DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Manchester First-tier Tribunal dated August 16, 2016 under file reference SC946/16/01493 does not involve any error of law. The decision of the First-tier Tribunal stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The issue in this appeal before the Upper Tribunal

1. At the heart of this appeal is an apparently simple question. In principle, if a tax credits claimant is unaware that her childminder no longer has appropriate OFSTED registration, is the claimant legally liable to repay any overpayment of tax credits relating to her childcare costs?

2. The answer, in a word, is yes.

The background to this appeal

3. The essential facts of this case are not in dispute. The Appellant was originally awarded tax credits of £19,099.49 for the 2015/16 tax year. This included a sum of £8,736 in relation to the childcare element of working tax credit (WTC). This component of the award was made on the basis that she was paying £240 a week in childcare charges to an approved childcare provider. The Appellant had been using the same childminder for some years.

4. On February 19, 2016 the Appellant, out of the blue, received a telephone call from Concentrix on behalf of Her Majesty's Revenue and Customs (HMRC). Concentrix advised her that her claim was being investigated as it appeared her childminder no longer had OFSTED registration. The Appellant naturally immediately contacted the childminder, who advised her OFSTED had stopped her registration due to an "error" and it would be reinstated.

5. However, HMRC then made a series of decisions on February 19, 22 and 24, 2016, the cumulative effect of which was to amend the Appellant's current year (2015/16) tax credits award so as to remove the WTC childcare element and raise a substantial overpayment. According to the Appellant's request for a mandatory reconsideration, the total overpayment levied was £8,110.12 (how this figure relates to that in paragraph 3 above is not relevant for present purposes).

6. The Appellant subsequently appealed, explaining that she was unaware that her childminder's OFSTED registration had ceased. She argued that she could not inform HMRC of something about which she had no knowledge, and so was not responsible for the overpayment.

7. There is no right of appeal to the First-tier Tribunal against an HMRC decision about a recoverable overpayment (see Tax Credits Act 2002, sections 28, 29 and 38(1)). The Appellant's appeal was therefore very properly treated as an appeal against the underlying entitlement decision.

The First-tier Tribunal's decision

8. The First-tier Tribunal, having heard evidence from both the Appellant and the childminder, dismissed the appeal at a hearing on August 16, 2016. The Tribunal helpfully summarised its reasons on the decision notice as follows:

> "Although the tribunal did understand the Appellant's frustration, the Regulations regarding childcare costs are explicit in relation to the fact that payment of those costs can only be made where the child care provider is registered with OFSTED. The tribunal accepted that [the Appellant] had checked this orally with her childminder but the fact remained the childcare provider was not registered. The responsibility for any parent is set out in correspondence from HMRC. The tribunal accepted that [the Appellant] had used this childcare provider for some time, since 2009, and that she had accepted her word regarding registration. However, the responsibility lay with the Appellant to check with OFSTED regarding the registration and this required more than simply to accept the childcare provider's oral confirmation."

9. The First-tier Tribunal later issued a short statement of reasons. The key passage read as follows, in the concluding paragraph:

> "7. The Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 state that the child care must be registered or approved and that means the child care provider must be 'registered' by OFSTED. At the time in question [the childminder] was not registered. It must therefore be concluded that these childcare charges incurred by [the Appellant] were not part of her childcare element of tax credits as her provider was not so registered and the appeal must fail. Recovery of any overpayment is outside the scope of this appeal."

The appeal to the Upper Tribunal

10. The Appellant's grounds of appeal to the Upper Tribunal were summed up as follows by her CAB representative (who was not acting for her at the time of the hearing below):

> "It is not reasonable therefore that the claimant should disclose a change of circumstances that she is not aware of, even if she had seen a registration document which was later revoked; if she was not advised of that fact she could not be expected to disclose something that she had not been made aware of."

11. A District Tribunal Judge gave permission to appeal.

12. Mr M P Alty, for HMRC, has provided a full submission resisting the appeal. He argues there is no material error of law in the First-tier Tribunal's decision (a mistake by the Tribunal as to the date of the operative HMRC decision, doubtless caused itself by an error in the HMRC response to the appeal, not being one that affected the outcome of the appeal in any way).

13. The Appellant's CAB representative argues in reply that the Appellant (a) had complied with her responsibilities as a recipient of tax credits, (b) had been led to believe by the childminder that OFSTED registration was still in place, and (c) could not disclose a matter (the childminder's de-registration) about which she was unaware.

The Upper Tribunal's analysis

14. I must start by recognising that the Appellant found herself in an extremely difficult position. The action by Concentrix – which was on the face of it entirely within

the law – resulted in the Appellant facing an immediate and acute financial and childcare crisis, seriously affecting both her health and her work. The problem, however, is that her appeal to the First-tier Tribunal was bound to fail, for two stark reasons.

15. The first reason is that under the tax credits regime issues of fault do not come into play when considering legal liability for overpayments. In other words, arguments that the claimant did not misrepresent anything or did not fail to disclose a change in circumstances because she was unaware of such a change have no purchase. Those types of arguments may have some traction in relation to most DWP social security benefits other than universal credit (see Social Security Administration Act 1992, section 71), but they are irrelevant in the HMRC tax credits context (see Tax Credits Act 2002, sections 28 and 29). In short, if tax credits have been paid but it later transpires there is no entitlement to tax credits, there is an overpayment, and in principle any overpayment is recoverable. That explains the logic behind the absence of appeal rights (see paragraph 7 above). If there are mitigating circumstances, they can at best go to the (non-appealable) discretionary issue of whether HMRC should recover the overpayment (on which see HMRC Code of Practice 26), and not the prior question of legal liability for the overpayment. It follows that the CAB representative's arguments need to be addressed to HMRC when it considers whether to effect recovery of the overpayment in this case.

16. The second reason is that, as the First-tier Tribunal correctly identified, entitlement to the childcare element of tax credits depends on the childcare being provided in prescribed circumstances by a person of a prescribed description: see regulation 14(2) of the Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002/ 2005). The details are contained in the Tax Credits (Approval of Child Care Providers) Scheme 2005 (SI 2005/93). Article 6(3) of that Scheme provides that "the approval body may withdraw an approval if satisfied that the approval criteria are no longer met in relation to that person". Article 6(2) then stipulates that "A person who has been given approval under paragraph (1) shall cease to be so approved if that approval is withdrawn by the approval body". In the present case it appears the childminder was subject to compliance action in 2013/14. OFSTED cancelled the registration in September 2014, well before the start of the 2015/16 tax year which was in issue on this appeal. The rights and wrongs of the dispute between OFSTED and the childminder are simply not directly relevant to the tax credits entitlement issue which the First-tier Tribunal had to decide.

17. It follows I have no option but to dismiss the appeal.

Conclusion

18. For these reasons, I conclude the decision of the First-tier Tribunal does not involve any material error of law. I must therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

19. I appreciate this outcome will be a major disappointment to the Appellant, but reiterate the constraints on the tax credits appeals process as provided for by Parliament.

Signed on the original
on 17 March 2017

Nicholas Wikeley
Judge of the Upper Tribunal