IN THE UPPER TRIBUNAL **Case No.** CTC/345/2012
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Appellant appeared in person.

The Respondent was represented by Ms Galina Ward of counsel, instructed by the Solicitor to Her Majesty's Revenue and Customs

Decision: Insofar as the Appellant's appeal before the First-tier Tribunal was an appeal against the decision of HMRC of which notice was sent to the Appellant and his wife on 8 December 2009, this appeal is dismissed.

Insofar as the appeal before the First-tier Tribunal might have been an appeal against a decision notified to the Appellant on 15 February 2011, the proceedings are adjourned for further argument.

REASONS FOR DECISION

Introduction – the adjudication regime for tax credits in outline

1. The regime for decision-making laid down by the Tax Credits Act 2002, which requires an annual calculation in respect of each tax year, seems unduly complicated for what is in effect a weekly benefit but the general structure must be set out briefly as it forms the background to this decision.

2. Insofar as decisions by HMRC are concerned, section 14 makes provision for an initial decision as to whether to award a tax credit following a claim in respect of a tax year and sections 15 and 16 provide for the amendment or termination of such awards during the course of the tax year. Where an award has been made for all or part of a tax year, section 17 provides for the checking of entitlement at the end of the year and section 18 provides for a decision on entitlement to be made at the end of that process. Section 19 makes provision for an enquiry to be initiated into the correctness of a section 18 decision and for a new decision to be made under section 19(3). Section 19(11) prohibits there being more than one enquiry. Section 20 and regulations made under section 21 provide for the revision of a decision in the light of a revision of tax liability or the discovery of fraud, negligence or an official error. Once a decision is made under section 18, the legislation therefore provides for a further decision only under section 19(3), section 20 or regulations made under section 21.

3. Section 38 provides for a right of appeal against decisions under sections 14, 15, 16, 18, 19(3), 20 and regulations made under section 21 (and also certain decisions relating to penalties or the charging of interest). Section 39(1) makes

provision for the manner in which appeals are to be made and for the time within which appeals must be brought –

> "Notice of an appeal under section 38 against a decision must be given to the Board in the prescribed manner within the period of thirty days after the date on which notice of the decision was given (or, in the case of a decision to which section 23(3) applies, the date of the decision)."

The procedural history of this case

4. The Appellant and his wife were in receipt of child tax credits as joint claimants in the tax year 2007-2008 following an initial award made in the summer of 2007 under section 14. His wife informed HMRC on 1 February 2008 that the marriage had broken down and that she was living apart from the Appellant, albeit in the same household. Because she was not able to answer the security question, she was advised to call back to end the joint claim but she appears not to have done so.

5. On 24 April 2008, the annual review/renewal notice was sent to the Appellant and his wife under section 17, requiring a response by 31 July 2008. The response did not state that the Appellant and his wife were no longer living together. On 28 July 2008, notice was issued to the effect that HMRC had decided under section 18 that the Appellant and his wife were entitled to tax credits for the whole year 2007-2008. I am told that payments had been made on an interim basis (under section 24(4)) in respect of the year 2008-2009 and that an award had still not been made under section 14 in respect of that year before the Appellant's wife contacted HMRC on 12 August 2008.

6. On 12 August 2008, the Appellant's wife telephoned HMRC's helpline. She informed the operator that she would be starting work on 1 September 2008 and that she had separated from her husband, although she stated that they were still living under the same roof.

7. In respect of the year 2007-2008, the operator answering the telephone purported to revise the decision of which notice had been given on 28 July 2008 on the ground that the Appellant and his wife were no longer living in the same household and decided that the joint award should be terminated with effect from 2 January 2008. That decision seems to have been made immediately, on 12 August 2008, but notices of it were not issued to each of the Appellant and his wife until 18 August 2008. The notices stated that a final decision had been made awarding tax credit on the joint claim for the period from 6 April 2007 to 1 January 2008 and they informed the recipients of their right of appeal in the following terms –

> "You have 30 days from the date of this notice to appeal. Any appeal must be in writing, but you may want to phone us first to see if we can reach an agreement without a formal appeal. You will still have the right to appeal if you do this."

