

(8) If a statement has not been made in response to the provision included in the notice by virtue of that subsection on or before the date specified for the purposes of that subsection, that decision may be made after that date.

(9) Where the Board make a decision under subsection (6) on or before the date referred to in subsection (8), they may revise it if a new statement is made on or before that date.

(10) Before exercising a function imposed or conferred on them by subsection (1), (5), (6) or (9), the Board may by notice require a person, or either or both of the persons, to whom the notice under section 17 was given to provide any further information or evidence which the Board consider they may need for exercising the function by the date specified in the notice.

(11) Subject to sections 19, 20, 21A and 21B and regulations under section 21 (and to any revision under subsection (5) or (9) and any appeal)—

(a) in a case in which a decision is made under subsection (6) in relation to a person or persons and a tax credit for a tax year, that decision, and

(b) in any other case, the decision under subsection (1) in relation to a person or persons and a tax credit for a tax year,

is conclusive as to the entitlement of that person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year.