



# Challenging tax credit overpayments

A guide for Advisers

## **Challenging tax credit overpayments – A guide for advisers**

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## SECTION 1 – AN OVERVIEW OF THE TAX CREDIT SYSTEM

*This guide has been written primarily for those who have some knowledge of the tax credit system and who need more information about the methods of challenging tax credit overpayments. We have also written, in association with Advicenow, a [guide for claimants](#) which provides basic information about appealing, disputing and dealing with tax credit debt. More detailed technical information about tax credits can be found on [our website](#). We have also created a website, in partnership with Rightsnet, which covers the giving side of HMRC including tax credits. [www.revenuebenefits.org.uk](http://www.revenuebenefits.org.uk) contains information, resources and updates on all parts of the tax credits system.*

### **1.1 Introduction**

Of the many differences between traditional social security benefits and tax credits, one of the most fundamental is that, in tax credits, overpayments are an integral and often unavoidable part of the system.

While a benefit claimant's entitlement is generally ascertainable at the time of payment, entitlement to tax credits for a tax year cannot be established until after the year-end. Payment during the year is based on income of a previous year, or an estimate of income for the current year; but it is not until after the year-end that the actual current year income can be ascertained and final entitlement assessed. If it then transpires that the claimant's entitlement exceeds what they have been paid, there is an underpayment; if it is less, an overpayment arises.

This provisional structure gives rise to three fundamental differences in the nature of overpayments as between the tax credits and social security regimes:

1. Under the social security system, overpayments are recoverable by the Secretary of State only if the statute so prescribes. In tax credits, overpayments are part of the system and all are recoverable by statute if HM Revenue and Customs (HMRC) decide to recover them (which they nearly always will).
2. In social security there is generally a right of appeal by which the recoverability of an overpayment can be judicially tested. There is, however, no right of appeal against an HMRC decision to recover a tax credit overpayment.
3. In most social security benefits, overpayments are only recoverable if they arise through misrepresentation or failure to disclose on the part of the claimant, 'whether fraudulently or otherwise' (Social Security Administration Act 1992, Section 71). Housing benefit and council tax benefit overpayments are also recoverable if they arise from official error, and the claimant can reasonably be expected to have known that they were being overpaid; if they cannot reasonably have known that, the overpayment is not recoverable (Housing Benefit Regulations 2006/213, reg 100(2); Council Tax Benefit Regulations 2006/215, reg 83(2)). In tax credits, by contrast, there is no distinction between recoverable and non-recoverable overpayments – they are all recoverable at the discretion of HMRC, which can (and generally do) recover even a tax credit overpaid by reason of their own error.

We shall examine those propositions further below. But first let us look in greater detail at how the tax credit system is structured, as it is necessary to understand that in order to grasp how tax credit overpayments arise.

## 1.2 Annual nature of the tax credit system

### The cycle of award and entitlement

The reason why overpayments are endemic in the tax credit system is that the system works on the basis of pay now, establish entitlement later. Unlike any other welfare benefits, entitlement to tax credits is based on the tax year, 6 April to the following 5 April, but it is not until after the end of the tax year in which payment is made that entitlement is finally ascertained. This 'cycle' of award followed by entitlement works like this.

An initial award is made at the start of the year, or when a claim is received, based on the claimants' current circumstances, and their income for the previous tax year.<sup>1</sup>

As the year progresses the claimant has the opportunity to notify [changes in circumstances](#) and income so as to keep their award updated, and is obliged to report certain changes such as alterations in the composition of the adult members of the household, in the children or young persons for whom a claimant is responsible, and in normal weekly working hours. The first of those groups includes single claimants entering a relationship, couples splitting up, or one member of a couple dying or going abroad for a prolonged period. The second might include children leaving the household and going into care, young people aged 16 or over dropping out of further education or training, or a child dying. The third group involves reporting to HMRC if 'normal' weekly working hours drop from 16 or more hours a week to below 16, or from 30 or more hours a week to less than 30. A full list of changes that must be notified can be found on the [HMRC website](#).

### Assessing entitlement for the 'current year'

After the year end, HMRC send a stack of renewal papers, the purpose of which is to ascertain the claimants' actual entitlement for the year just gone, and if appropriate act as a claim for the year ahead. Changes in entitlement will arise from changes in personal circumstances and changes in income. For income the final entitlement is based on the following formula:

If current year income (CYI) is less than or equal to previous year income (PYI), the final award is based on the lower CYI and there may be an underpayment;

If CYI is greater than PYI by no more than a certain amount (known as the income disregard (see 2.1)), the final award is based on PYI;

If CYI is greater than PYI by more than the income disregard, the final award is based on CYI less the income disregard, and an overpayment may arise.

It was announced in the June 2010 emergency Budget that from April 2012 an income disregard would also be introduced for falls in income. This power was provided for in the original legislation but has never been used by HMRC to date. From April 2012, the first £2,500 drop in income will be ignored and only when the fall is greater than £2,500 will there be a re-adjustment of tax credits.

### Establishing initial award for the following year

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<sup>1</sup> For 2003-2004 the 'previous tax year' was deemed to be 2001-2002 (not 2002-2003) to enable claims to be made in advance.

The same information is also used to establish the claimants' initial award for the following tax year although in that case the full CY income is used. The income disregard for the current year, CY, can only be used to compare CY income with preceding year income; it cannot be carried forward to the following tax year.

### **1.3 The income disregard and its implications**

The income disregard in each year from 2003-04 to 2005-06 inclusive was £2,500. Its purpose was to provide a 'buffer zone' in which a family's income could increase during the course of a year without affecting their tax credit entitlement. Though considered generous at the time it was introduced, in the event the £2,500 buffer zone proved insufficient to prevent hardship to families whose income increased above that amount. Therefore in 2006-07, in a bid to reduce the volume of overpayments arising from increases in income, the income disregard was increased quite dramatically to £25,000. See Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002/2008, reg 5.

That was probably the most significant of the changes announced in the pre-Budget Report on 5 December 2005 ('PBR 2005'), and the overpayment figures relating to the 2006-2007 tax year showed a significant fall in both the number and amount of overpayments. HMRC have attributed this largely to the increased disregard.

The effect of the increase has been to bring greater certainty for claimants in a system where a major problem had been the sheer unpredictability of what families could expect to receive. Yet, the tax credit system retains some flexibility for those whose income goes down in a year to claim a higher entitlement, subject to one important new restriction discussed at point 3 below. The June 2010 emergency Budget announced changes to the disregard both by introducing a disregard for falls in income (as discussed above) but also by reducing the disregard for rises in income from £25,000 to £10,000 from April 2011 and then down to £5,000 from April 2013.

As a result of these changes, it is likely that overpayment figures will rise again as the disregard gets nearer to the original choice of £2,500. In addition, the introduction of an income disregard for falls in income means that the flexibility which the system had will be partially restricted when income falls as such families will no longer be immediately able to secure a higher entitlement to match their new income level. See our website section ['What's next for tax credits?'](#) for more information about the Budget changes.

Although the current £25,000 is generous, there are some traps.

#### *Cross-year overpayments originating before 2006-07*

The £25,000 disregard applies only to income rises in 2006-07 and subsequent years – overpayments being recovered from final awards for 2005-06 and earlier years will still be calculated by reference to the £2,500 disregard applying in those years. See [Doing the sums](#) for more details and an example.

#### *Reporting income increases to HMRC*

Secondly, it might at first seem that any income rises of £25,000 or less, because they have no effect on the current year's award, need not be reported to HMRC until the renewal process gets underway at the start of the following tax year. But in fact it is sound advice to report such changes during the current tax year, even if they have no effect on the current year's entitlement, in order to avoid

overpayment of provisional payments in the early part of the following tax year. Again, see [Doing the sums](#) for examples of how this works.

To guard against overpayments generated by provisional payments that reflect outdated income figures, the Government announced two specific measures in PBR 2005.

The first, introduced at the end of the 2006-07 tax year, involved HMRC contacting 'key groups of claimants' to 'obtain more up-to-date income information on which to base the next year's payments while the finalisation process is completed'.

Since 2008-09, where claimants have not provided up-to-date information about their income and circumstances, the income figure used to calculate provisional payments has been up-rated by average earnings.

#### Income decreasing then increasing in-year

The £25,000 disregard covers any increase in income over and above the level of the previous year's income. Where income falls below the level of the previous year, then rises again, the subsequent increase is not covered by the disregard until it reaches the same level as the previous year's income.

Therefore, there is a risk of a recoverable overpayment accruing if income falls, and the claimant, in order to secure extra tax credits, submits a revised income estimate which is based on the lower figure. If income rises again in the same year, that initial estimate may turn out to be too low, and tax credits paid on the basis of the low estimate may turn out to have been overpaid.

This is a point that needs to be borne in mind particularly in periods of maternity leave, sick leave and similar periods of temporary absence from work when income levels fall but might rise again later in the year if the claimant returns to work.

There are more details with worked examples at [Doing the sums](#).

The problem is partly alleviated from 2007-08 by a PBR 2005 measure under which claimants reporting a fall in income will have the rest of their payments for the year adjusted accordingly, but will not be paid the accrued entitlement from the earlier part of the year. At the end of the year, when final income is known, any remaining underpayment will be paid over. According to the PBR announcement:

*'... this approach will provide a buffer against any overpayment accumulated by the family during the year, especially where their estimate of income proves to have been too low.'*

This measure will help those whose incomes fall during the year then rise again in that any ensuing overpayment will be kept within limits. However, it will be of less assistance to those whose income falls and stays low in that they will not get the underpayment that will have accrued up to that point until the end of the year. The measure has been criticised by bodies such as the Child Poverty Action Group on those grounds. Nevertheless, tax credit entitlement for the remainder of the award period will be adjusted from the point at which the claimant reports the fall in income.

Again, there are numerical examples at [Doing the sums](#).

## 1.4 Accrual of tax credits income during the tax year

As shown at the beginning of this guide, a tax credit overpayment can arise by operation of the system, irrespective of any claimant misrepresentation, non-disclosure or official error by HMRC.