8. The decision notices also stated that the sum of £621.30 was due from the Appellant and his wife and that they would be asked to pay back that amount but should contact HMRC if they thought they needed longer to pay or should not be required to do so because the overpayment was caused by HMRC's error. As the Appellant points out, they did not expressly state that he and his wife were not entitled to tax credits in respect of the period from 2 January 2008 to 5 April 2008: that was merely implied. They also did not state that entering into discussions with HMRC would not postpone the date from which the time for appealing ran.

9. In respect of the year 2008-2009, it appears that the payments of tax credits to the Appellant and his wife made under section 24(4) had continued until 28 July 2008 and that the total amount paid was £998.82. On 19 August 2008, the HMRC made a decision, presumably under section 14, awarding the Appellant's wife tax credit from 12 May 2008 – *i.e.,* three months before her notification of 12 August 2008 which is the maximum period by which a new claim may be backdated. I can see no evidence that any decision was made in respect of either the Appellant or his wife on any renewal claim in respect of the year 2007-2008, so there appears to be no decision to the effect that they are not entitled to tax credit from 6 April 2008 to 11 May 2008 or any later date. It may well be that there was no renewal claim and this may not matter if the recoverability of the interim payments in this case depends on whether the Appellant and his wife were entitled to tax credit at the end of the preceding year. Perhaps it was for that reason that there is also no evidence of any attempt to recover the interim payments at that stage and, indeed, they appear not to have been mentioned.

10. Understandably, the Appellant's wife appears to have understood the overpayment of £621.30 mentioned in the notice of 18 August 2008 to be in respect of the whole period between 1 January 2008 to 12 May 2008 (when the award to her commenced) and, in a document dated 30 August 2008, she disputed her liability to repay it, saying –

> "a) My husband … and I were personally and domestically separated: i.e., did <u>not</u> share the same bedrooms, the cooking, the washing and shopping etc., and have continued to proceed with divorce.
>
> b) However we jointly contributed to the payment of mortgage and utility bills for the household.
>
> c) We continued to live in the same household until present due to financial difficulties.
>
> d) I have to contribute financially to the upkeep of two children at university and one child of 14 years old and therefore I do not have the funds to pay back the £621.30 (jointly)."

She completed another form to similar effect on 5 October 2008.

11. HMRC replied to her on 16 December 2008. The reply did not directly address those points made in the Appellant's wife's argument that implicitly raised

the question whether the decision of 18 August 2008 might be wrong, but it did remind her that she had had a right of appeal. It also informed her, for the first time, that £998.82 in respect of the year 2008-2009 had been overpaid in addition to the £621.30 in respect of the previous year and it refused to write off either overpayment but left open the possibility of arrangements being made for repayments. It seems that a "notice to pay" may also have been sent to the Appellant on 22 December 2008. If so, he took no action, but his wife seems to have entered into an arrangement to make repayments.

12. In early 2009, the matrimonial home appears to have been sold and the Appellant and his wife moved to their respective current addresses.

13. Nothing further happened until 13 July 2009, when HMRC opened an enquiry under section 19 into the amount of tax credit to which the Appellant and his wife were jointly entitled in the year 2007-2008. I am told that this action was taken when an inconsistency was noticed in HMRC's records It had been realised that, because the decision of 28 July 2008 had been made under section 18 and because no ground for revision under section 20 or regulations made under section 21 had been made out, a further decision altering it could be made only following an enquiry under section 19 and no such enquiry had been initiated before 18 August 2008. The enquiry was initiated just before the time for doing so expired but it appears to be possible that the notice required by section 19(1) may have been sent only to the Appellant's wife and not also to him. This is uncertain because the enquiry had to be opened "manually" due to the way the computer had recorded the decision of which notice had been given on 18 August 2008. In any event, it appears that the Appellant's wife was given an opportunity to make submissions in relation to the enquiry but that there was no contact whatsoever with the Appellant.

14. Nonetheless, on 8 December 2009, HMRC sent both the Appellant and his wife notice of the outcome of the enquiry and of the decision made under section 19(3). The covering letters said that the effect of the award notices was "to confirm the decision we made on 12 August 2008". The award notices again said that there had been an overpayment of £621.30, of which £310.65 had been recovered leaving an outstanding overpayment of £310.65. How exactly half the outstanding sum had been recovered was not explained but I am told that it had been recovered from the Appellant's wife and it may be that the three months' arrears due to her on the 2008-2009 award had been retained. The notices informed the recipients of their right of appeal in the same terms as before. The Appellant says that he did not receive the notice addressed to him.

