

Tax Credits Overpayments
– Notes for SSLPA talk 28/7/04
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New Tax Credits (“TCs”) introduced April 2003

Background.

Child Tax Credits (“CTC”) replaces child amounts in Income Support (“IS”). Existing IS claimants could claim CTC from April 2003 if they chose to do so. New IS claimants have had to claim CTC for their children from April 2003. Existing IS claimants who haven’t already claimed CTC are being migrated from October 2004.

Working Tax Credits (“WTC”) replaces WFTC from the same date. CTC also is included with WTC for those in work with children – it is a benefit for those in and out of work.

Overpayments

– completely different from other benefits.

Scheme was designed to allow claimants to be overpaid by their own choice – they don’t have to notify the Inland Revenue (“IR”) of all the changes of circumstances which can reduce their entitlement – ie don’t have to tell IR if stop work, if income increases or if child leaves household. Understanding was that these OPs would be recovered from next year’s award. Claimant who notify changes in circumstances can trigger OPs where it as part of the notification it turns out that their income for this year is higher than the PYI income their award was originally based on.

Over and underpayments can also occur because of changes in the claimant’s income; because income is looked at annually, income from one period of year will affect income and therefore award in another – if your income goes up part way through a year by more than the annual £2,500 disregard you will have been overpaid for the first part of the year, if it goes down at all you will have been underpaid.

However, large nos of in-year overpayments made not because claimants fail to notify changes of circumstances, but because of IR error, which claimants were often not aware of. Examples of errors,

- IT errors – misreading forms. IR doesn’t generally keep original forms, info scanned in and some of it is cross checked manually. Computers can misread marks or creases on forms.
- Computer glitches eg automatic backdating where claimant not entitled to backdating.
- Mistakes inputting information on changes in circumstances.
- Delays in adjusting awards following changes in circs.
- Delays sending out award notices, sometimes notices not sent out at all.

- Losing and gaining children/partners/disabilities

Numbers involved may be very large – In relation to adjustments, HB guidance suggests estimated 2 million claimants overpaid in year alone – doesn't include end of year overpayments.

Expecting high levels of overpayment discovered at the end of the year as well because in the first year, awards were based on income for 2001-2, so we'd expect that to create overpayments as many peoples' income will have increased. Also because awards for 2004-5 initially provisional based on last year's award. People who had the benefit of the £2,500 disregard last year will be overpaid at the beginning of this year. There will be overpayments on top of overpayments – last year's overpayment could run into this year.

Statutory framework.

Initial decision on a claim is made under s 14 Tax Credits Act 2002 (TCA) – this triggers an award notice, under s 23. No statutory right to ask for reasons.

Advisers who have seen award notices will be aware that they give very little information - do not include details of how the award has been calculated.

Award is calculated on an annual basis, using the previous year's income, unless the claimant asks for it to be based on current year's income.

At the end of the year a final notice is given under s 17. A final decision on entitlement is then made under s 18.

Definition of OP - s 28 TCA

S 28(1) & (2) Where the amount of a TC paid for a tax year exceeds the amount of TC to which they are entitled for the tax year.

Excess is overpayment.

No actual overpayment until entitlement finalised at the end of the year.

IR *may* decide to recover – discretion.

Also deals with who is liable to repay – single claimant is, or couple – joint and several liability.

Likely overpayments that arise in-year are dealt with in s 28(5)TCA 2002

“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; but this subsection does not apply once a decision is taken in relation to the person or persons for the tax year under s 18(1).”

Award refers to amount overpaid, but doesn't say where it goes.

“Recovery” is a term that relates to what happens at the end of the year, likely overpayments are “reduced” or “eliminated”.

Notification requirements set out in s 23 TCA – no requirement to notify decision under s 28.

There is no statutory test for when an actual or likely overpayment may be “recovered”. Basic principle is that all overpayments are recoverable.

Section 29 Recovery

Deals with what happens at the end of the year, when the IR has decided an overpayment is recoverable.

They then have to notify the claimant of the amount where claimant liable to repay and how it is to be recovered.

Can be recovered by deductions from payments or in future years, as tax.

