

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal held on 21 February 2005 is erroneous in law. I set it aside. I give the decision which the tribunal ought to have given namely (i) to dismiss the claimant's appeal and (ii) to confirm the decision of the local authority to include working tax credit and child tax credit in the assessment of the claimant's entitlement to housing benefit and council tax benefit for the period from 21 June 2004 until 2 September 2004.

2. The claimant claimed housing benefit and council tax benefit in January 2004 on the footing that she was a lone parent working 20 hours a week and was in receipt of wages, child tax credit, working tax credit and child benefit. Her claims were assessed accordingly. On 25 June 2004 the claimant informed the local authority that she had stopped work on 21 June 2004 due to her ill health and that her son had left her home on 20 June 2004. Although the precise date is not entirely clear, it is not in dispute that shortly after the claimant ended her employment she formed the Inland Revenue of this fact. Notwithstanding this, she continued to be paid working tax credit and child tax credit, despite telephone calls from the claimant and the local authority to the Inland Revenue on 27 July 2004 and 19 August 2004. It was not until the claimant received a letter dated 3 September 2004 from the Inland Revenue that she was informed that she had been overpaid tax credits in the total sum of approximately £960 for the tax year 2004-5 and that she would have to repay. The claimant made a statement to the effect that she knew that there had been an overpayment, that she had put the money aside and not spent it so that she could repay it. Notwithstanding that both the claimant and the local authority knew that the claimant would have to repay the overpaid tax credits, the claimant's income for the period from 21 June 2004 to 2 September 2004 was assessed by the local authority on the footing that her income included the amount of those tax credits and her entitlement to housing benefit and council tax benefit for that period was calculated accordingly. The claimant appealed the local authority's decision. The tribunal upheld the claimant's appeal on the footing that the claimant had no beneficial interest in the overpaid tax credits, but held them upon trust for the Inland Revenue. The local authority appeals with the leave of a chairman. The Secretary of State indicated that he wished to become a respondent to the appeal and was joined as a party. The Secretary of State supports the local authority's appeal. For ease of explanation I refer only to the relevant housing benefit regulations: there are parallel council tax benefit regulations.

3. In my judgment the tribunal's finding that the tax credits received by the claimant after she ceased work were held in trust by her for the Inland Revenue is unsustainable. Although the claimant wisely put these monies away so that she could meet any future liability for an overpayment, there was nothing in law to preclude her from spending those monies at the time that she received them. The "ear marking" of monies received for a particular purpose does not create a irrevocable trust of those monies, however wise the ear marking may have been. The decision of the tribunal must therefore be set aside.

4. For the following reasons it is clear, in my judgment, that the tax credits paid to the claimant after she ceased work constituted "income" of the claimant for the period for which

they were paid. They were monies paid regularly to the claimant. They therefore prima facie fell to be taken into account as the claimant's income for the period over which they were paid. The question next arises whether the fact that these monies were overpaid deprives them of the characteristic of being "income" for the period for which they were paid. Both the local authority and the Secretary of State point out that regulation 33(3AA) of the Housing Benefit General Regulations 1987 provides that tax credits overpaid in any tax year which are subsequently recouped from tax credits payable in a subsequent tax year are to be treated as reducing the amount of tax credit awarded in the subsequent year. This means that where a claimant is overpaid tax credit in tax year 1 and this overpayment is recouped from tax credits paid in tax year 2, the amount of his income for tax year 2 is reduced by the amount of the recoupment. If the overpaid tax credit for tax year 1 were to be disregarded as the claimant's income in that year, the effect of the regulations would be that the overpayment would be disregarded in both tax year 1 and tax year 2, thereby achieving a double disregard. In my judgment regulation 33(3AA) demonstrates that overpaid tax credits are only to be disregarded in the circumstances set out in that regulation and that overpayment of tax credits cannot be disregarded in the tax year in which the overpayment takes place. (As the local authority very fairly points out, this means that a claimant who is in receipt of overpaid tax credits in tax year 1, but who is not entitled to tax credits in tax year 2, as I understand is the position with the present claimant, never receives the benefit of the deduction afforded to those claimants who are in receipt of tax credits for both years. However I do not consider that this can affect the plain meaning of the regulation).

5. The conclusion I have reached in the preceding paragraph receives support from the decision of the Court of Appeal in R(IS) 5/99 and of the Deputy Commissioner in R/JSA 4/04. In each of these cases a student had been paid a loan in circumstances where the loan had been, or might have been, overpaid. It was decided that until such time as it was determined that the loan had been overpaid and was repayable, the loan was to be taken into account in assessing the student's entitlement to income related benefits. In the present case the revenue did not decide that tax credits were overpaid until 3 September 2004, when an overpayment decision was made and the claimant informed that the overpayment was recoverable – see page 78 of the case papers. Until that time, therefore, by an analogy with the two cases referred to, there was no footing upon which the tax credits paid to the claimant could not be taken into account in assessing her income.

6. I therefore allow the local authority's appeal and substitute my own decision as set out in paragraph 1 above.

(Signed)

**A Lloyd-Davies
Commissioner**

(Date)

4 April 2006