15. However, it is clear that he received a letter of 26 April 2010 requiring him to pay £810.06 to HMRC, because he disputed the overpayment by letter dated 10 May 2010. On 20 May 2010, HMRC wrote to say that the amount of overpayment in respect of the year 2007-2008 was £621.30 and in respect of the year 2008-2009 was £998.82, but that £600 had been recovered, leaving an outstanding balance of £1,020.12. It was not explained why £810.06 had been sought from him but it is now clear that that was his share of the total overpayment, the £600 having all been repaid by his wife. It may be noted that, in respect of the year 2007-2008, the letter referred to the award notice issued on 18 August 2008, now accepted as having

been unlawful, and did not mention the decision issued on 8 December 2009. the letter also told the Appellant that "you can appeal if you think that the amount of tax credits you were awarded in the first place was wrong", although it did not explain how.

16. On 31 May 2010, the Appellant wrote to say that, while he and his wife had separated on about 1 February 2008, they had not ceased to live in the same household then or at least until September 2008 when his wife had started work. He also said that he had understood his wife to have challenged the overpayment but that it now appeared that she had a repayment arrangement and he asked for the overpayment to be written off as against him. On 1 July 2010, HMRC said that it was now too late to change its decision. The correspondence continued unproductively with three more letters from the Appellant and three responses from HMRC. In the last response, dated 16 February 2011, HMRC said –

> "If you are not happy with my response then you can appeal against the date used to end your joint award, and I have enclosed a copy of the appeal form with this letter for your convenience".

17. The Appellant lodged an appeal, which was received by HMRC on 15 March 2011. However, HMRC then decided that the Appellant had been wrongly informed that he had a right of appeal in respect of the response dated 16 February and that notice of the last relevant decision had been sent on 8 December 2009. Therefore, on 7 July 2011, HMRC wrote to the Appellant saying –

> "The law states you must appeal within 30 days of the date of the letter telling you about the decision. We can look at extending the time for appealing if the appeal is received after 30 days but no appeal can be made once a period of a year and 30 days has passed since the decision was notified. Therefore one year and 30 days is the absolute time limit for appealing. We received your appeal on 15 March 2011 which is more than one year and 30 days after the date of our decision, which was 8 December 2009. This appeal is outside the absolute time limit.
>
> We will now send your appeal to the Appeals Service who will confirm whether the appeal can be accepted. They will contact you with their decision."

18. HMRC referred the appeal to the First-tier Tribunal. (The Appeals Service had been an agency of the Department for Work and Pensions that had at one time provided the administration for appeal tribunals constituted under the Social Security Act 1998 but it had been abolished several years earlier, even before the functions of those appeal tribunals were transferred to the First-tier Tribunal.)

19. The First-tier Tribunal gave the Appellant an opportunity to make submissions and found itself the recipient of two further rounds of submissions by each party before ruling that "the Appeal is out of time and may not proceed". By way of reasoning, it said in its decision notice –

> "Rule 23(5) Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 provides that no appeal may be made after 12 months after the normal one month time limit for appealing and Rule 23(8) of the said Rules states that the Tribunal must not allow an appeal to proceed where it has been lodged outside the absolute time limit."

20. The Appellant asked for a statement of reasons, which was duly provided but did not add anything material (and did not need to do so) and the Appellant then applied to the First-tier Tribunal for permission to appeal, which was granted.

21. An appeal to the Upper Tribunal was duly lodged and I raised the question whether the First-tier Tribunal in fact had any power to extend the 30 day time limit imposed by section 39(1) at all – even for the period of a year mentioned by both HMRC and the First-tier Tribunal. I have received a number of written submissions from both parties and directed an oral hearing. I am grateful to both the Appellant and Ms Ward for their helpful arguments.

The absence of a power to extend time for appealing

22. HMRC now concedes that the legislation relating to appeals does not have the effect that both HMRC and the First-tier Tribunal once thought it had and that it did indeed once have. It is submitted that there is now no power at all to extend the time limit contained in section 39(1) of the 2002 Act. I agree.

23. Until this case raised the issue, HMRC and the First-tier Tribunal clearly believed that time could be extended under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). However, the provision in the rules that permits time to be extended in all other cases in the Social Entitlement Chamber (subject to a maximum extension of one year in social security and child support cases due to the effect of rule 23(5) and (8), which were the provisions mentioned by the First-tier Tribunal), is rule 5(3)(a), which provides that the First-tier Tribunal may –

> "extend or shorten the time for complying with any rule, practice direction or direction".