Recovery entirely within the discretion of the Inland Revenue. This means that the policy on recovery is all-important. Despite this, the policy was not finalised until November last year, 8 months into the scheme, and too late for many claimants who could have benefited from it. Contained in Code of Guidance on Overpayments, COP26 – available on IR website.

In essence policy provides that overpayment will not be recovered where due to official error – v similar to HB test – 2 limbs:

OP caused by mistake by IR *and*

Claimant could reasonably have been expected to think their award was correct

IR may not recover where it would cause hardship – factors are listed in code – include things like children under 5 in household, illness which could be worsened by recovery.

Recovery rates

These were originally set out in COP 26. With effect from 6/4/04 the maximum rates are now set out in Reg 12A Amendment of the TCs(Payments by the Board) Regs 2002 – amended by reg 18 TCs (Miscellaneous Amendments) Regulations 2004 SI 762.

10% for those getting maximum award

25% for those getting less than maximum

100% for those getting family element only

There is no maximum for in-year overpayments, and no policy on maximum recovery – awards can be reduced by any amount in year, and can even be reduced to to nil. Solution last year was to introduce top up payments – this is in Code. Although it’s

still in code, IR hasn't yet decided whether to make top up payments again this year, although it's likely they will – otherwise likely to face legal challenges.

In fact, computer automatically adjusts awards in-year so as to pay out the correct amount over the year, so in effect it automatically recovers in-year overpayments. Can't be overridden. That's why top up payments have to be made. How will they work when there's an overpayment from last year on top of an in-year overpayment?

Similarly with recovery from the award for the following year, although recovery rates are meant to be maxima, computer deducts full amount automatically. If claimant would face hardship and wants to repay at a lower rate, the only way this can be done is for top up payments to be made.

Remedies

Section 38(1) TCA lists decisions which may be appealed. Decisions under ss 28 and 29 are not among them.

Decisions under s 14 and 18 can be appealed, so if the Inland Revenue has made a mistake about the claimant's entitlement, the claimant can appeal against this.

Very difficult to identify from information given what's happened or whether there is anything to appeal against.

Can get more information by asking for TC647 to be sent to the claimant or adviser (if authorised) – this breaks the award down in more detail-

- Entitlement elements
- Impact of income
- Lists deductions (total deduction figure includes the amount already correctly paid)

If still makes no sense write to the TCO address at the top of the award notice and ask for a tailored reply. Individual member of staff at IR then researches the case and provides a detailed breakdown. No time scale for issuing explanations.

You may want to put in an appeal anyway to ensure deadline met and ask for top up payments pending outcome. We don't know if IR will stop recovery pending appeal, but it seems unlikely they will given IT constraints.

Where it is accepted that there has been an overpayment, but the claimant wants to dispute the decision to recover, remedy is adjudicator or parliamentary ombudsman. Have to go through internal complaints procedure first.

If you clearly identify a mistake on entitlement and appeal against that, probably wise to make this very clear because there are a lot of appeals against recovery because award notices tell claimants they have a right to appeal.

In these cases IR may write and say there is no right to appeal and send new form "Request to reconsider recovery of overpaid tax credits" – it has no number but is

sometimes referred to as insert to COP 26". You can also get form from Help Line although they may need prompting.

Claimants can send this to the Overpayments Disputes Team, Tax Credit Office (GB) Preston PR1 0SB.

Care needs to be exercised – form only relates to overpayments test, doesn't deal with hardship. Form has 3 boxes;

- I believed the amount of TCs being paid was correct because
- It wasn't possible to tell if award was correct because
- I knew the award was wrong and took the following steps to tell you

Potential problem with the third one, because there are a lot of claimants who have been overpaid because IR haven't acted on change of circumstances, and who keep contacting the IR to tell them – one eg of a woman who closed her bank account to stop them paying her – but there is an issue about whether they meet the second limb of the test. Can argue that if IR knew and kept paying it confirmed you were entitled by continuing to pay.

COP1 Putting things right

1. Complain to customer service manager
2. Complain to Director with overall responsibility

Then go to adjudicator/ombudsman. Jurisdiction v similar. Have to go to Ombudsman via MP. Ombudsman publishes reports, adjudicator puts case studies on website. Can go to adjudicator first then ombudsman. Problem is likely to be delay, and fact that not clear if recovery will stop in the meantime – probably won't. By the time your complaint has been resolved, your overpayment will have been recovered – although you can get the money paid back to you.