One of the features of the annual basis of assessment for tax credits is that income, as assessed for tax credits purposes, is deemed to accrue evenly day by day throughout the year. Therefore, in tax years when the income disregard was only £2,500, claimants reporting an increase in income would notice that an overpayment had accrued for the period before they reported the increase, as well as after, even if they reported the increase promptly. A simplified example will illustrate how this worked.

### *Example*

Fergus and Deirdre made a joint claim for tax credits in 2005-06. In the first six months of 2005-06, only Fergus was working. Their joint income for 2004-05 was £12,000 a year, Fergus's annual salary. Therefore, for the first six months of 2005-06 their tax credit award was based on joint income of £6,000 (half of Fergus's earnings).

Fergus continued on the same salary level in 2005-06. Halfway through the tax year Deirdre started working, also earning £12,000 a year, so their annual income in a full tax year doubled to £24,000 and their joint income for the second half of the year to £12,000.

Fergus and Deirdre reported this change to the Tax Credit Office straight away, who processed it promptly. The Tax Credit Office recomputed their income ignoring the first £2,500 of the increase, and recalculated their tax credits accordingly.

Now because of the way the regulations spread income over the whole tax year, when Fergus's and Deirdre's income for the whole of 2005-06 is recalculated, it is spread evenly over both six-month periods. Thus, because their annual income is now £18,000 (£12,000 for Fergus and £6,000 for Deirdre), for the first six months their joint income is recomputed as £9,000, not £6,000. Even with the £2,500 disregard, this is bound to make a difference to their entitlement for those six months and could mean that an overpayment will have arisen in that period.

This 'washback' effect of income-based overpayments is hardly noticeable now that the disregard has been raised to £25,000 but the problem is likely to re-appear as the disregard falls to £10,000 (from April 2011) and then £5,000 (from April 2013). But in earlier years, the fact that overpayments could arise even if claimants reported everything promptly, and did all that they were supposed to do, was barely acknowledged in HMRC literature and guidance. Hence, a lack of claimant understanding – not helped by incomplete or misleading guidance from HMRC – merely compounded the problem of overpayments in the early years.

## SECTION 2 – AN INTRODUCTION TO OVERPAYMENTS

### 2.1 How do overpayments arise

Apart from income rises (as explained in section 1), there are several other ways in which overpayments can occur. These include:

1. *Claimant error*

The tax credit system is extremely complex and claimants have many responsibilities that they must adhere to in order to keep their tax credits up to date. As if having complex rules was not difficult enough, HMRC's explanation of those rules is not always good enough for most claimants to understand their obligations. This often leads to claimants misunderstanding the rules.

2. *Official (HMRC) error*

Official error by HMRC can refer to many things from wrong advice by the tax credit helpline and computer errors to misleading advertising materials. As complex as the system is for claimants, it is equally so for the HMRC staff who have to administer it, which means that helpline advice can be wrong or misleading and even HMRC publications have given incorrect information about the system.

3. *Claimant delay in notifying changes of circumstances or income*

There are certain changes of circumstances that must be notified to HMRC within one month of them happening (or from when the claimant became aware of them occurring). Even if a claimant reports a change within one month, an overpayment may still build up because an overpayment generally starts to accrue the day after the change. For example, if someone drops their working hours from 35 to 25 (thereby losing the 30-hour element) on 1 May and tells HMRC on 25 May, they will avoid a penalty for failure to report a change of circumstances, but will most likely have an overpayment of the 30-hour element from 2 May to 25 May.

4. *HMRC delay in processing changes of circumstances or income*

Changes of circumstances can be reported via the tax credit helpline or in writing to the Tax Credit Office. Generally, changes done via the helpline are implemented immediately. On occasion, HMRC take a considerable period of time to action the changes and in some cases don't action them at all. As explained later in the guide, HMRC allow themselves 30 days to action a change, and any overpayment building up in that period is fully recoverable.

5. *Adjustment of a claim following in-year examination or end-of-year enquiry*

HMRC have various compliance powers to check claims during the year (examinations) and also following the end of the tax year (enquiries). If they find anything that they believe is wrong, an amendment to the claim will be made and often these go back at least one tax year, generally creating an overpayment.



For example, an enquiry into a 2009-2010 claim concludes that the claimant was not a single person and should have claimed as a couple. The whole 2009-2010 claim will become overpaid as there was no entitlement as a single person. (Note that notional offsetting may apply here as explained in section 4.5)

#### 6. *Failure to complete renewal forms*

Following the end of each tax year, HMRC send claimants renewal papers which seek to gather information about circumstances and income in order to finalise the year just ended and act as a claim for the new tax year. Each tax credit award is at most a tax year long. In order to ensure there is no stop in payments, HMRC continue paying 'provisional payments' at the start of the new tax year based on the information they held in the tax year just ended until they get up-to-date information during the renewals process.

If the renewals process is not completed (either by returning the forms to HMRC or completing the declaration over the phone) by 31 July following the end of the tax year, HMRC will end the provisional payments. The tax year just ended will be finalised on information held. However, as the renewals process was not completed, there is no claim for the new tax year and so all of the provisional payments made become an overpayment. Note, however, that some claimants who are classed as 'nil award' or who receive the maximum family element only are 'auto-renewal' cases and are not required to reply unless their income or circumstances are different from those shown on their renewal notice.

Provided the claimant contacts HMRC within 30 days of the statement of account (issued when their payments are stopped), the renewal should be completed and claim put in place back to 6 April. For renewals relating to 2009-2010 only, the 30 days was extended to 60. After this 30-day (or 60-day) period, the claim can only be put in place from 6 April if there is good cause for missing the deadline. If that doesn't apply, the only alternative is to make a new claim which can be backdated three months and dispute any overpayment.

#### 7. *Payments via employer(PVE)*

Until February 2006, working tax credit (WTC) was often paid via employers through the payroll. An employer was allowed up to 42 days to process a change to payment of WTC. An overpayment would often accrue during the waiting period before any change was made. No new overpayments can arise in this way, but many outstanding overpayments are caused by PVE. In addition, we have seen cases where HMRC have sought recovery of an overpayment where they claim payments were made via a claimant's employer but upon a check of payslips we have discovered the payments were never made, even though the HMRC system believes they were. It is always useful to confirm that the payments were in fact made, rather than relying on confirmation from HMRC.

## 2.2 Understanding overpayments

From an adviser's perspective, one of the most difficult aspects of dealing with tax credit overpayments is identifying the cause of the overpayment. We have set out the main causes of overpayments in part 1 and 2.1 above; however, in most cases there is more than one cause and indeed in some cases several of these causes may be present.

Most claimants have gone through the dispute process at least once before they seek advice, which can be helpful as they will generally have received a response from HMRC which gives some indication of why HMRC think there is an overpayment. In these cases the starting point is to analyse the awards for the period in question (and often earlier periods) in order to verify whether HMRC's explanation is correct. We often find that HMRC issue explanations that are either completely wrong, do not explain the whole overpayment or identify the cause correctly but ignore evidence as to why it happened.

One of the most difficult aspects about working an overpayment case is that it is not possible to look at each tax year in isolation. So, for example, if HMRC are seeking recovery of an overpayment for 2009-2010, it could be affected by something that happened in 2007-2008 and it is therefore necessary to establish what has happened each year in order to make sense of the current overpayment.

The following points may be useful when dealing with an overpayment:

1. If HMRC have already issued a dispute response or explanation, a good starting point is to analyse that response to verify whether it is correct.
2. If there is no HMRC response or explanation, start with the year which first shows the overpayment and analyse each award notice from that year to identify any changes that may have caused the overpayment. The award notices need to be checked against the claimant's actual circumstances. This should allow identification of any official error (e.g. computer or processing errors) as well as any claimant error.
3. If an award notice shows recovery of an earlier overpayment, it may be necessary to go back and look at earlier tax years to get a full view of whether that recovery is correct.
4. Use the intermediaries helpline (0845 300 3946). They can answer questions about awards, tell you how many awards were issued in a particular year and what information HMRC used to calculate them. This is particularly useful if the claimant has lost their paperwork. You can register as an intermediary by following the instructions on [HMRC's website](#).

## 2.3 Recovery of overpayments – law vs. policy

Section 28(1) Tax Credit Act 2002 sets out the law on recovery:

*'Where the amount of a tax credit paid for a tax year to a person or persons exceeds the amount of the tax credit to which he is entitled, or they are jointly entitled, for the tax year . . . the Board may decide that the excess, or any part of it, is to be repaid to the Board.'* (italics supplied).

Note that unlike the position on social security benefits, HMRC have the discretion to recover any overpayment no matter how it was caused. To deal with this discretion, HMRC have a policy for overpayment recovery which is set out in [Code of Practice 26 \(COP 26\)](#).

Section 28(1) should be read in conjunction with Section 28(5), which gives HMRC power to adjust an award in-year if they detect that an overpayment is likely to arise at the end of it:

*'Where it appears to the Board that there is likely to be an overpayment of a tax credit for a tax year under an award made to a person or persons, the Board may, with a view to reducing or eliminating the overpayment, amend the award or any other award of any tax credit made to the person or persons . . .'*

When questioned about this during the passage of the Tax Credits Bill through Parliament, the responsible minister Paul Boateng MP said that he expected the then Inland Revenue to use their discretion 'sensibly and fairly' (Hansard, Standing Committee A, 22 January 2002, col 185). So how in fact does HMRC exercise this discretion given them by statute, and is their exercise of it fair and sensible? This is the question on which much of the controversy regarding tax credits focused in the first five years of the system's operation.

Under TCA 2002, Section 29(3) to (5), HMRC may recover overpayments in one of three ways:

- by deduction from any tax credit award made to the claimants (referred to as 'ongoing' recovery which can only take place if the same claim on which the overpayment occurred is still in payment);
- by direct recovery; or
- through PAYE coding.

COP26, HMRC's policy statement on recovery of overpayments, has been modified many times since its introduction in 2003. The current version dates from July 2010. We outline the three main recovery methods below. More discussion about current recovery practice can be found in section 4.

