

R(TC) 1/08

Mr N Paines QC
Deputy Commissioner
17 December 2007

CTC/2270/2007

Couple – calculation of income when there are earnings for period before they became a couple

The claimants started living together in July 2004 and made a joint claim for working tax credit (WTC) and child tax credit (CTC), which was awarded from the date of cohabitation. Prior to that the claimant had been receiving WTC and CTC as a single parent with one child and his future wife had been working until shortly before she moved in with him. In a subsequent Annual Declaration, required under section 17 of the Tax Credits Act 2002, made in September 2005, the couple declared the wife's income for 2004/05 as nil. In September 2006, pursuant to section 19(3) of the Act, Her Majesty's Revenue and Customs (HMRC) issued decisions on their entitlement to WTC for 2004/05 based on their joint income for the whole tax year, reducing their entitlement by £750. The claimant appealed, arguing that income earned by his wife before they became a couple was irrelevant to their WTC entitlement after becoming a couple. The tribunal confirmed HMRC's decision and the claimant appealed to the Commissioner submitting that the tribunal had failed to use its discretion. HMRC submitted, relying on sections 3 and 7 of the Act, that the tribunal's decision was correct in law.

Held, dismissing the appeal, that:

1. the tribunal was correct in law. The position where a claim period is less than a whole tax year is governed by regulation 7 of the Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002, which provides that the income for the relevant period is a fraction of the income for the whole tax year, the fraction being the number of days in the claim period divided by the number of days in the tax year. The same fraction is then applied to the income threshold and other elements in the calculation (paragraphs 15 and 16);
2. the wording was unambiguous and even if it created an anomalous outcome in a case where it attributed a portion of income to a claim period in which no income was in fact earned, the outcome was not so absurd that Parliament could not have intended it (paragraphs 18 to 20).

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I have to dismiss this appeal as the decision of the Stockport North appeal tribunal dated 19 April 2007 is not erroneous in law.

REASONS

2. The real issue in this appeal concerns the calculation of income for the purposes of a joint claim for working tax credit (WTC) where people become a couple (and thus obliged to make a joint claim) in the course of a tax year and part of their income was earned before they became a couple. The appeal tribunal accepted the submission of Her Majesty's Revenue and Customs (HMRC) and held that the income earned in the tax year but before they became a couple is to be taken into account. The claimant says that this cannot be right: in the case of joint claimants, only income earned while they were joint claimants can be relevant. He says in effect that the tribunal's interpretation is perverse.
3. The facts of this case point up what the claimant says are the anomalous consequences of the tribunal's interpretation. At the start of the relevant tax year (2004/05) he was a single claimant for WTC and child tax credit (CTC), living with

one child. He formed a relationship with his present wife, and she moved into his house in July 2004. In February 2005 a child was born to the two of them; I understand that at some point they married, and I shall for convenience refer to her as his wife, though the marriage is irrelevant to the matters in dispute. The claimant's wife had worked in the early weeks of the tax year but stopped work before they became a couple.

4. The claimant and his wife made a joint claim for WTC and CTC in November 2004 and an award was made to them for the period from July 2004 (when they became a couple) until the end of the tax year. The CTC is not affected by the issues in the appeal, so I shall only refer to WTC.

5. In September 2005 the claimant and his wife completed an Annual Declaration of their income for the tax year 2004/05 pursuant to section 17 of the Tax Credits Act 2002. In it the claimant declared his income for the tax year (in fact slightly overstating it, which will have been to his disadvantage) but his wife's income was declared as nil. She had in fact earned a certain amount of money in the early weeks of the tax year. Using the information in the Declaration, HMRC calculated the couple's WTC and CTC entitlement for the tax year.

6. In September 2006, HMRC wrote to the claimant and his wife pursuant to section 19 of the Act, saying that the information given in the Annual Declaration did not accord with information provided by the claimant's and his wife's employers and asking them to make further declarations. The claimant telephoned HMRC saying that his partner moved in with him after she gave up work and that any income she earned previously should not affect their combined household income. Both of them also made declarations disagreeing (in not entirely diplomatic language) with HMRC's figures. The claimant had to point out that HMRC had omitted part of his income. His wife said that income earned before she moved in with the claimant was not applicable to the claim and that she had had her own bills to pay at her previous address. There was also correspondence about a cheque for tax credit which had been wrongly dishonoured on presentation. This led to a payment of compensation by HMRC to the claimant, but is not relevant to this appeal.

7. HMRC issued decisions on the couple's tax credit entitlement pursuant to section 19(3) of the Act using the figure given by the claimant for his income and including the claimant's wife's earnings. The WTC entitlement according to the decision was some £750 less than the amount paid in the claim period.