24. That does not permit the extension or shortening of the time for complying with a provision in primary legislation. It could not do so. Tribunal Procedure Rules cannot permit an extension or shortening of the time for complying with a provision in primary legislation unless there is a specific enabling provision in primary legislation permitting such a rule (*Mucelli v Government of Albania* [2009] UKHL 2; [2009] 1 W.L.R 287). There is no such provision in primary legislation relevant to the present case.

25. The Appellant submits that the result is unfair, but I am not persuaded that any unfairness is such that I can read into the legislation provisions that are not there.

How did this situation arise?

26. It is clear that the present position is unintended and legislation will doubtless follow this decision in order to restore a power to extend the time limit for appealing. However, while I agree with HMRC as to the present position, I differ as to the cause and it is important that I explain my reasoning because it may have a bearing on how the current legislation should be amended.

The legislation as originally enacted

27. As section 39 of the 2002 Act was originally drafted, subsection (3) provided that appeals under section 38 lay to the tax commissioners and subsection (6) applied Part 5 of the Taxes Management Act 1970, relating to tax appeals, to such appeals subject to such modifications as might be prescribed. Section 49 of the 1970 Act permitted the Board of Inland Revenue or the tax commissioners to admit an appeal brought out of time and section 54 made provision for the settling of appeals.

28. However, section 39 of the 2002 Act was never brought into force in its original form because section 63(1) provided that "[u]ntil such day as the Treasury may by order appoint, Part I of this Act has effect subject to the modifications specified in this section". Section 63(2) and (10) provided that appeals in Great Britain, other than appeals against employer penalties, lay to appeal tribunals constituted under the Social Security Act 1998, with a further appeal to a Social Security Commissioner. Section 63(5)(b) and (9) disapplied, *inter alia*, subsections (3) and (6) of section 39 in such cases and section 63(8) provided that –

> "Regulations may apply any provision contained in –
> (a) Chapter 2 of Part 1 of the Social Security Act 1998 (c. 14) (social security appeals: Great Britain),
> (b) Chapter 2 of Part 2 of the Social Security (Northern Ireland) Order 1998 (SI 1998/1506 (N.I.10)) (social security appeals: Northern Ireland), or
> (c) section 54 of the Taxes Management Act 1970 (c. 9) (settling of appeals by agreement),
> in relation to appeals which, by virtue of this section, are to an appeal tribunal or lie to a Social Security Commissioner, but subject to such modifications as are prescribed."

29. The Tax Credits (Appeals) Regulations 2002 (SI 2002/2926) (hereinafter "the 2002 Appeals Regulations"), made by the Commissioners for Inland Revenue, duly applied several provisions of the 1998 Act, as well as section 54 of the Taxes Management Act 1970, to tax credit appeals, with appropriate modifications. As so applied and modified, section 12(7) of the 1998 provided –

> "Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought , and may in particular extend the time

> limit for giving notice of appeal specified in section 39(1) of the Tax Credits Act 2002."

Section 16(1) was also applied. It provided that –

> "Regulations ('procedure regulations') may make any such provision as is specified in Schedule 5 to this Act".

Paragraph 4 of Schedule 5, as modified, specified –

> "Provision as to the time within which, or the manner in which –
> (a) …; or
> (b) any application, reference or appeal is to be made, including provision extending the time limit for giving notice of appeal specified in section 39(1) of the Tax Credits Act 2002".

It is difficult to see what section 12(7) added to that power, either in the modified or the unmodified version of the legislation.

30. The Tax Credits (Appeals) (No.2) Regulations 2002 (SI 2002/3196) (hereinafter "the 2002 Appeals (No.2) Regulations") were made by the Secretary of State for Work and Pensions who had responsibility for making Regulations under the relevant provisions of the 1998 Act. The powers cited in the preamble included sections 12(7) and 16(1) of, and Schedule 5 to, that Act. Unsurprisingly, the Regulations closely followed the equivalent legislation applying to social security cases before appeal tribunals. This was to be found in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), made under the same provisions of the 1998 Act in their unmodified form. However, there was one important difference. The time limit for appeals in social security cases were specified in regulation 31 of the 1999 Regulations, whereas the time limit for tax credits cases was, of course, in section 39(1) of the Tax Credits Act 2002.