#### Recovery by deduction from continuing award

This is HMRC's preferred method of recovery. Under the current version of COP26, there are certain limits on the amount by which payments of tax credits can be reduced in order to recover an overpayment which arose in the previous year (cross-year overpayment). Those limits, which depend upon a claimant's income, are as follows:

- 10% of the award payment for claimants on maximum tax credits;
- 100% for claimants receiving only the family element of child tax credit; and
- 25% for all other claimants.

Sometimes HMRC will adjust an award during the award period in order to try to prevent an overpayment from accruing. In such cases the limits set out above apply to restrict recovery.

HMRC will reduce, or even stop, payment of tax credits where the claimant reports a change in circumstances or income that results in a lower entitlement, or entitlement ceasing altogether.

Potential overpayments that are identified during the award period in this way are loosely termed in-year overpayments.

In certain circumstances, HMRC will agree to reduce the recovery percentages further, or collect an overpayment over a longer period, or write off an overpayment altogether if the claimant is experiencing particular hardship (see [section 4.4](#)).

### Former recovery practices

Recovery practices were not always so simple. Historically, the above limits applied only to cross-year overpayments. In-year overpayments were recovered differently. HMRC's computer would automatically adjust the award to ensure that tax credit was paid at 'the right amount' for the whole year. If this caused hardship, claimants could ask for additional payments, which might prevent them from falling into poverty but prolonged the recovery of the overpayment debt into later years. Also, the initial hardship caused by the automatic 100% in-year recovery was only alleviated if the claimant asked, and knew that it was possible to ask, for additional payments.

The additional payments, where made, brought payments back up to a certain percentage of what they were before the recovery began, that percentage depending on the circumstances of the claimant. Up to and including March 2006 those percentages were:

- 10% for those on income support or jobseeker's allowance whose child tax credit payments had fallen below 90% of what they would have received if they had not been overpaid;
- 25% for those on maximum working tax credit or child tax credit, or in receipt of a disability element in either tax credit;
- 50% for other claimants whose payments had dropped below that percentage of what they would have received if they had not been overpaid.

Additional payments were not made to those receiving only the family element of child tax credit, or to those whose award was reduced because HMRC found that 'something was wrong' with their claim. In addition, where an overpayment had arisen from an increase in income of more than £2,500, no additional payments were made. That latter restriction was removed with effect from 13 February 2006.

After March 2006 the percentage rates of in-year recovery were brought into line with the more generous rates applied to cross-year overpayment recovery – ie the 10%, 100% and 25% rates set out above. This was announced in a statement made by the Paymaster General to the House of Commons Treasury Sub-Committee dated 1 February 2006.

In an earlier statement made at the same time as the pre-Budget Report on 5 December 2005, the Paymaster General announced that from November 2006 in-year overpayment recovery would be subject to automatic limits set at those 10%, 25% and 100% rates. In other words, in-year overpayments would no longer be subject to 100% automatic recovery, and there would no longer be any difference between the rates of recovery of in-year and cross-year overpayments.

Both these announcements were in response to specific lobbying by LITRG and other tax and welfare rights bodies.

Then, in a further statement on 6 December 2006, the Paymaster General announced that it had not been possible for the technology to achieve the automatic limits on recovery promised for in-year

overpayments from November 2006. Instead, the automatic limits would apply from April 2007; the limits would be applied manually in appropriate cases, without the claimants having to ask, from January 2007; and meanwhile HMRC remained open to requests for top-up payments from those eligible.

The fully automated limits were finally implemented during a system upgrade over the weekend of 30 June/1 July 2007.

For 2004-05 and 2005-06, where a cross-year overpayment was being collected at the 10%, 25% or 100% rate (see above), it was recovered at the same percentage from any additional payments made. Thus, if additional payments were being made at the 90% rate, and a cross-year overpayment was still being collected at 10%, the effective rate of additional payment was 81%, i.e. 90% less 10% of 90%. It is understood that this double recovery has not applied since April 2006.

The Appendix shows a table that traces the developments in the history of HMRC's tax credit overpayment recovery since just before and after the 2005 pre-Budget report.

### Direct recovery

HMRC generally recover tax credit overpayments directly like any other tax debt in two situations:

- where there is no continuing award; or
- where the claim in which the overpayment occurred has ended. For example, where there has been a change of household which has ended the previous household's claim, and the overpayment being collected arose under the claim made by that previous household.

Direct recovery cases are dealt with by the Debt Management and Banking (DMB) arm of HMRC which is separate from the Tax Credit Office (TCO), which deals with ongoing recovery. TCO issue the initial notice to pay the overpayment and recovery is then passed to DMB to pursue. Strictly the payments are due in 30 days, but claimants can ask to repay over anything up to 10 years if their circumstances require it. DMB recently introduced a much clearer and fairer policy on recovery of direct recovery overpayments, the detail of which is set out in HMRC's new guide for intermediaries '[How HM Revenue & Customs handle tax credits overpayments](#)'.

More information about how HMRC pursue direct recovery cases in practice can be found in [Section 4](#).

### Recovery through PAYE coding

While provision is made in the Tax Credit Act 2002, Section 29(5) for tax credit overpayments to be collected through the PAYE system, HMRC have never implemented collection fully in this way. HMRC have begun to pilot this method of recovery and its use is currently being evaluated to see if it can be offered to more tax credit claimants. Recovery through PAYE may impact on means-tested benefits and so careful thought needs to be given if this is offered as an option by HMRC.

### 'Fairly and sensibly'?

In operating these systems, are HMRC recovering tax credit overpayments 'fairly and sensibly', as Paul Boateng MP hoped when introducing the Tax Credits Bill in January 2002?

Having devised a welfare system that aimed to be responsive to changes in income and circumstances, for the Government then to create a regime where overpayments could be corrected with the minimum hardship to claimants was always going to be a tough challenge. But the solutions initially decided upon (practically without consultation) resulted in HMRC facing accusations of maladministration, as the implementation of policy all too often plunged claimants back into the very poverty from which it was the purpose of the system to relieve them.

During the summer of 2005, a succession of reports such as those by One Parent Families, the Adjudicator, the Parliamentary Ombudsman and Citizens Advice drew attention to the hard cases and injustices created by the prevailing regime. Meanwhile, the tax professional and welfare rights bodies involved in tax credits work were agitating for specific changes, urging HMRC and Government:

- to cease automatic 100% in-year recoveries, and consider freezing all in-year recoveries;
- to take greater care in setting provisional payments so as not to set them too high;
- to consider applying the percentage recovery rates to the cumulative total of overpayments, without distinguishing between in-year and previous year overpayments, while enabling those who wish to pay early to do so;
- to introduce a 'pause' before recovery began, so that those facing overpayments had a chance to budget.

The first and third points were dealt with by the Paymaster General's announcement that automatic in-year recovery would reflect the percentage rates applicable to cross-year recoveries, and that from April 2006 those same rates would be applied to additional payments made to claimants put in hardship because of in-year recovery. Regarding the second point, after 2004-05 HMRC ceased the practice of automatically deducting the £2,500 disregard when setting the levels of provisional payments at the start of a new tax year, so that fewer claimants were paid too much in the early part of the year.

## SECTION 3 – CHALLENGING OVERPAYMENTS

### **3.1 Options for challenging overpayments**

There are six options that must be considered when challenging an overpayment. The options are not mutually exclusive, therefore it may be appropriate to pursue one, two, three or all of them, depending on the circumstances of each case. The options are:

1. Appeal
2. Dispute
3. Official error
4. Complaint
5. Repayment/hardship
6. Judicial Review

We give further information about each course of action in the remainder of this section.

Some readers of this guide may wonder why ‘explanations’ are missing from this list. Based on our experience, we generally don’t formally ask HMRC for an explanation of how an overpayment arose. The reason for this is that such requests do not suspend recovery action, whereas disputes do. On that basis we think it is preferable to send in a dispute, which as well as suspending recovery, also acts as a way of getting further information. That said, it is open to advisers to write to HMRC and ask for an explanation as to how an overpayment arose or phone the helpline and make a request, but attention must then be given to the recovery action to ensure it does not go any further in the interim. This often involves either asking DMB for a suspension of recovery or negotiating a time to pay whilst the explanation is sought.

### **3.2 Appeals**

#### *The appeals process*

A tax credit appeal is a formal process that allows a claimant to challenge a tax credit overpayment. Appeals are dealt with by an independent tribunal which is completely separate from HMRC. This is the [First-tier Tribunal](#) (Social Entitlement Chamber) to which most welfare benefit appeals go in the first instance. It is administered by the Tribunals Service which is an agency of the Ministry of Justice. The Tribunals Service is legally independent of HMRC and there is a specific set of rules governing the [First-Tier Tribunal’s procedures](#).

If you are dissatisfied with the decision of the First-tier Tribunal, you can appeal further, but only on a point of law and with permission, to [the Upper Tribunal](#) (Administrative Appeals Chamber), which replaced the former Social Security and Child Support Commissioners on 11 November 2008. On matters of fact, as opposed to law, the decision of the First-tier Tribunal is nearly always final.

From the Upper Tribunal, a right of further appeal lies, again with permission and on a point of law, to the Court of Appeal, Court of Session in Scotland, or Court of Appeal in Northern Ireland.

#### *Appealable decisions*

Not all decisions by HMRC are appealable. Only those decisions set out in Section 38 Tax Credit Act 2002 carry a right of appeal:

- An initial decision on a claim for tax credit (Section 14(1));
- A revised decision on reporting a change of circumstances (Section 15(1));
- Any other revised in-year decision altering or terminating an award (Section 16(1));
- An end-of-year decision leading to a final award (Section 18(1) for reply-required cases or (6) for auto-renewal cases);
- A decision following an enquiry (Section 19(3));
- The continuation of an enquiry (appellant may ask for a direction that HMRC must give a closure notice – Section 19(9), (10));
- A decision on a discovery (s 20(1) – revision of income tax liability, or Section 20(4) – fraud or neglect of claimant or representative);
- A decision correcting an official error under regulations made under Section 21. Note there is no right of appeal against a refusal by HMRC to correct an official error;
- The determination of a penalty by HMRC (Sch 2, para 1); and
- A decision to charge interest on an overpayment (Section 37(1)).

Appeals must be made in writing to HMRC within 30 days of the date on the decision notice. It is possible to file a late appeal within 13 months of the date on the decision notice in [certain circumstances](#). When an appeal is filed, recovery action should be suspended.