8. In October 2006 the claimant wrote appealing the awards for July 2004 to April 2005 and for the tax years 2005/06 and 2006/07. The ground of appeal in relation to 2004/05 was the wrong inclusion of the claimant's wife's earnings. In relation to the latter years the letter complained about the knock-on effect of including the wife's income in the 2004/05 calculation. The letter also queried the income figure used for 2003/04, which seems to have produced an overpayment for that year of which £350 was being recovered, but the claimant did not appeal in respect of that. The letter complained in addition about the dishonoured cheque, delay in dealing with the joint tax credit claim and the number of telephone calls the claimant had had to make in October 2004. It concluded by threatening judicial review and accusing HMRC of "acting *ultra vires* and *Wednesbury Unreasonable* and given the wider public issues, there may well be an element of human rights".

9. By a further letter the claimant added a further ground of appeal, to the effect that a letter to the Tax Credit Office dated 2 October 2004 had given details of the wife's income and had indicated that her earnings ended in June 2004, before they became a couple. Any overpayment was therefore HMRC's fault. The letter also asked the tribunal to use its discretion in relation to financial hardship.

10. The claimant prepared a submission to the appeal tribunal, repeating that income of his wife's prior to the joint claim period was irrelevant, referring to the letter of 2 October 2004 and the dishonoured cheque and complaining about other behaviour of the Tax Credit Office, including a telephone conversation in which the claimant says that a member of the TCO staff told him that his wife's income would not form part of the household income. He also referred to the involvement of his MP and submitted that the appeal had only been listed as a result of that involvement.

11. The claimant attended the hearing before the appeal tribunal on 19 April 2007. The presenting officer took the tribunal through the calculations. The claimant accepted the correctness of the figures for his and his wife's earnings but disputed that her earnings before they became a couple were relevant, submitting that joint income must mean income earned while living together. The tribunal confirmed HMRC's decision, holding that joint income for these purposes meant the income of both partners earned in the tax year. It accepted that the claimant had been "entitled to take the view he did", by which I infer the tribunal meant that the claimant had acted in good faith ("innocently" as it was put in the decision notice), but in law the couple should have disclosed the wife's income and a recoverable overpayment of tax credit had occurred.

12. The claimant appeals with the leave of the tribunal chairman. His grounds of appeal are (1) that the TCO misled the tribunal in not disclosing that his appeal related to three tax years and the tribunal had erred in not considering claim periods other than the one in 2004/05, (2) that the tribunal failed to use its discretion on the point of joint income and, by including the wife's income prior to their living together, in essence confirmed that at the start of the relationship she had not spent any of the money earned earlier in the tax year and rejected the point that there had been no joint income within the relationship and (3) wrongly rejected the argument that the mistake had been the TCO's as the letter of October 2004 had disclosed that she had earned between April and June 2004.

13. The appellant has also supplied a copy of a letter from the Financial Secretary to the Treasury to the claimant's MP which contains an explanation of his tax credit overpayments in 2004/05, 2005/06 and 2006/07 and of why HMRC were recovering the overpayment. The claimant relies on the use in the letter of the term "household income", saying that his wife's income before she joined the household could not be household income. The Treasury's letter also contains an apology for the dishonouring of the cheque that the claimant complained about (which was apparently wrongly thought to have been counterfeit or fraudulent) and for the other problems the claimant had had with tax credits; it mentions that the claimant had been compensated for the bank charges resulting from the dishonoured cheque and would receive a further compensatory payment of £50. In addition the claimant has supplied a copy of a letter dated July 2006 in which the TCO said that there were no overpayments on any of his tax credit awards.

14. HMRC have submitted that the tribunal's decision was correct in law, relying on sections 3 and 7 of the Tax Credits Act 2002. In relation to tax years after 2004/05 they submit that there was no valid appeal, and in relation to the discretion to write off overpayments they say that that is outside the tribunal's jurisdiction, relying on the decision in CTC/2662/2005 and CTC/3981/2005. In reply the claimant reiterates that income earned before the relationship cannot be household income and that income before the claim period was irrelevant. He also said that he had had no notice of the 2006 investigation.

Entitlement in respect of the 2004/05 claim period

15. HMRC and the tribunal were right to include the claimant's wife's income in the calculation. Section 3 of the Act required the couple to make a joint claim once they began living together as husband and wife. Section 7(4) provides that the "current year income" of a couple is "the aggregate income of the persons [by whom a joint claim is made] for the tax year to which the claim relates". That covers any income in the tax year. This is reinforced by regulation 4 of the Tax Credits (Definition and Calculation of Income) Regulations 2002 (SI 2002/2006) which defines "employment income" as earnings received in the tax year.

16. The position where a claim period is less than a whole tax year is governed by regulation 7 of the Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002 (SI 2002/2008); this regulation provides, at step 3 of the calculation, that the income for the relevant period is a fraction of the income for the whole tax year, the fraction being the number of days in the claim period divided by the number of days in the tax year (so that if, for example, the claim period is 200 days and the tax year 365 days, the income for the period is 200/365 of the total). The same fraction is applied to the income threshold and where necessary to other elements in the calculation. This will have been done in respect of the claimant's earnings as well as his wife's.