31. As permitted by the modified provisions of the Social Security Act 1998, regulation 4(2) of the 2002 Appeals No.2 Regulations (equivalent to regulation 31(5) of the 199 9Regulations) provided that –

> "The time limit specified in section 39(1) of the 2002 Act may be extended in accordance with regulation 5."

32. Regulation 5(1) (equivalent to regulation 32(1) of the 1999 Regulations) provided –

> "The time limit within which an appeal must be brought may be extended where the conditions specified in paragraphs (2) to (8) are satisfied, but no appeal shall in any event be brought more than one year after the expiration of the last day for appealing under section 39(1) of the 2002 Act."

33. It is unnecessary to set out paragraphs (2) to (8), which were very similar to paragraphs (2) to (8) of regulation 32 of the 1999 Regulations. Suffice it to say that

the Board of Inland Revenue had a limited power to extend the time limit (as did the Secretary of State under regulation 32 of the 1999 Regulations) and a legally-qualified member of an appeal tribunal had a less limited power to do so. Any extension was limited by the closing words of paragraph (1), which provided for what is known as an "absolute time limit".

34. It would be hard to devise a method of legislating more calculated to obscure the law from the sight of claimants and judges. The power to extend the time limit in the 2002 Act was to be found in subordinate legislation made under a different Act, which Act was modified by subordinate legislation made under the 2002 Act. In this case, the complexity of the legislation has led to it being misunderstood also by HMRC – the Commissioners for Her Majesty's Revenue and Customs having replaced the Board of Inland Revenue in 2005 – and Government lawyers charged with drafting amending legislation.

The legislation as amended from 3 November 2008

35. On 3 November 2008, the appeal tribunals and Social Security Commissioners constituted under the Social Security Act 1998 were abolished and their functions were transferred to, respectively, the First-tier Tribunal and the Upper Tribunal by the Transfer of Tribunal Functions Order 2008 (SI 2008/2833) (hereinafter "the 2008 Transfer of Functions Order"), made under Part 1 of the Tribunals, Courts and Enforcement Act 2007. There was no equivalent transfer of the functions of appeal tribunals and Social Security Commissioners constituted under the Social Security (Northern Ireland) Order 1998 (SI 1998/1506). Schedule 3 to the 2008 Transfer of Functions Order therefore amended section 63 of the 2002 Act by replacing references to "an appeal tribunal" by references to "the appropriate tribunal", which was defined as the First-tier Tribunal in Great Britain and an appeal tribunal in Northern Ireland, and by adding references to the Upper Tribunal to references to Social Security Commissioners. The 2008 Transfer of Functions Order did not amend sections 12(7) and 16(1) of, or paragraph 4 of Schedule 5 to, the 1998 Act, although it amended other parts of sections 12 and 16 and Schedule 4.

36. However, section 22 of the 2007 Act provides for Tribunal Procedure Rules to govern the practice and procedure to be followed in the First-tier Tribunal and paragraph 4 of Schedule 5 to that Act expressly provides that –

> "Rules may make provision for time limits as respects initiating, or taking any steps in, proceedings before the First-tier Tribunal …".

That power has been exercised in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). Rule 23(2) and entries in Schedule 1 provide for time limits in social security cases. In view of section 39(1) of the Tax Credits Act 2002, the Rules cannot, and do not need to, make provision for a time limit for tax credit appeals. Although there is an entry in respect of tax credits in Schedule 1, it provides simply that the time for providing a notice of appeal is "as set out in the Tax Credits Act 2002". Rule 5(3)(a), which I have already set out, permits the First-tier Tribunal to extend the time limit in social security cases although, by virtue of rule 23(5), by no more than 12 months.

37. Therefore, it was not necessary for regulations made under the modified 1998 Act to make provision for a time limit for appealing to the new First-tier Tribunal in social security cases or to make provision for the First-tier Tribunal to have the power to extend such a time limit. In consequence, the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI 2008/2683) (hereinafter "the 2008 Consequential Provisions Order") amended the 1999 Regulations by revoking regulation 31 and removing from regulation 32 provision for the extension of time limits by legally-qualified members of appeal tribunals. Regulation 32(1) to (8) was retained in an amended form, allowing the Secretary of State to extend the time limit in limited circumstances. That retention was unnecessarily in the light of rule 23(4) of the 2008 Rules (which provided that an appeal was to be treated as having been made in time if the maker of the decision being challenged did not object), unless the restrictions on the Secretary of State's power were regarded as important.

