THE UPPER TRIBUNAL **Appeal No.** CTC 1699 2009
ADMINISTRATIVE APPEALS CHAMBER

PD v HMRC and CD (TC)

DECISION

The appeal is dismissed and the decision of the tribunal below is confirmed.

REASONS FOR DECISION

1 The appellant (PD) is appealing with my permission against the decision of the First-tier Tribunal that the entitlement of her and her former husband (CD) to tax credits from 6 April 2006 to 15 September 2006 was a total of £1314.62.

The parties to this appeal
2 The First-tier Tribunal heard both PD and the respondents, Her Majesty's Revenue and Customs (HMRC) at a hearing in Liverpool. CD, who was the joint claimant with PD for the period in question, was not aware of that hearing. As he was a joint claimant for tax credits for that period, he was a party to the proceedings and should have been given notice.

3 I explored that issue in my decision CTC 2612 2005, to which HMRC drew attention in this appeal. The reasoning in that decision has now been overtaken by changes in the law, and it is in my view no longer good law. The problem is now addressed expressly by the First-tier Tribunal (Social Entitlement Chamber) Rules 2008 ("the Tribunal Rules"). Under those rules, where a couple make a joint claim and only one of the couple appeals against a decision on that claim, the other is a respondent to that appeal. A respondent is defined in those rules as meaning:

> "in an appeal against a decision, the decision maker and any person other than the appellant who had a right of appeal against that decision."

In this case both PD and CD had a right of appeal against the decision. As only PD appealed, it follows that CD is a respondent to the appeal. It also follows that CD is therefore a "party" to the proceedings. This flows from the definitions of "party" and "respondent" in rule 1 of the Tribunal Rules. That applies to any appeal where one of two joint claimants appeals against a decision made on the joint claim.

4 As CD was a party to the proceedings, rule 27 of the Tribunal Rules requires that a hearing be held, and that he be notified of the hearing, unless he consented to, or did not object to, a decision without a hearing. As CD was not aware of the proceedings, he could not consent to, or not object to, a decision on the papers. So the tribunal was required to hold a hearing (as it did). It was also required to notify him of the hearing (and it did not).

5 It follows that the hearing of this appeal was held without proper notice being given. In principle, the decision of the tribunal should be set aside if there might as a result be an effect on the outcome of the appeal.

6 I granted permission to appeal to deal with that point, and made CD a party to the appeal. He is now a party and has commented on the issues. Any previous error in not notifying him has therefore been corrected. I must now turn to the reason why PD sought permission to appeal against the decision of the tribunal.

The disputed tax credits decision

7 Standard tax credits decision making involves two stages of decision making in respect of any payment. First, an award of tax credits is made when an application has been received. This will take effect, in most cases, either at the beginning of the tax year or when a claim is made during the year. It lasts for all of, or the rest of, the tax year unless it is revised by another official decision. The legislation calls this the initial decision. See section 14 of the Tax Credits Act 2002.

8 The standard procedure also requires that this initial decision, or award, be looked at again at the end of the tax year. Section 17 of the Act requires HMRC to send all those with awards a "final notice". This requires the recipients to tell HMRC about their incomes for the year, among other things. Once HMRC has given that notice, and received a reply, it makes a decision about the entitlement of the recipient to tax credit in that year (now completed). That is called a "decision after final notice". See section 18 of the Act. It is that final decision on entitlement that decides the recipient's total tax credits for the year.

9 The decision against which PD was appealed was the entitlement decision, or decision after final notice, in respect of the tax credits payable on the joint claim made by her and CD in the tax year 2006-2007.

The facts

10 PD and CD, then a married couple who shared a household, claimed and were awarded both child tax credit and working tax credit for 2006-2007. The initial decision making the award was for £4080.70 child tax credit and £374.50 working tax credit. They have two children and at the time PD was working at least 35 hours a week. The claim and award were based on the estimated joint income of the couple.

11 PD and CD separated on 15 09 2006, so bringing the joint award for that year to an end. PD informed HMRC of this on 16 01 2007, and HMRC as a result issued a revised decision awarding child tax credit and working tax credit to PD and CD for the period to 15 09 2006 (that is, to the date of separation).

12 As PD was the main carer for the children, she was able to claim tax credits for them from 16 09 2006. That is a separate claim and gives rise to a separate award and separate entitlement to tax credit. That decision does not involve CD and is not part of this appeal.