Normally appeals are submitted on form WTC/AP or by way of letter to the Appeals team, Tax Credit Office, Preston, PR1 0SB. If the decision was made as a result of a compliance investigation then the process is slightly different. In such cases it is advisable to send the letter of appeal directly to the compliance officer, who will pass it to the compliance appeals team. The claimant should have received a letter from the compliance officer at the start of the investigation that contains a direct dial phone number. It is often useful to contact the compliance officer directly to confirm that an appeal will be forthcoming. If the normal appeal route is used, there is no harm to the appeal, but it may cause some delay whilst it is filtered and sent to the relevant compliance appeals team.

#### Decision to recover an overpayment

One noticeable absence from the list above is a right of appeal against a decision by HMRC to recover an overpayment. Using the appeal rights above, a claimant can challenge a decision by HMRC that led to an overpayment and, if successful, that decision can be reversed establishing that there is in fact no overpayment (or it is less than the original amount).

However, if there is in fact an overpayment (the claimant has received more than their entitlement), there is no right of appeal against HMRC's decision to recover this overpayment.

More information about the appeals process can be found on the [LITRG website](#).

### **3.3 The dispute process**

Most challenges against overpayments will be done using the dispute process. This process is used where there is in fact an overpayment but the claimant believes that they should not pay it back because of an error by HMRC.



The dispute process is not governed by statute. Under statute, HMRC may recover all overpayments howsoever caused. HMRC set out their policy on how they exercise this discretion in Code of Practice 26. The process in COP26 is referred to as the 'dispute process'.

The dispute process is internal to HMRC. Disputes are decided by the Customer Service and Support Group (CSSG), part of the Tax Credit Office in Preston.

In September 2009, a specialist team was set up within CSSG to deal with disputes and complaints from certain intermediaries (primarily those who provide free help to claimants). As well as creating a dedicated team, a new process was implemented which means advisers should receive an acknowledgement letter with the contact details of the named caseworker dealing with the dispute or complaint. More information on how to write to the team can be found [here](#).

Disputes can be lodged using form [TC846](#) or by letter (generally preferred by advisers as it allows a full argument to be put forward).

As soon as the claimant disputes an overpayment, whether on form TC846 or in some other written format, HMRC must suspend recovery while the matter is investigated. Recovery should not recommence unless and until the dispute is resolved against the claimant and in HMRC's favour. Thereafter, HMRC's policy is that suspension can only be reactivated if the claimant submits a new dispute with new evidence to HMRC which requires further investigation.

This is a harsh policy, particularly in light of the often poor explanations of overpayments that we see. Under current policy there is no suspension of recovery whilst seeking an explanation for the overpayment, nor is there suspension whilst pursuing a complaint via HMRC's own procedures or escalating to the Adjudicator. Whilst this is the official HMRC policy, it is still worth speaking with DMB to request a suspension as sometimes they will defer recovery whilst you take further action.

### 3.4 Appeals vs. disputes

The distinction between appeals and disputes is one that even HMRC staff have difficulty with. The box below gives an example of when an appeal and dispute may be appropriate.

APPEAL	DISPUTE
<p>HMRC have worked out your tax credit award incorrectly or decided that you are not entitled to tax credits or some part of tax credits and you do not agree with this.</p> <p><u>Examples of when an “appeal” is the right thing to do:</u></p> <p>Daisha claims tax credits for her three children. Her eldest child finishes her GCSEs but decides to stay on at school to do her A levels. Daisha tells HMRC and continues to receive tax credits for three children. When HMRC work out Daisha’s final tax credits for the year, they only include two children. Because Daisha received money for three children, HMRC think that they have overpaid her. Daisha can appeal the decision and ask HMRC to change her award as she should have received tax credits for three children. If this is successful, the overpayment will disappear.</p>	<p>HMRC have the right information about your income and situation, but for some reason you were paid more than you were entitled to have.</p> <p><u>Example of when a “dispute” is the right thing to do:</u></p> <p>Eric and his wife were paid tax credits for three children when they only have two. When Eric received his award notice, he phoned HMRC to tell them they had the number of children wrong. HMRC did not correct the mistake and kept on paying Eric too much tax credit. After the end of the year, Eric had received more tax credit than he should have and so has an overpayment. Eric can use the dispute process because he accepts that he has been paid too much, but doesn’t think he should have to pay it back because he told HMRC of the mistake as soon as he saw his award notice.</p>

There are some important differences between the two processes:

- Appeals are a statutory process. Disputes are governed by COP26 published by HMRC that sets out how their statutory discretion is exercised.
- Appeals are dealt with initially by HMRC but proceed to an independent Tribunal outside of HMRC. Onward appeals go through the court system. This is in contrast to disputes that are decided within HMRC and further challenge is limited through the Adjudicator and Parliamentary Ombudsman.
- Appeals have a strict time limit and should be made within 30 days of the date on the decision notice. In certain circumstances you can lodge a late appeal within 13 months of the date on the decision notice. Disputes have no time limit and a dispute can be filed at any time.
- Appeals are dealt with by the appeals team in the Tax Credit Office. Disputes are handled by the Customer Service and Support Group in the Tax Credit Office.

- Appeals are filed either by letter or using form WTC/AP. Disputes can be sent either by letter or using form TC846.

If a claimant sends an 'appeal' to HMRC that should be a dispute, it will generally be re-directed. Unfortunately when the opposite happens, a claimant sends a 'dispute' when in fact they want to appeal, the letter tends to be treated as a dispute. In such cases we recommend that advisers argue that HMRC should treat the original letter as an appeal. There is no requirement that appeals must state that they are an 'appeal' so long as they meet the [other appeal requirements](#).

### 3.5 The previous 'reasonableness' test

Prior to 31 January 2008, claimants faced the much criticised 'reasonableness test'. This test had long been criticised by representative bodies, and following a succession of reports in 2007 by the Adjudicator, The Parliamentary Ombudsman and Citizens Advice, HMRC decided to revise the test.

The following paragraphs contain information about the operation of the reasonableness test. Whilst the test is not applicable to new cases, HMRC have stated that the test will still be used where a claimant asks HMRC to review a previous dispute decision that was made under the old test. In practice, our experience is that all current disputes are being dealt with under the new test which is generally more generous to claimants. Officially, any disputes outstanding as of 31st January 2008 should have been dealt with under the new test.

COP26 (April 2007 version) stated:

*'For us to write off an overpayment you must be able to show that the overpayment happened because:*

- *we made a mistake, and*
- *it was reasonable for you to think your payments were right.'*

Both tests had to be satisfied before HMRC would write off an overpayment.

Of the two tests described above – that HMRC must have made a mistake, and that it must be reasonable for the claimant to have thought their award was right – it was the second of the two, commonly known as 'the reasonableness test', that provoked the most controversy.

The April 2007 version of COP26 put the section '*Disagreeing with recovery of an overpayment*' very near the front of the document. It tended to adopt a 'tick box' approach to satisfying the reasonableness test, the general thrust being that if the claimant had done all they could be expected to do, and HMRC had not, then it was likely that HMRC would agree to write off the overpayment.

What was the claimant expected to do? Specifically, the claimant was required to check their award notice promptly on receiving it. As a minimum, the claimant was expected to check the following details.

- Whether the award was for an individual or for a couple. If the award was made out to a single claimant, and the claimant was a couple and in receipt of a joint award, any resulting overpayment was unlikely to be written off if the claimant did not spot and report the error.

- The hours the claimant worked. The award notice should have shown that information, and if it recorded it incorrectly, the claimant should have spotted and reported it. Simple enough in straightforward situations, though where working hours fluctuated because the claimant worked for an agency, for instance, or did shift work, this test could be more difficult to satisfy. The difficulty could be exacerbated by the absence of any clear guidance from HMRC as to how an agency or shift worker should compute their 'normal' working hours.
- Whether the claimant received income support or income-based jobseeker's allowance. If they did, then they should also have received maximum tax credits. Again, this should have been an easy check to make in most situations, though where people were unfamiliar with the benefits system they may have been unsure of the difference between the income-based and contribution-based variants of jobseeker's allowance (JSA). To add to their confusion, DWP notices did not always make it clear which variant the claimant was being paid. It was not uncommon for tax credit overpayments to arise because claimants in receipt of contribution-based JSA had been paid maximum tax credits appropriate to income-based JSA, and because of their unfamiliarity with the systems they had not spotted or reported the error. Unfamiliarity with systems (in the case of a migrant claimant) has been held to satisfy the equivalent reasonableness test in housing benefit (see CH/858/2006).
- Whether the claimant, or anyone in the claimant's household, had a disability element. Again, confusion often arose when people were paid severe disability element (SDE) when they were only entitled to the standard disability element. It was rare for an overpayment so generated to be written off, and we have even seen a case where (initially at least) the TCO refused to write off an overpayment where a local tax office had themselves wrongly advised the claimant that she was entitled to SDE.
- The number and age of any children in the claimant's household.
- Childcare costs. The difficulties in correctly calculating the average where there are fluctuating childcare costs need hardly be elaborated here. The important thing was to check that the figure reported to the TCO was the one that was shown on the award notice.
- Total household income for the period shown on the award notice. Again, this should reflect what the claimant reported to the TCO.
- In addition, the claimant was required to check that the amounts going into their bank account matched what was shown on the award notice. This was easier said than done in cases where the payments matched in total, but individual bank account entries did not tally with the individual payments listed on the award notice.

HMRC expected the claimant to report any incorrect information on their award notice on the day that the notice was issued. If there was a change in their circumstances or income, they were obliged again to report that to HMRC.

Given the legendary complexity and opacity of the tax credit award notice, there was surprisingly little sympathy for people who misunderstood it. They were simply expected to ask for advice, or get someone to do so on their behalf. This betrayed a complete lack of understanding of the predicament of people with a disability that made deciphering, or understanding, such material problematic, and was arguably in breach of HMRC's own [disability equality scheme](#).