38. Unfortunately, the draftsman of the 2008 Consequential Provisions Order thought it desirable to make equivalent amendments to the 2002 Appeals (No.2) Regulations, presumably not appreciating that the Tribunal Procedure Rules would not, and could not, make provision allowing the First-tier Tribunal to extend the time for appealing in tax credit cases. What the draftsman could have done was amend regulation 5 by simply replacing references to legally qualified panel members with references to the First-tier Tribunal. However, the result of his or her more extensive amendments was to ensure that the First-tier Tribunal would not have the power to extend the time limit mentioned in section 39(1) of the 2002 Act.

39. The 2008 Consequential Provisions Order also amended the 2002 Appeals Regulations in order to take account of the amendments to the 1998 Act made by the 2008 Transfer of Functions Order. Ms Ward submitted that the effect of amendments made to regulation 2 of the 2002 Appeals Regulations was that those Regulations applied only to Northern Ireland from 3 November 2008. However, I do not consider that that was so. The terms "appeal tribunal" and "Social Security Commissioner" were rightly limited in that definition provision, so that they had effect only in Northern Ireland, but the other regulations were correctly amended so as to refer to the First-tier Tribunal and Upper Tribunal where that was appropriate as a result of the amendments to the 1998 Act. I am not aware of any defect in the drafting of the amendments to the 2002 Appeals Regulations that might have invalidated the amended 2002 Appeals (No.2) Regulations from 3 November 2008. The defect at that time was in the 2002 Appeals (No.2) Regulations themselves.

The legislation as further amended from 1 April 2009

40. However, on 1 April 2009, the tax commissioners were abolished and their functions were also transferred to the First-tier Tribunal and Upper Tribunal, by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). That Order made consequential amendments to a large number of statutes, including both the 1970 Act and the 2002 Act.

41. Section 39(3) of the 2002 Act was repealed with all the other subsections, save subsection (1) itself and subsection (6) which, if it had not been disapplied, would still have applied Part 5 of the 1970 Act (as now amended) to tax credits appeals.

42. Section 63 was simplified. The concept of "appropriate tribunal" was removed. Instead, section 63(2) was amended so as to provide that appeals, other than those against employer penalties, are to the First-tier Tribunal in Great Britain and to the appeal tribunal in Northern Ireland and also so as to disapply section 39(6). Subsections (5)(b) and (9) of section 63 were repealed. Importantly, subsection (8) was amended so that it applied only in relation to appeals to appeal tribunals and Social Security Commissioners.

43. The effect of the amendment to section 63(8) was that the subsection ceased to apply in relation to appeals in Great Britain. Where an enabling power is repealed, subordinate legislation made under that power ceases to be valid unless preserved by a saving provision (*Watson v Winch* [1916] 1 K.B. 688). Therefore, the 2002 Appeals Regulations lapsed insofar as they applied to Great Britain and the 2002 Appeals (No.2) Regulations, which applied only in Great Britain, fell with them. In my judgement it is this, rather than the amendment made to regulation 2 of the 2002 Appeals Regulations in 2008, which is the reason why those Regulations no longer apply in Great Britain.

44. The draftsman of the 2009 Order might reasonably have taken the view that most of the 2002 Appeals Regulations could have been revoked in relation to Great Britain with effect from 3 November 2008 without anything of value being lost. However, apart from overlooking the need to retain a provision for extending the time for appealing, causing them to lapse altogether in relation to Great Britain overlooked the fact that those Regulations applied section 54 of the 1970 Act to tax credit appeals in Great Britain as well as in Northern Ireland. The explanatory note to the Revenue and Customs Appeals Order 2012 (SI 2012/533) says that the reference to the First-tier Tribunal "was inadvertently omitted" when the 2009 Order was made, which seems odd but might perhaps explain why paragraph (a) was not repealed. In any event, it is clear that the effect of the amendment of section 63(8) was unintended.

The Revenue and Customs Appeals Order 2012

45. The 2012 Order therefore amends section 63(8) of the 2002 Act so that it again applies to appeals to the First-tier Tribunal in Great Britain. However, the reference to the Upper Tribunal has not been restored. It seems plain from the record of the debate on the 2012 Order in the Second Delegation Committee of the House of Commons on 21 February 2012, that the Minister was concerned principally, and perhaps only, about the application of section 54 of the 1970 Act to tax credit appeals (although it was claimed at the same time that HMRC could settle appeals without the Order).