13 At the end of the year, following the standard procedure, PD and CD both received the required final notice, and both separately completed the necessary form. HMRC used that information to make the entitlement decision or final decision for the period of the joint claim in 2006-2007. That is the decision now under appeal.

The decision under appeal

14 PD's appeal was based on a number of grounds, including what she contended was false advertising by HMRC. The tribunal dealt with these issues clearly and, save for a couple of accidental errors, correctly and I can do no better than set out in anonymised form, and then comment on, Judge Clarke's decision on these points:

> [2] … In her letter of appeal [PD] said that in calculating entitlement for the year 2006/2007 HMRC should have only used the actual income that was received into the household during the period and that it should be apportioned as between 6 April and 15 September when CD and PD were living together in the same household and when she was the only person working and that any income earned by CD after the date of separation on 15 September 2006 should not form part of the calculation and should be disregarded. PD repeated and enlarged upon her appeal at the hearing and she confirmed that CD was only part of the household until 15/09/2006 when the

> parties separated. She said that she felt she was being penalised for trying to keep her children going and she indicated that in their literature HMRC had highlighted "household income". She said that it was unfair that CD's income of £5,000 earned after the parties had separated was included in the calculation because she did not receive any of that money. On behalf of HMRC Mr Sutton stated that he understood PD's concern but that the Department had applied the Regulations. PD indicated that she had followed the rules by notifying changes to HMRC and as a result had been penalised.
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> [3] The tribunal considered carefully all the written and oral evidence, including the letter of appeal. The tribunal found that Regulation 3(1) and Step 2(a) of the Tax Credits (Definition and Calculation of Income) Regulations provides that tax credit calculations are based on the income for a full year from 6 April in one year to 5 April in the following year. Accordingly PD's joint claim for the period 6/04/2006 to 15/09/2006 must include all the income from employment received by PD and by CD in that tax year. Furthermore, the tribunal found that under section 7(3)(a) and (b) of the Tax Credits Act 2002 and regulation 5 of the Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002, as amended by regulation 4 of the Tax Credits Up rating Regulations 2006, so long as the claimant's income increased during the year of the award by no more than £25,000 (compared to that of the previous year), then the previous year's income will still be used to calculate entitlement. For the 2005/2006 year CD and PD's household income was £19,085. As the total joint income received in the year was less than the total income received in the 2006/2007 tax year, the lower figure was used to calculate the joint tax credit *entitlement...*

15 The definition of employment income to be taken into account is in regulation 4 of the Definition and Calculation of Income Regulations. The dispute here about that definition is in substance the same argument as was considered by Deputy Commissioner Paines QC in CTC 2270 2007. That case concerned a couple who came together during the year. It was the earnings of one partner before they became a couple that caused the problem in that case, rather than here where it is the earnings after PD and CD stopped being a couple that is the cause of concern. The question of law is exactly the same – is entitlement based on a fraction of the full year's income or only the actual income for part of it?

16 The Commissioner heard similar criticisms of the rule in that case to those put forward here. He decided (at [19]) that:

> "Despite the claimant's criticisms of the effect of the law in his case, I cannot conclude that the position in which it put him and his wife is so absurd that Parliament and the Treasury cannot have intended it. They must have realised that the result of taking whole-year income and applying the fraction would not accurately reflect earnings in the period in any case where the level of a person's income was not constant over the tax year…"

17 I agree, and adopt those comments on rationality as applying equally to this appeal. As Judge Clarke rightly emphasised in her decision, the rules require the full year's income to be taken into account, and the tribunal has no discretion to do otherwise.

Conclusion

18 I noted above that the hearing conducted by the tribunal below was wrong in law because proper notice was not given to all parties. Any failure of fairness caused by this has now been rectified because CD is a party to this appeal and has made his own comments on the case.

19 For this reason, although the tribunal below erred in law in holding a hearing without proper notice to all parties, it is now clear that all parties have had an opportunity to express their views on the appeal and also that in the particular circumstances the tribunal could not have reached any other outcome decision than the decision it did reach. There is therefore no useful purpose to be served by taking any other step than to confirm the decision of the tribunal below.

David Williams
Upper Tribunal Judge
19 05 2010

[Signed on the original on the date stated]