A claimant could have been excused for failing to make these checks in exceptional circumstances – bereavement of a close relative or a serious illness were given as examples. For both claimants and advisers, the test was extremely difficult to satisfy, not helped by the seemingly inconsistent approach taken by HMRC staff in administering the test. Cases that were very similar in nature often received different outcomes and HMRC staff were notoriously bad at explaining why any decision had been made, other than to say that ‘it was not reasonable for the claimant to think their award was correct’.

### **3.6 The responsibilities test**

The old versions of COP26 were most noticeably silent on what claimants could expect from HMRC. Whilst HMRC internal guidance gave some indication of what claimants could expect, the reasonableness test centred around the claimant and put the emphasis on them to check HMRC’s work. There seemed little responsibility for HMRC and this led to large overpayments being recovered in situations where the claimant did not spot an error which HMRC had made.

In designing the new test, HMRC attempted to move away from the one-sided list of responsibilities, replacing a test which imposed all of the responsibility on the claimant to one which set out responsibilities for both parties.

#### HMRC’s responsibilities

COP26 sets out the following HMRC responsibilities:

- *When you contact us for information we should give you the correct advice based on the information you give us. We’ll offer you support, for example, if you want us to explain your award notice to you, we’ll talk you through it in detail.*
- *When you make or renew your claim we should accurately record and use the information you give us to work out your tax credits and pay you the correct amount.*
- *When we send you an award notice we should include information you’ve given us about your family and your income. If you tell us that there is a mistake or something missing on your award notice, we’ll put it right and send you a correct award notice.*
- *When you contact us to tell us about a change of circumstance we should accurately record what you’ve told us and send you a new award notice within 30 days. The 30 days doesn’t start until we get all of the information we need from you to make the change. It is therefore important that you give us all of the information when you tell us about a change.*

#### Claimant responsibilities

HMRC have set out the following responsibilities for claimants:

- *When you make or renew your claim you should give us accurate, complete and up-to-date information.*

- *You should tell us about any change of circumstance throughout the year so we have accurate and up-to-date information. The law says you must tell us about certain changes within one month of them happening – you should use the checklist we sent with your award notice to check what the changes are, a copy of the checklist is included with this leaflet.*

*To reduce the chance of getting an overpayment, we recommend that you tell us about any changes in income as soon as possible.*

- *Each time you get an award notice you should use the checklist we sent with it, a copy of the checklist is included with this leaflet. You should check all the items listed and tell us if anything is wrong, missing or incomplete.*
- *You must tell us about some changes within one month of them happening - these are listed on the back of the checklist.*

*The main details we expect you to check are:*

- *whether the award is for you as an individual or as part of a couple*
- *the hours you work*
- *whether you get Income Support or income-based Jobseeker's Allowance or Pension Credit*
- *whether you, or anyone in your household, has a disability element*
- *the number and age of any children in your household*
- *childcare costs*
- *your total household income for the period shown on the award notice.*

*We'll send you a corrected award notice when you tell us if anything is wrong, missing or incomplete. If you don't get an award notice within one month of telling us about a change in circumstance please phone our Helpline as soon as possible.*

- *After you get any award notice you should check that the payments you get from us every week or every four weeks match the amount we said you should get on the award notice. We expect you to tell us if you got any payments that didn't match what was shown on the award notices during the period an overpayment arose.*
- *If you spot a mistake on your award notice you should tell us within one month of getting your award notice. Please make a note of when you got your award notice and when you told us about the mistake. We may ask you for this information to show that you acted within one month.*

There are four possible outcomes to a dispute:

Outcome	Overpayment written off?	Explanation
1. Both HMRC and the claimant have met their responsibilities.	NO	If both sides have met their responsibilities, the overpayment is likely to be a naturally occurring overpayment which is built into the system, or is caused because HMRC have 30 days to action a change.
2. HMRC have met their responsibilities but the claimant has failed to meet theirs.	NO	The overpayment is not written off because of the failure of the claimant to meet their responsibilities. This may be overridden if there are exceptional circumstances.
3. HMRC have failed to meet their responsibilities but the claimant has met theirs.	YES	The overpayment is written off in full because HMRC failed to meet their responsibilities.
4. Both HMRC and the claimant have failed to meet their responsibilities	PARTIALLY	The part of the overpayment attributable to HMRC's failure will be written off, the part attributable to claimant error will remain recoverable unless exceptional circumstances are present.

There is an extremely useful document within HMRC's own guidance detailing the steps that dispute advisers should follow in determining disputes under the new test. This document can be found [here](#). Accompanying this document is an [action guide](#) which sets out the process staff follow when looking at a dispute.

Under point 4 in the summary table above, where both parties have failed in their responsibilities there will be a partial write off calculated by apportioning the part of the overpayment that is attributable to HMRC's failure.

The guidance directs dispute staff to go on and consider four additional questions in this situation:

*Did the claimant, for overpayments in 2008-2009 onwards, report any error on their award notice within one month of receiving it?*

*Did the claimant, for overpayments prior to 2008-2009, report any award notice error promptly?*

*Did HMRC delay in processing a change of circumstances for more than 30 days?*

*Did HMRC incorrectly process a change of circumstances?*

In the first two cases, if the claimant informed HMRC within one month (or promptly for overpayments arising earlier than 2008-2009) the overpayment relating to the error on the award notice should be written off. If notification is made outside of these time limits, it would seem that the overpayment will only be written off from the date that HMRC were actually informed of the error.

In the last two cases, the part of the overpayment relating to HMRC's error in not processing a change of circumstances within 30 days or processing a change incorrectly should be written off.

Any remaining overpayment would appear to be recoverable.

One other way of having an overpayment written off is to examine whether 'notional offsetting' applies if the case involves separating couples, couples coming together or one member of a couple dying or going abroad for longer than 8 or 12 weeks (depending on the circumstances). More information can be found in [section 4.5](#).

#### *The responsibilities test – an improvement?*

Overall we have welcomed the departure from the old reasonableness test, and remain optimistic that the new test will provide better decisions for claimants. Particularly welcome is the clarity on what HMRC expects from claimants and, more importantly, what claimants can expect from HMRC.

However, there are parts of the new test that we still have concerns about, which still seem to create an unfair balance in favour of HMRC.

We strongly oppose the 30 days that HMRC have allowed themselves to implement changes of circumstances reported by claimants. However promptly claimants make their report, if HMRC do not process the changes until the end of the 30-day period, any overpayment accrued in the meantime will remain recoverable. We feel that there is no justification for this practice which will hit worst those on the lowest incomes.

We are also concerned that the new test is based around establishing whether HMRC and the claimant have met responsibilities and what evidence HMRC will use to determine this. In light of the missing telephone recordings (as detailed below) and the repeated frustration of advisers reporting post going missing in the HMRC post room, we remain concerned about how HMRC will establish whether claimants have met their responsibilities.



The new COP26, coupled with changes to the way disputes are handled, has led to an improvement in the quality of decisions that are given by HMRC in disputes. In our view, the fact that the test has a benchmark via the list of responsibilities makes it easier for claimants and advisers to show why the overpayment should be written off. That said, although we think the new test is an improvement on the previous reasonableness test, we still see examples of poor decision-making, disregard for evidence and refusal to consider exceptional circumstances in the dispute cases we deal with.

Claimants also need clear explanations of how overpayments arose in order to invoke COP26 effectively, and HMRC need to show claimants that COP26 has been applied by issuing full and detailed explanations of decisions. This does not always happen and we believe that this is fundamental if the new test is to work effectively for claimants.

### **3.7 Exceptional circumstances**

The third step of the [process](#) for TCO advisers requires consideration of whether any 'exceptional circumstances' were present which prevented the claimant from meeting their responsibilities (see 2 and 4 in the summary table above).

According to the guidance exceptional circumstances do not need to be rare, and the words can simply mean 'strong reasons'. Examples given of exceptional circumstances are the death of a close relative, serious illness, and flooding of the claimant's home.

If exceptional circumstances are found then the overpayment that resulted from the claimants' failure to meet their responsibilities due to exceptional circumstances should be written off.

It is not possible to list circumstances which HMRC will accept as 'exceptional'. HMRC take a different approach in each and every case depending on the circumstances. It should be noted that the exceptional circumstances with which HMRC are concerned in this part of the test are those existing at the time when the claimant was expected to meet their responsibilities. Exceptional circumstances may also exist which mean it is more difficult for the claimant to repay an overpayment. This is discussed in section 4.7.

### **3.8 Evidence**

One of the biggest difficulties with disputes is evidence. HMRC will often refuse to accept that a claimant has met their responsibilities if they cannot locate correspondence or telephone calls in support.

It is for this reason that we recommend that claimants keep a file with copies of all tax credit correspondence. Claimants should keep copies of all letters sent to HMRC as well as detailed notes about any telephone calls including date, time, operator name and a brief description of the conversation.

#### *Subject access requests (SAR)*

Sometimes called data protection requests, this is useful to obtain copies of data from HMRC including print outs of household notes (the notes that helpline operators make during telephone calls), other award information and telephone calls.

Requests should be made in writing to:

TCO SAR Team  
SECTION 5  
AREA E  
FLOOR 1 ST MARKS HOUSE  
ST MARYS STREET  
PRESTON  
LANCS  
PR1 5LL

Prior to December 2010, advisers could write to the TCO SAR Team attaching a copy of a TC689 consent form and ask for their client's data. Since that date, the SAR Team have sent letters to advisers stating that this is no longer possible and written permission for SAR data to be sent to an adviser must be obtained, otherwise the data will be sent directly to the claimant.

### Records of telephone calls

[Step 9 of the HMRC staff action guide](#) on dealing with disputes states that telephone records should be checked if the claimant mentions a call in their dispute. In our experience HMRC do not always do this and it is therefore advisable to make it clear in any dispute that HMRC should listen to all relevant recordings and if necessary refer HMRC to their own guidance on this subject.

Unfortunately, despite HMRC repeatedly saying that all telephone calls are recorded, this is not always correct particularly in relation to the early tax credit system. In a number of cases in 2003 and 2004, calls to the helpline that were diverted to a private supplier were not always recorded. The scale of the problem was revealed in the answer to a Parliamentary question by David Laws MP on 20 February 2007 (see col 612W in Hansard for that date). The response from Benefits and Credits was:

*'The private sector advisers dealt mainly with generic, non-claimant specific enquiries. They received the same training as the HMRC staff to enable them to do this.'*

However, it would have been very difficult to filter accurately the generic from the claimant-specific, particularly where the same call contained elements of both.