46. However, no further regulations have been made under section 63(8) since the 2012 Order came into force on 1 March 2012. It may have been thought that the

Order would have the effect of reviving the 2002 Appeals Regulations, insofar as they had lapsed, and therefore also the 2002 Appeals (No.2) Regulations, although that would not be consistent with the understanding that the 2002 Appeals Regulations had applied only in Northern Ireland before they lapsed due to the amendments made to them in 2008. In any event, the 2012 Order had to be retrospective to have the effect of reviving subordinate legislation that had ceased to be valid and nothing on the face of the Order indicates that it is to have such retrospective effect. There are well-established forms of words used when it is intended that subordinate legislation that has not been valid is to be treated as though it has always been valid. It is clear that the Committee considering the Order anticipated that its effect would be the application of section 54 to tax credit appeals in Great Britain but there is nothing to indicate that it thought that that would be achieved without new regulations being made under the power being amended. Moreover, as I have already observed, the amendment does not restore the previous reference to the Upper Tribunal and it is therefore not obvious that it was intended that all the subordinate legislation previously in force should be revived. I conclude that the 2012 Order does not have retrospective effect. Therefore, not only does section 54 still not apply to tax credit cases in Great Britain, but it also remains the position that neither HMRC nor the First-tier Tribunal has the power to extend the time limit in section 39(1) of the 2002 Act insofar as it applies to appeals in Great Britain.

The effect on the current appeal

47. If, as HMRC considers is the position, the last appealable decision in this case was sent to the Appellant on 8 December 2009 and his appeal was not received by HMRC until 15 March 2011, it seems at first sight that the appeal to the First-tier Tribunal must have been out of time and that the present appeal should be dismissed. However, there are two contrary arguments, which are variations of points made by the Appellant.

48. The first argument is that notice of the decision of 8 December 2009 may have been effective only when the Appellant received the notice or a copy of it, which, he claims, was only after the appeal was brought. In the absence of any relevant provision equivalent to regulation 2(b) of the 1999 Regulations, which deems notice of decisions of the Secretary of State to be given when they are sent, it is certainly arguable that section 7 of the Interpretation Act 1978 applies and it is open to a person to prove that a decision given under the 2002 Act has not been received in the ordinary course of post so that time has not started to run. (Regulation 2(b) of the 2002 Appeals (No.2) Regulations did not apply to notices required to be given under the 2002 Act.) However, even if he did not receive the original notice, the Appellant in this case was made well aware of the effect of the decision in the letter of 20 May 2010 and was also informed of a right of appeal and I do not consider that any lack of the "details" of the right of appeal required to be provided by section 23(2) has the effect that that letter does not amount to adequate notice of the decision in this particular case, given that the Appellant did not seek any further details or take any action to appeal for nine months and, as Ms Ward

pointed out, had not made any attempt to appeal against the defective decision notified on 18 August 2008.

49. The second argument is that, as the Appellant puts it, the letter of 16 February 2011 was "at the end of a review process". It seems to me to be arguable that, either by itself or taken with previous letters, that letter amounted to a decision under the Tax Credits (Official Error) Regulations 2003 (SI 2003/692), which were made under section 21 of the 2002 Act. The appeal would be effective as an appeal against such a decision and it may therefore not have been wrong after all to inform the Appellant that he had a right of appeal. The Appellant obviously thought that he was appealing against a decision issued on 16 February 2011 when he lodged his appeal.

50. Regulation 3(1) of the 2003 Regulations permits a decision of a specified type, including a decision under section 19(3) of the 2002 Act, to be revised "if it is incorrect by reason of official error". It is clearly arguable that a refusal to revise a decision because it is considered that there is no official error is a decision "under" the Regulations in respect of which there is a right of appeal under section 38.

51. There are a number of potential official errors that HMRC might have identified in the decision of 8 December 2009 while dealing with the correspondence from the Appellant. They may not have been raised by the Appellant but, insofar as they are points of law arising on matters known to HMRC, that may be immaterial notwithstanding regulation 3(2). The Appellant was plainly arguing that the decision of 8 December 2009 was wrong and HMRC equally plainly did not regard there to have been any fundamental defect in that decision.