17. Where the level of a person's income is constant through the tax year, this calculation produces a figure for income which is equal to the income in fact earned in the claim period. Where the level of income is not constant, it will produce a figure that is not exactly equal to the income earned in the period. The present case is an extreme example of that: a portion of the claimant's wife's earnings has been attributed to the claim period although her earnings were earned entirely outside the claim period.

18. The claimant says that it is perverse to take his future wife's income before they became a couple into account. She was living elsewhere, had her own living and accommodation expenses to pay out of her income; to include her income prior to the period of the joint claim in the calculation of WTC entitlement during the period of the joint claim presupposes that she brought all that money with her into the relationship, which she did not of course do as she had had to meet expenses out of it before setting up home with the claimant. He adds that income earned before they became a couple cannot be joint income and income earned before she entered the household cannot be household income.

19. However, the position is that Parliament in passing the Act and the Treasury in making the Regulations have chosen a method of determining income that may be criticised as somewhat rough and ready and as producing anomalous outcomes in cases like the present, but is nevertheless relatively simple to operate compared with

the alternative of enquiring into the actual income of each single and joint claimant in respect of claim periods of less than a tax year. It was a matter of political judgment whether to sacrifice accuracy for the sake of simplicity of calculation; whatever the merits or demerits of that judgment, the meaning of the wording used is clear. While terms like “joint income” and “household income” are frequently used to refer the income of joint claimants, the words that the tribunal had to interpret are the words of section 7(4) of the Act, which clearly include the wife’s income in this case. I do not agree with the claimant that the tribunal had any discretion to decide what is included in the “joint income”; it was obliged to apply section 7(4).

20. 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 – including cases where a person had no earnings for part of a tax year – and must have decided to accept that inaccuracy. Notionally spreading a person’s income over the whole tax year, as these rules do, is not irrational even if it partly attributes income to a period in which no income was earned. While the claimant’s wife will obviously not have brought the whole of her earlier earnings into the relationship, it is reasonable to assume that the fact of her having earned in the first three months of the tax year will have to some extent improved her financial position as at June 2004 and consequently that of the two of them as a couple.

Tax years subsequent to 2004/05

21. I appreciate that the above conclusion has knock-on consequences for subsequent years, both as regards recovery of the 2004/05 overpayment and because it leads to the conclusion that there will have been overpayments in the subsequent tax years. It does not seem that the tribunal was in the end misled about the scope of the claimant’s appeal. The claimant says that he drew the tribunal’s attention to his appeals in relation to subsequent tax years. I do not consider that the tribunal erred in law in failing to deal with them. That is not so much because there was no valid appeal in respect of subsequent years as because the tribunal has no appeal jurisdiction over issues about payments and recovery of overpayments: see paragraph 17 of the decision in CTC/2662/2005 and CTC/3981/2005.

Mistake by HMRC

22. I agree with HMRC that the tribunal did not make any material error in law in dismissing the claimant’s argument that any overpayment should not be recoverable because the overpayment was due to HMRC’s error in not noticing what the claimant had told them in the letter of 2 October 2004. The sentence in the tribunal’s statement of reasons “As a consequence of his failure to make this disclosure a recoverable overpayment of tax credit occurred” is not quite accurate, since the tax credit will have been paid before the Annual Declaration was made, and suggests that the tribunal had in mind the approach to recovery of overpayments of social security benefits; the position on tax credits is different, as Mr Commissioner Jacobs explains in CTC/2662/2005 and CTC/3981/2005.

23. But since tribunals do not have any jurisdiction over recovery of overpayments, there was nothing the tribunal could have done even if it had agreed with the claimant on this point.

Treasury's letter and TCO's letter of July 2006

24. The claimant has supplied me with copies of the Treasury's letter and the TCO's letter of July 2006; they were not before the tribunal. I have already explained in paragraph 19 above why the Treasury's letter does not alter my view of the meaning of section 7 of the Act. I do not consider that the fact that the TCO told the claimant in July 2006 that there were no overpayments can alter my view of the law or otherwise affect the outcome of the case.

25. The letter was no doubt written before the TCO became aware of the claimant's wife's earnings in the 2004/05 tax year. I have no jurisdiction to consider issues of legitimate expectation or other issues of public law, but in any event I do not see how the claimant could rely on that letter now, given that he knew (as his 2 October 2004 letter shows) that the TCO considered his wife's income to be relevant and also knew that it had not been disclosed in the Annual Declaration in September 2005 even though the form clearly asked for it. I accept that he genuinely believed that the income was not relevant but, given that in my judgment he was wrong about that, I do not see how the July 2006 letter could have given him any form of legitimate expectation that the TCO would not change their view if they knew about his wife's income.

No notice of investigation

26. Finally the claimant complains that he had no notice of the investigation that led to the reduction in payments. He does not seem to be right about that. The letters to him and his wife of 11 September 2006 said that HMRC intended to enquire into their claims. Section 19 of the Act allows HMRC to enquire into people's entitlement provided that they give notice that they are doing so; it also allows them to give notice asking for information. The September letters did both things. Section 19 allows HMRC to give a notice of the enquiry and notice requiring information in the same letter.