Following a campaign by LITRG and others, [tax credit officials have agreed](#) that where an issue arises as to whether a claimant telephoned the helpline at that time to report a change in circumstances or a mistake in their payments, in the absence of any tape recording of the call the claimant will usually be given the benefit of the doubt, with any ensuing overpayment being written off.

### **3.9 Second disputes and next steps**

#### Second disputes

As noted above, when a dispute is received, HMRC will suspend recovery of any overpayment.

If the dispute decision is negative, HMRC will re-commence recovery of the overpayment once again. If the claimant has further evidence in support of the overpayment, a further (second) dispute can be

sent to HMRC. It is advisable that this second dispute makes it absolutely clear what the further evidence is and why it changes the previous dispute decision.

In cases where the claimant has further evidence, previously unconsidered by HMRC, recovery will be once again suspended under COP26.

However, if a claimant submits a further dispute with no new evidence, COP26 states that HMRC will not suspend recovery even if HMRC have failed to take this previous information into account.

Given the history of poorly explained dispute responses, we are disappointed that HMRC have decided not to suspend recovery in cases where they have failed to consider a crucial piece of evidence. We continue to argue that recovery should be suspended in our own dispute cases in such circumstances, although the official policy is as set out in Cop26.

### Next steps

While there are rights of appeal against awards and other decisions on tax credit entitlement, there is no statutory right of appeal against the exercise by HMRC of their discretion in relation to an overpayment recovery. That is not to say there is no legal or other remedy. If HMRC refuse a request to write off an overpayment resulting from their error, the following steps may be taken.

- Make a formal complaint under HMRC's complaint procedures. These are described in the factsheet [Complaints and putting things right](#) which supplanted Code of Practice (COP) 1 in April 2007. More information about complaints can be found below in Section 3.11.
- If the internal complaints route produces a result that is unsatisfactory to the claimant, refer the matter to the [Adjudicator](#). The Adjudicator acts as a 'fair and unbiased referee investigating complaints about [HMRC and certain other departments] after their own efforts to resolve matters have failed'. It is important to note that the Adjudicator cannot rewrite HMRC policy and procedure; she can only determine whether the existing policies and practices of the Department have been applied fairly.
- If the claimant is dissatisfied with the Adjudicator's decision, the claimant's MP can refer the matter to the [Parliamentary Ombudsman](#) whose brief is to investigate cases of maladministration by Government departments or other public bodies resulting in injustice.

Although there is no statutory right of appeal against HMRC's exercise of their discretion, there is one judicial remedy – that of judicial review. See section 3.12 for further information.

### **3.10 Official error**

This is not the 'official error' test as understood by those who have experienced tax credit overpayments due to HMRC error or delay. Official error in this context is defined as an error relating to tax credit made by:

- an officer of the Board;
- an officer of the DWP or Department for Social Development (in Northern Ireland); or
- a person providing services to any of those departments (eg the IT contractor),

to which neither the claimant nor any person acting for the claimant materially contributed.

A decision may be revised by reason of official error at any time within five years of the date of decision. Prior to 6 April 2010, the time limit was five years from the end of the tax year to which the decision related.

This is a useful alternative to an appeal where the only problem is a clear mistake in the award on which both sides can agree and which HMRC can simply correct retrospectively without the panoply of an appeal. There appears to be no right of appeal against a decision by HMRC not to revise the original decision under the official error rules, although there may be a possibility of judicial review action (see section 3.12 below).

### 3.11 Complaints

#### The complaints process

Where HMRC has handled a case badly or if a dispute has failed, there is a complaints procedure which also provides for payment of compensation if a claimant has lost out financially, or suffered anxiety or distress, as a result of HMRC's error or delay.

HMRC's complaints procedure was originally set out in a code of practice, COP1. There have been numerous revisions of COP1 over the past few years, each one giving less information than its predecessor. The current version, which is no longer designated a code of practice, is in the form of a factsheet but, like many HMRC publications bearing that title, it is largely devoid of facts. The current factsheet version is available [here](#).

Points to note about this procedure are:

- To make a complaint, write or speak to the person or office you have been dealing with, putting 'complaint' at the top of your letter if you are writing. You can also complain by fax or in person but not by email. You are asked to *tell them as much as you can about your complaint, including what went wrong, when it happened, who you dealt with, and how you would like it settled*.
- If the response of the local office is unsatisfactory, ask the office to look at your complaint again. It will be referred to *a senior officer who has not been involved, who will take a fresh look at it and how HMRC have handled it, then give you a final decision. This second review is often called a 'Tier 2 complaint'*.
- If you are not happy with the response of the senior officer, you can ask [the Adjudicator](#) to look into your complaint.
- If you are unhappy with the Adjudicator's decision, you can also ask your MP to refer the matter to the [Parliamentary Ombudsman](#).

One very important point about the complaints process is that HMRC policy is not to suspend recovery whilst the complaint is being dealt with even if it goes to the Adjudicator or Ombudsman. Advisers should speak to DMB to see if they are willing to suspend, in some cases they might agree, in others they may stick to their official policy. In such cases, advisers must ensure that the claimant engages with DMB so as to avoid the case continuing along the recovery route and potentially reaching county court.

## Your Charter

HMRC's Charter was introduced in 2009 and has statutory backing in the Finance Act 2009. Although it does not replace existing rights and remedies, it is a useful addition especially in the complaints process.

There are nine rights for claimants and three responsibilities upon claimants. The Charter can be viewed in full on the [HMRC website](#).

When sending a complaint to HMRC, it can help to refer to the Charter, specifically identifying where HMRC have not met their obligations.

## Compensation

If you have suffered financial loss, or particular anxiety or distress, you should consider claiming compensation.

On *financial loss*, the factsheet says that HMRC will consider refunding any reasonable costs you have had to pay as a direct result of HMRC's mistakes or unreasonable delay. It lists, as examples, postage, phone calls, and professional fees. The former COP1 also listed under this head travelling expenses and financial charges. You should keep evidence of all such costs (receipts etc) and show them to HMRC when asked.

If the extra costs have arisen because HMRC mistakes or delays result in your receiving a late notification of a tax credit overpayment, the department may decide not to collect the full amount owed, but strict conditions apply.

On payments for worry and distress, the factsheet has this to say:

*'If you think our actions have affected you particularly badly, causing you worry or distress, tell us straight away. We may be able, in some cases, to make a payment to apologise.'*

The former COP1 added:

*'These payments, which are not intended to put a value on the distress you have suffered, will usually range from £25 to £500.'*

Under the former COP1 there was a third head of compensation for poor complaints handling:

*'If we handle your complaint badly or take an unreasonable time to deal with it, we may pay you compensation, on top of any reasonable costs, to reflect this. These payments will usually range from £25 to £500.'*

That paragraph no longer appears in the factsheet but there is no reason why poor complaints handling cannot be one of the factors to be considered in determining the amount of compensation for worry and distress.

If you are negotiating compensation for yourself, you do not have to accept what HMRC offer. Look at the case studies in the Adjudicator's Annual Reports to get an idea of the kind of sums that are agreed after reference to the Adjudicator's office.

### 3.12 Judicial review

Although there is no statutory right of appeal against HMRC's exercise of their discretion, there is one judicial remedy – that of judicial review, exercisable by the High Court. One advantage of this method is that the initial threat of proceedings, or failing that an application for permission, can concentrate the mind of the defendant. Another advantage is that the procedure can be expedited so that it can work much faster than other remedies. The drawback is that if the Department does not back down in the preliminary stages, going ahead with the procedure can be expensive for the claimant, even if CLS funding is obtained. It is also a specialist area where expert legal representation is required. There is a very useful basic guide to the judicial review procedure on the website of the [Public Law Project](#).

If some kind of administrative review jurisdiction could be exercised at a lower level within the judicial structure – e.g. by a specialist tribunal more accessible to those on low incomes – access to justice in this important area would be greatly enhanced. The Tribunals, Courts and Enforcement Act 2007, which entered into force on 1 April 2009, empowers the Upper Tribunal to exercise judicial review as well as the High Court in particular types of application. Whether this will be effective in increasing access to judicial review remains to be seen. A better solution, from the point of view of the low-income claimant, might be an appellate body similar to the Internal Review Service which reviews DWP decisions on access to the Social Fund.

## SECTION 4 – RECOVERY AND REPAYMENT OF OVERPAYMENTS

### **4.1 Methods of recovery**

As explained above, HMRC may recover overpayments under the TCA 2002, Section 29(3) to (5), in one of three ways:

- by deduction from any tax credit award made to the claimants (referred to as ‘ongoing’ recovery which can only take place if the same claim on which the overpayment occurred is still in payment);
- by direct recovery; or
- through PAYE coding.

At present only the first two of these methods are used in practice. Recovery through PAYE coding is currently being evaluated through a pilot. HMRC are also piloting recovery via DWP benefits.

It should be noted that claimants do not have a choice between ‘ongoing’ and ‘direct’ recovery. The recovery method used is determined by the circumstances of the overpayment.

If the claim on which the overpayment occurred is still in payment, ongoing recovery will be used by the Tax Credit Office. If that claim has ended, or if the claim is a ‘nil’ award (entitlement exists but no payments are due as income is too high) then HMRC will send the debt to their Debt Management and Banking arm for collection by direct recovery. This is the case even if a claim ends and then re-starts for some reason (e.g. a claimant splits with their partner, makes a single claim and gets back together making a new joint claim – the overpayment from the original joint claim cannot be recovered from the new joint claim).

HMRC have published a [guide for intermediaries online](#) which explains how HMRC handle tax credit overpayments, including their direct recovery policies.

### **4.2 Direct Recovery**

Direct recovery cases are dealt with by Debt Management and Banking (DMB) which is a separate arm of HMRC to the Tax Credit Office (who deal with ongoing recovery issues). DMB collect tax debt as well as tax credit debt although the processes for each are different.