52. The Appellant argued before me that the decision of 8 December 2009 was invalid because it confirmed the admittedly defective decision made on 12 August 2008. However, that is a matter of language rather than substance. Rather than confirming the decision of 12 August 2008, it replaced it with a decision to the same effect. It was at least intended that the defect in the 2012 decision – that it had been made without an enquiry under section 19 being initiated – would not be repeated.

53. On the other hand, it is arguable that that error was repeated. First there is the element of doubt as to whether notice initiating the enquiry was ever sent to the Appellant, although it was sent to his wife who was by then at a different address. If the enquiry was not properly initiated before the deadline, the subsequent decision was arguably invalid and the decision of 28 July 2008 stands. In any event, it is arguable that there was an official error if, as appears to have been the case, the Appellant was given no opportunity to contribute to the enquiry (which might itself be an indication that the need to give the Appellant notice of the initiation of the enquiry was overlooked). If failing to communicate with the Appellant was an official error, the decision of 8 December 2009 could have been revised under regulation 3(1) of the 2003 Regulations in the light of any facts that HMRC failed to find in the course of the enquiry as a result of the failure to communicate with the Appellant and HMRC should have considered afresh the merits of the Appellant's case.

54. More radically, it is arguable that there was really no overpayment at all, at least in the year 2007-2008 and before 12 May 2008 in the subsequent year. I had originally assumed, because the disclosed documents appeared to be addressed only to the Appellant and not also his wife and that it was said that half the overpayment had been recovered, that the issue in this case was merely whether the Appellant and his wife jointly were entitled to the tax credits or only his wife was entitled to them. However, the documents provided to me just before the hearing – the implications of which I confess I did not fully grasp until afterwards – show that it is HMRC's case that neither of them is entitled to the tax credits from 1 January 2008 to 11 May 2008. Moreover, HMRC is seeking to recover the alleged overpayment from the two of them notwithstanding that, on the facts as HMRC has always understood them to be, the Appellant's wife would have been awarded exactly the same amount of tax credits had she answered the security question when she telephoned the helpline on 1 February 2008 as was paid under the joint award. It may be a reasonable inference to be drawn from the Appellant's wife's failure to take any action between that abortive telephone call and her later one on 12 August 2008 that she was satisfied that financial arrangements between her husband and herself were such that she had the benefit of the award of tax credits and, indeed, it appears that they continued to run a joint bank account and that it was into that joint account that the tax credits were paid. It seems absurd that HMRC should have what is in effect a windfall of about £1,000 at the expense of the Appellant and his wife in these circumstances.

55. It is therefore arguably necessary, where a retrospective decision to terminate a joint award must be made because they have separated, to treat both members of the couple as having made claims in their own right at the date of termination of the joint award so that continuity of entitlement by at least one of them is not unreasonably lost. If HMRC do not do so, it is arguably necessary to treat an appeal relating to such a termination decision as an appeal also in respect of a refusal to award tax credits to the members of the former couple individually.

56. Even if HMRC does not accept that analysis, there seems to me to be a powerful argument for it ceasing action to recover the overpayment from the Appellant and his wife in the present case and for repaying to his wife what has already been recovered from her, save to the extent necessary to prevent there being double payment for the period from 12 May 2008 to 11 August 2008.

Conclusion

57. I am satisfied that the First-tier Tribunal had no power to extend the time for appealing in this case but I am not currently satisfied that an appealable decision was not made on 16 February 2011, in which case the appeal to the First-tier Tribunal was in time.

58. I therefore dismiss this appeal insofar as the appeal before the First-tier Tribunal may have been an appeal against the decision of HMRC of which notice was sent to the Appellant and his wife on 8 December 2009 and I adjourn the

proceedings insofar as the appeal before the First-tier Tribunal may have been an appeal against a decision notified to the Appellant on 15 February 2011.

59. I will issue directions for further argument on the points raised in paragraphs 52 to 54 above and for the addition of the Appellant's wife as a party to these proceedings.

60. However, if HMRC were to decide that it would not recover the overpayment alleged to have arisen in both 2007-2008 and 2008-2009 and would repay to the Appellant's wife anything already recovered from her (save as may be necessary to prevent there being double payment from 12 May 2008), the Appellant and his wife would have achieved practical success and this appeal, which ultimately turns on its own particular facts, could be withdrawn.

Mark Rowland
26 April 2013