Provisional awards – first few weeks of 2004-5 tax year

Claimant is paid at last year's entitlement at last year's rates until 2003-4 entitlement finalised. No award notice given in practice unless change of circumstances notified in the provisional period. Payments restored to full entitlement, so claimants who were having overpayments recovered will see payments increase.

Effects of overpayment reduction/elimination on Income Support

2003-4

Reg 7 Social Security (Working Tax Credit and Child Tax Credit) (Consequential Amendment) Regulations 2003 SI 455 set out transitional arrangements.

CTC counted as income.

Reg 7(1);

“In the case of a claimant for income support who makes a claim, or whose partner makes a claim, for a child tax credit, the Secretary of State shall treat the claimant’s income as including an amount equivalent to the amount of CTC to which he, or his partner is entitled for the period specified in paragraph (3)¹”

Paragraph 3 goes on to specify a period from 7/4/03 to 6/4/04. The regulation is intended to prevent double entitlement to amounts for children before these were abolished for income support from April 2004.

Same regs abolish child amounts in IS/JSA for CTC claimants from 6/4/04 once they claim CTC.

The DWP will treat the claimant as though they were in receipt of their correct entitlement to CTC when their actual payments are far lower. Could work to their advantage, whilst they are being overpaid tax credits, get IS on the basis of a lower income than they in fact have. Where an overpayment is being recovered, may get no IS for children, or a reduced amount - reduced to an income below subsistence level.

Top up payments were treated as part of the award and not treated as income for IS.

2004 onwards

CTC doesn’t count as income for IS. WTC does count as income for IS – actual amount paid.

Same regs abolish child amounts for claimants on IS as they move onto CTC. So this will have same effect. Claimant’s award reduced, can’t get any IS to make up the difference.

Effects of overpayment recovery on housing benefit

HB works the other way around. It is the actual tax credits received which is taken into account.

LA has to average annual award under regs 24 and 25 HB Gen regs to give weekly income to take into account. Reg 24 – estimate income over such period (not more than 52 weeks) as is appropriate in order that average weekly income be estimated accurately – room for different interpretations about what that means. Under reg 25 LA would divide annual award by 365 or 366 and then multiply by 7.

Some confusion as to how this should work. Government is now seeking legal advice – HB Direct July 2004.

New regs deal with how awards are treated when actual overpayment being recovered. Reg 9(4) Social Security (Miscellaneous amendments) Regs 2004 SI 565 amends reg 33 HB(Gen) Regs. to make specific income rule for reduced TC payments – it’s the reduced amount which is taken into account as income.

¹ This regulation has subsequently been amended by SI 1731 to make it subject to para (2) and reg 31(3) IS regs.

New regs don't deal with in-year overpayments. There was a regulation that did, but it was repealed. There is guidance to local authorities in "Housing Benefit and Council Tax Benefit - A Guide to the New Tax Credits". At paragraph 1503 this states;

"The important points to remember are:

- you use the amount of the tax credit award that is due to be paid, ie after the deduction of any overpayment, to calculate the average weekly income

New guidance now issued from April in HB/CTB A18/2004

This says LA looks at award after deduction made and then if balance nil, don't take any further TC income into account, if more than nil apportion annual award after deduction made over the relevant period.

Normal changes of circumstances rule applies.

Guidance on treatment of provisional awards after April 2004 – claimants whose TCs rise because OP no longer being recovered – guidance says 170,000 HB cases estimated – claimants should be advised to report changes of circumstances to LAs, but guidance says LAs shouldn't take any action unless change reported.

Once revised award provided by claimant HB to be reassessed.

Arrears of tax credits are treated as capital for HB reg 40(9) HB Gen regs.

Claimants may lose out on housing benefit whilst they are being overpaid tax credits, and if a likely overpayment is subsequently "eliminated" or "reduced", backdating issues may arise. On the other hand, depending on their circumstances, claimants may gain housing benefit when an overpayment is being recovered. (Claimants already entitled to maximum HB will not gain).

Top up payments – guidance on these is a bit confused as it refers to award being adjusted – although in fact this doesn't happen. It's our understanding top ups are taken into account for HB.

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