HMRC have recently revised their guidance around tax credit direct recovery cases and their policy is much more understanding towards claimants and more generous than the previous guidance. That said, its success very much relies on its implementation by staff.

#### *The direct recovery process*

The following table gives an overview of the direct recovery process. Further detailed information can be found in the [HMRC guide for intermediaries](#).

STEP	PROCESS	EXPLANATION
STEP 1	Notification of overpayment – TC610	<p>When a claim ends, for whatever reason, and any overpayment is outstanding, the tax credit system will issue a TC610 notice to pay form once any appeal period has passed (normally 30 days).</p> <p>The <a href="#">TC610</a> advises the claimant that the amount is owed to HMRC and normally gives 42 days to pay. It advises claimants that overpayments can be spread over 12 months but does not set out any longer payment options. It encourages claimants to contact the payment helpline on 0845 302 1429. The payment helpline is part of the contact centre directorate in HMRC.</p> <p>A sample of the TC610 can be found on page 11 of the <a href="#">HMRC intermediaries guide</a>.</p>
STEP 2	Debt passed to Debt Management and Banking (DMB)	If no response is received to the TC610, and no dispute has been filed, the debt will be passed from the Tax Credit Office system to Debt Management and Banking's IDMS system.
STEP 3	Reminder letter sent by DMB	A reminder letter, IDMS 99 will be sent automatically.
STEP 4	A further reminder letter sent by DMB.	If no response is received to the TC610 or the previous reminder (IDMS 99), a further letter will be sent asking for payment.
STEP 5	Debt Management Telephone Centre (DMTC) will attempt telephone contact	<p>DMTC will contact the claimant to discuss the overpayment and request payment. If the claimant disputes the overpayment they should be referred to the tax credit helpline and DMB should suspend recovery to allow the claimant time to do this.</p> <p>If DMTC establish that the claimant cannot make a payment arrangement (based on the financial hardship criteria below) they will suspend collection for 12 months or consider remission.</p> <p>See the <a href="#">HMRC intermediaries guide</a> for further information (Pg. 5)</p>



STEP 6	Personal contact	<p>If the claimant has refused to pay in full or no contact could be made by telephone, the Debt Technical Office (DTO) will review the case to ensure the overpayment is due and also to see if any of the special rules applying to household breakdowns or dual recovery applies (see below for further information).</p> <p>If no contact can be made, it may be referred to a field officer for a visit. A payment arrangement can still be agreed at this stage.</p>
STEP 7	Legal proceedings	<p>If no contact can be made, or the claimant refuses to make a payment arrangement, HMRC will consider legal proceedings by going to court to obtain a judgment.</p> <p>HMRC also have the power of distraint (seizing of goods) but as yet have not used it in tax credit cases. We understand that HMRC may pilot the use of distraint in tax credit cases where the claimant has received a penalty for deliberate behaviour.</p>

Time to pay arrangements

The TC610 (see Step 1 in the table above) normally gives claimants 42 days to pay the amount stated. Often in tax credit cases the amount due can be several thousands and most claimants will not be able to pay it immediately.

The TC610 informs claimants that the debt can be repaid over 12 months, but does not set out any longer payment options. Even 12 months is not long enough for most tax credit claimants with substantial overpayments.

What claimants are not told at this point is that DMB have a time to pay system that allows repayments over much longer periods.

Previously, DMB staff were instructed to ask for income/expenditure details for time to pay arrangements that lasted more than three years. New guidance, given to staff in March 2010, means that full income/expenditure details are no longer required, except if repayments will take longer than 10 years.

The following time to pay options are available:

**1. 12 months**

HMRC should readily accept an offer to repay the debt in twelve monthly instalments. No additional questions should be necessary.

**2. Over 12 months up to 10 years**

Claimants can ask HMRC to repay over any period up to 10 years without providing full income and expenditure details. HMRC staff are instructed to follow the 'Tax Credits Negotiating Framework' in dealing with these requests. A copy of this is available in Section 5 of the [HMRC intermediaries guidance](#).

Staff are encouraged to try and set up a direct debit arrangement for any time to pay agreements. Generally, repayments of less than £10 per month will not be accepted unless they will clear the debt in less than three years. If a claimant cannot afford £10 per month, then DMB should suspend recovery for twelve months and then review the situation at the end of that period. If the claimant is still unable to pay more than £10 per month following their twelve-monthly review, HMRC should consider writing off the debt on grounds of financial hardship. This new guidance does not affect time to pay arrangements already in place for less than £10 per month unless they stop for any reason.

**3. 10 years or more**

DMB staff are instructed to get a full income/expenditure breakdown where claimants request time to pay agreements that will last longer than 10 years. This is most likely to be needed where the overpayment debt is large and the claimant has a low income. As with shorter arrangements, payments of less than £10 per month will not be accepted and HMRC should suspend the debt in those cases and review after twelve months.

If a claimant has agreed to repay over a period longer than 10 years, provided payments are made as agreed, HMRC will write off any debt remaining at the 10-year point.

A copy of the income/expenditure form used by HMRC can be found in the [HMRC intermediaries guide](#). In assessing ability to repay, HMRC state that they will compare actual expenditure with figures produced by the Office of National Statistics and seek an explanation from the claimant where their figure is higher. This should not be done for expenditure that the claimant does not have any control over unless they appear excessive. This includes things like rent, mortgage, secured loans, council tax, court fines, pension payments, life assurance, HP or conditional sale, TV licence, maintenance and child support.

*Other methods of recovery*

HMRC have the power to use charging orders against a claimant's residence where a debt is owed. The current [guidance](#) (Pg. 6) states that this will not be considered in stand-alone tax credit debt cases but may be considered if there is another HMRC debt as well.

### Legal proceedings

The final step in the direct recovery process involves HMRC commencing legal proceedings, normally in the county court, to obtain judgement for the debt.

In the past, some claimants who were taken to county court were not given the opportunity to challenge the recovery of the overpayment or even explain if they didn't understand why they had been overpaid. Even at this stage it is possible that HMRC have given an incorrect explanation or have made a mistake in dealing with the overpayment. Some judges treated tax credit cases in the same way as ordinary tax debt, which meant that if HMRC produced a certificate of debt that was enough to gain judgement against the claimant.

This approach is incorrect. Tax debt cases follow a special procedure called CPRPD7D meaning they do not follow the normal allocation process. Critically CPRPD7D does not apply to tax credits overpayments which basically means that the claim should follow the normal court processes including allowing the claimant to raise a defence and requiring HMRC to answer the points of that defence. [A full explanation of the importance of this can be found in an article we wrote in 2008 which explains the procedure.](#)

We still strongly caution against allowing overpayments to reach the county court, but clarification of the status of tax credit debt cases means that claimants may have an opportunity to challenge aspects of HMRC's case. It remains far from clear how far the courts will go in examining the papers and whether they will consider the test under COP 26. On that basis we prefer to ensure cases are dealt with before proceedings are started.

### **4.3 Ongoing recovery**

#### The ongoing recovery process

Tax Credit Office is responsible for ongoing recovery cases. Ongoing recovery is used where the claim which gave rise to the overpayment is still in payment.

Under the current version of COP26, there are certain limits on the amount by which payments of tax credits can be reduced in order to recover an overpayment which arose in the previous year (cross-year overpayment). Those limits, which depend upon a claimant's income, are as follows:

- 10% of the award payment for claimants on maximum tax credits;
- 100% for claimants receiving only the family element of child tax credit; and
- 25% for all other claimants.

Sometimes HMRC will adjust an award during the award period in order to try to prevent an overpayment from accruing. In such cases the limits set out above apply to restrict recovery.

HMRC will reduce, or even stop, payment of tax credits where the claimant reports a change in circumstances or income that results in a lower entitlement, or entitlement ceasing altogether. In some cases, because the above percentages above apply to in-year overpayments as well as those that go across tax years, a claimant will continue to be paid even though they have received their entitlement for the year. This will mean that their overpayment is increased. If this happens it should

be clear on the award notice and the claimant can contact HMRC to request that they stop payments for the remainder of that tax year so as not to increase the overpayment any further. Recovery and payments will re-commence in the following tax year.

Potential overpayments that are identified during the award period in this way are loosely termed in-year overpayments.

#### Financial hardship in ongoing recovery cases

In certain circumstances, HMRC will agree to reduce the recovery percentages further, or collect an overpayment over a longer period, or write off an overpayment altogether if the claimant is experiencing particular financial hardship.

Any financial hardship in ongoing recovery cases is dealt with by the Tax Credit Office. The first step is for the claimant to contact the tax credit helpline (0845 300 3900) to ask that the recovery percentage is reduced or the overpayment is written off on hardship grounds. The helpline should refer the case to the Tax Credit Office who will make a decision on whether the recovery rate can be varied.

If the claimant receives the family element only (or family and baby element), HMRC will not normally adjust the rate of recovery. Nor will they do so if the overpayment was caused by deliberate fraud or error.

If a decision on hardship is required, TCO will pass the case to Debt Management and Banking (DMB) who will contact the claimant to check what is affordable. Once this information has been gathered, HMRC will decide whether to vary the recovery rate or remit (either fully or partially) the overpayment. The criteria used to determine this will be the same as that for direct recovery (see section 4.4 below). Once a decision has been made by DMB, they will inform TCO who will write to the claimant.

If advisers have all of the relevant information collected, they can write to the Tax Credit Office, Preston, PR1 0SB to make a request in writing.

#### **4.4 Financial hardship**

The information in this section applies to both direct and ongoing recovery cases. Some claimants will not be able to afford to make any repayments to HMRC or will only be able to offer less than £10 per month. If that is the case, there are two potential options available. The first involves getting HMRC to suspend recovery of the overpayment until the financial situation improves or, in cases where there is unlikely to be any improvement in the claimant's financial situation, the second option is to ask HMRC to write off the debt on financial hardship grounds.

Prior to March 2010, HMRC's policy on financial hardship was practically non-existent. It was unclear to advisers when HMRC would write off overpayments on grounds of financial hardship and very few claimants were successful when requesting this. In addition, there was no clear process for such requests which meant they were often left for months with a back office team with whom neither advisers nor claimants could make any contact.

Since [March 2010](#), DMB has revised its approach to the recovery of tax credit overpayment debt, which includes a much clearer policy on financial hardship and also more clarity around how this should be requested.

#### *Claimants who are unemployed with no assets or savings*

In such cases, HMRC should suspend recovery for 12 months. At the end of that period, the case should be reviewed and if there is no likelihood that circumstances will improve, consideration should be given to writing off the overpayment or, at the very least, suspending it for a further 12 months. If circumstances have improved, HMRC will seek a time to pay arrangement (see above for more details).

Pensioners are not mentioned as a specific group in the new HMRC guidance; however, where a pensioner is in receipt of pension credit and there is no realistic chance that their situation will improve, we believe the same criteria should be applied.

#### *Claimant is on sickness/incapacity benefit*

Where a claimant is in receipt of a sickness benefit such as incapacity benefit or employment and support allowance, cannot afford to offer any repayment to HMRC and there is little prospect of them ever gaining employment, HMRC should write off the outstanding overpayment. If there is some prospect that the claimant may be able to enter employment in the future, recovery should be suspended for 12 months and the situation reviewed at the end of that period.

#### *Claimant unable to meet living expenses*

In situations where a claimant cannot meet essential living expenses such as water, gas and electricity, they should request that the overpayment recovery be suspended until their circumstances improve. Where there is no likelihood that this will happen, a request for the overpayment to be written off on financial hardship grounds should be made. In our experience this is most likely to succeed where evidence of their current situation is given to HMRC.

#### Financial hardship process

The above information regarding financial hardship applies to both direct recovery and ongoing recovery cases.

The process for those subject to ongoing recovery is outlined in section 4.3 above.

For those in the direct recovery process, DMB are tasked with recovering the debt and it is with them that initial contact should be made to discuss financial hardship. Specifically claimants or their advisers should contact the Debt Management Telephone Centre (DMTC) (0845 366 1206) and the case should then be referred to a Debt Technical Officer. The DTO should then assess the case based on the information received or by contacting the claimant for further information. Any letter sent to the claimant should include a phone number for the DTO dealing with the case. The claimant should be informed by letter of the outcome, regardless of whether the decision is to temporarily suspend recovery or to write off the overpayment in full.

If DMTC refuse to consider hardship or make a referral to a DTO, the [HMRC intermediaries guidance](#) on the HMRC website should be quoted and a complaint made (see section 3.11 above).

## 4.5 Couples

### Couples and overpayment recovery

The law says that an overpayment debt for a couple can be collected by HMRC in full (but only once!) from either the claimant or their partner. The stated policy of HMRC where this has happened following a household breakdown is to write to both members of the former couple (making every effort to trace any former partner for whom they do not have an up-to-date address).

If the claimant believes that there should be a difference in what they and their former partner should pay, then HMRC will take into account the circumstances of both of them and may ask each of them to pay a different amount, or one of them to pay the full amount. Alternatively, they can agree between them to pay different amounts and inform HMRC of this decision.

Prior to August 2009, HMRC policy was to allow each party to repay 50% of the overpayment. However, when confirming this agreement in writing, HMRC reserved the right to return to the partner who was engaging with them for the other 50% if they could not trace the other partner.

LITRG, along with other representative bodies, expressed concern that HMRC often pursued the engaging partner with vigour whilst the other partner remained 'untraceable'. This often meant the mother with care of the children had to repay the whole joint overpayment debt where the absent partner was difficult to trace.

Since August 2009, HMRC have implemented a much fairer policy in these situations. As before, provided a person engages with HMRC, they will allow repayment of 50% of the joint debt. Provided that this 50% is paid (either by lump sum or on a payment plan) HMRC will not pursue that person for the remaining 50%. Instead they will pursue the other partner, and if they cannot collect the money will not go back to the engaging partner to collect it.

It is important to note that the law still allows HMRC to pursue either partner for the full amount of the joint debt. Also, this process is not well advertised by HMRC, so you should ensure that you ask Debt Management and Banking if you think it applies.

### Notional offsetting

Sometimes, tax credit claimants who form a couple or who become single, either because they separate or because one partner dies, are slow in reporting the change to HMRC. Yet in many cases, if they had acted promptly they would have continued to be entitled to tax credits, albeit in a different capacity.

Until 18 January 2010, HMRC would recover the whole of any overpayment arising on the old claim, but give no credit for what the claimant would have received had they made a new claim at the right time.

From 18 January 2010, HMRC introduced a new policy that means tax credits recipients who start to live together, or who become single after being part of a couple, but are late reporting the change to HMRC, can reduce the overpayment on their old claim by whatever they would have been entitled to had they made a new claim promptly.

This new policy applies to overpayments arising from 18 January 2010, but also to overpayments that were still outstanding as of that date. So, if an overpayment has been repaid in full prior to 18 January 2010, the new policy will not apply. However, if any part of it remains unpaid, offsetting can be applied to it.

To request notional offsetting, claimants should contact the tax credit helpline to ask for their case to be referred to the 'notional offsetting (or notional entitlement)' team in the Tax Credit Office.

Note that the notional entitlement set-off will not cover the three months by which the claimant will be able to backdate their new claim. Normally HMRC will grant the three months backdating automatically, but if that doesn't happen, they will need to ask for it.

On the whole HMRC policy is to be lenient and not charge a penalty where the failure to report has resulted from a mistake or misunderstanding. If HMRC think the claimant has been negligent in not reporting, and they are left with a net overpayment even after notional entitlement has been applied, they may be charged a penalty against which they can appeal.

If the failure to report is dishonest, the penalty may well be substantial and in extreme cases notional entitlement will not be given.

#### **4.6 Dual recovery**

Some people will be paying back two overpayments, one via ongoing recovery and another via direct recovery. This often happens where there is an overpayment on an old claim, and a new overpayment on a current claim. Since August 2009, HMRC have implemented a new policy which means that any direct recovery action should be suspended until the ongoing recovery ends.

Whilst we welcome this policy, HMRC are not proactive in telling claimants about it. If this applies, you should ask Debt Management and Banking to suspend the direct recovery action. Further details can be found in the HMRC intermediaries guide and in the [Debt Management Banking Manual Online](#).

#### **4.7 Special circumstances**

##### Cases involving mental health issues

HMRC have produced some information for cases involving claimants with mental health issues. The following is reproduced from the intermediaries guidance:

*HMRC will deal with mental health cases carefully and sympathetically to avoid distress to the customer.*

*HMRC will need a letter from a health care professional or mental health social worker explaining the mental health problem to enable it to deal with these cases. The evidence should include the nature of the illness and as far as possible, whether the illness is likely to be long-term (for example, schizophrenia) or where the prospects for recovery are expected to be good.*

*If the information has not been provided HMRC will need to write to the claimant or third party asking for the documentary evidence. Only in exceptional circumstances will the evidence received be insufficient to relieve the claimant from responsibility for payment.*

*If the mental health problems existed at the time the overpayment occurred then Benefits and Credits can consider whether exceptional circumstances are such that writing off the overpayment is*

*appropriate. If the mental health problems exist at the time the overpayment is being recovered then DMB will review the circumstances:*

*☒ For sole debts HMRC will write to the third party and the customer to let them know that it will not continue with recovery of the overpayment.*

*☒ For joint debts HMRC will continue with recovery from the other partner in line with the section above.*

*☒ For Household Breakdown cases HMRC will write to the customer to advise them that it will not continue with recovery of their share of the debt. However, HMRC will pursue the ex-partner for their share of the debt (more information is available at section 3).*

Further guidance for cases involving claimants with mental health issues can be found in the [tax credit section of the DMB manual](#). Further information about the manual can be found in section 5.1.

### Exceptional circumstances

In exceptional circumstances, for example where a claimant is seriously ill or a close family member is ill, a request can be made to HMRC to suspend recovery of the overpayment until such time as the claimant is able to discuss their financial situation fully with HMRC. Claimants or their advisers should phone the debt management telephone centre (0845 3661206) to explain the situation if this applies.



## APPENDICES

### Appendix A – HMRC manuals

HMRC publish a range of internal manuals that give more detail about their policies, processes and operations.

The following manuals are relevant to tax credits:

[Tax credit technical manual \(TCTM\)](#)

[Tax credit manual \(NTC\)](#)

[Tax credit claimant compliance manual \(CCM\)](#)

[Debt management and banking manual \(DMB\)](#)

From an overpayment point of view the following parts are particularly useful:

1. [Notional offsetting](#)
2. [Dual recovery](#)
3. [Claimants with mental health issues](#)
4. [Cases involving domestic violence](#)

### Appendix B – Changes in tax credit overpayment recovery since November 2005

<b>With effect from/for</b>	<b>Change</b>	<b>Source</b>
November 2005 onwards	Manual suspension of collection of disputed overpayments introduced	PMG statement to Treasury Sub-Committee, 26 October 2005
13 February 2006 onwards	Top-up payments offered to people whose income rises by more than £2,500 with effect from 13 February	PMG statement to Treasury Sub-Committee 1 February 2006
2006-07 and subsequent years	Annual income disregard rises from £2,500 to £25,000	Pre-Budget report December 2005
April 2006 onwards	Rates of top-up payments reflect rates at which year-end overpayments are recovered from ongoing payments of award	PMG statement to Treasury Sub-Committee 1 February 2006
January 2007	Manual process to enable rates of recovery of in-year overpayments to be aligned with those of cross-year overpayments	Pre-Budget December 2006
July 2007	Rates of recovery of in-year overpayments aligned automatically with those of cross-year overpayments	Pre-Budget December 2005 as modified by pre-Budget December 2006

**This guide was written by Victoria Todd (Welfare Rights Technical Officer) and Robin Williamson (Technical Director) of the Low Incomes Tax Reform Group. The information in this guide is for general guidance only.**

**The Low Incomes Tax Reform Group is an initiative of the Chartered Institute of Taxation. Our website can be found at [www.litr.org.uk](http://www.litr.org.uk)**

The information contained in this guide is for general guidance only. You should neither act, nor refrain from action, on the basis of any such information. You should take appropriate professional advice on your particular circumstances because the application of laws and regulations will vary depending on particular circumstances and because tax and benefit laws and regulations undergo frequent change.

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