[2017] AACR 23

(AR v Secretary of State for Work and Pensions and LR (CSM)
[2017] UKUT 69 (AAC)

Judge Wikeley **CCS/1431/2016**
13 February 2017

Child support – assessment of income – treatment of expenses received from employer

In 2014 the mother, the parent with care, applied for child support maintenance to the Child Maintenance Service (CMS) which initially assessed the father's liability as £133.11 a week and later, following a review, as £207.34. The father appealed to the First-tier Tribunal (F-tT), arguing that the CMS had wrongly assessed his liability on review by using his income for 2013/14 (not 2014/15) and by failing to deduct expenses he incurred during the course of his employment. The F-tT rejected his appeal, holding that the CMS had been bound to use the figures provided by Her Majesty's Revenue and Customs (HMRC). The Secretary of State eventually supported the appeal but the judge decided to set out his reasoning, as the failure to take properly into account work-related expenses may also be a problem for other non-resident parents.

Held, allowing the appeal, that:

1. HMRC had details of the father's income for 2014/15, the latest available tax year, when it received CMS's request and should have provided that information (not the 2013/14 figures) and the F-tT had not been "bound" to accept the figures erroneously supplied by HMRC: *SB v Secretary of State for Work and Pensions (CSM)* [2016] UKUT 84 (AAC) followed (paragraph 16);

2. where a person received a sum of money on account of expenses which could be drawn on as they arose then this would be income charged to tax within the meaning of regulation 36, and the figure the CMS would use to calculate maintenance would include this sum. However, the father had incurred expenses for which he had been reimbursed, and therefore had not actually received any income or any sort of benefit in kind, and in these situations the expenses would not be "income on which the non-resident parent was charged to tax" within regulation 36. This construction was consistent with the policy intention of the legislation and the principles established in previous case law: *Owen v Pook (Inspector of Taxes)* [1970] AC 244 (paragraphs 29, 32, 34 and 40).

The judge set aside the decision of the F-tT and re-made the decision, upholding the father's appeal and remitting the case to the Secretary of State so that a fresh determination could be made in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the appellant ("the father").

The decision of the Norwich First-tier Tribunal dated 20 November 2015 under file reference SC142/15/00855 involves an error on a point of law. The Tribunal's decision is accordingly set aside.

The Upper Tribunal is in a position to re-make the decision on the appeal by the father against the decision of the Secretary of State dated 11 May 2015. The decision that the First-tier Tribunal should have made is as follows. The Upper Tribunal re-makes the decision accordingly.

> *(1) The father's appeal against the Secretary of State's decision dated 11 May 2015 is allowed. The Secretary of State's decision of that date is set aside and the case is remitted to the Secretary of State for fresh determination. The Secretary of State is directed to make a fresh request for a HMRC figure (within the meaning of regulation 36(1) of the Child Support (Maintenance Calculation) Regulations 2012). Unless regulation 34(2) of those*

Regulations requires the father's current income to be used, the Secretary of State is directed to determine the father's "historic income" and so determine his child support liability on the basis of that HMRC figure for 2014/15. The effective date for that calculation is 9 May 2015.

(2) in making that recalculation, where the father has incurred expenses for which he has been reimbursed after the event, so in effect he has not actually received any income or any sort of benefit in kind, any such payments of expenses are not "income on which the non-resident parent was charged to tax" (ie within regulation 36(1) of the CSMC Regulations 2012).

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The legal issues raised by this appeal

1. This appeal to the Upper Tribunal against the decision of the First-tier Tribunal (the F-tT) raises two discrete legal issues.

2. The first ("Issue A") is whether the father's income tax return for the correct tax year had been used when calculating his child support liability in May 2015; see [14]–[18] below.

3. The second ("Issue B") is whether the father's gross income for the purposes of the child support legislation has been correctly calculated, in particular as regards the treatment of payments he had received from his employer for certain work-related expenses see paragraphs [19]–[43] below.

The parties to this appeal

4. The appellant is the non-resident parent ("the father"). The first respondent is the Secretary of State for Work and Pensions (whose operational arm is now known as the Child Maintenance Service, or the CMS). The second respondent is the parent with care ("the mother"). The appellant and second respondent are the separated parents of two children, both of whom live with their mother.

The proceedings before the Upper Tribunal

5. I held an oral hearing of this appeal in London on 24 November 2016. The father attended along with Mr M Delph, his accountant, who has acted as his representative throughout these proceedings. The Secretary of State was represented at the hearing by Ms Z Leventhal of counsel. A written submission had been made on behalf of the Secretary of State in advance of the hearing by Mrs Beverley Massey ("the Secretary of State's first response"). A further written submission ("the Secretary of State's second response"), and involving a significant change of position (ie a U-turn) on the part of the first respondent, was made after the hearing by the Government Legal Department and by way of a response to further directions which I had issued after the hearing.

6. The mother did not attend the hearing, but she was not required to do so. She also did not attend the hearing before the First-tier Tribunal, perhaps understandably seeing this appeal as essentially a dispute between the father and the CMS. I have read her account of why she felt she had no option but to make a formal application to the CMS for child maintenance. She has not made any representations on the legal issues raised by this appeal. While I understand her position, the matters she raises cannot directly affect the matters I have to decide.

The background to the appeal

7. The mother applied for child support maintenance in May 2014. In the same month the CMS made a maintenance calculation of £133.11 a week. A year later, on 9 May 2015 and in a decision formally issued on 11 May 2015, the CMS carried out a review of that assessment. This time the father's liability was assessed to be £207.34 a week. The father applied for a mandatory reconsideration and then appealed.

8. Mr Delph's letter of appeal on behalf of the father (letter dated 10 May 2015, page 30 of the file) concisely summed up his client's position on both Issues A and B:

> "You are working with totally wrong information – 2013/14 earnings information (£71,542) which is at least a year old; and having added expenses and benefits (£4,645) – but having made no deduction for expenses incurred by him wholly and necessarily incurred in his employment (same £4,645 figure)."

The First-tier Tribunal's decision now under appeal

9. The F-tT held an oral hearing on 20 November 2015, attended by Mr Delph and the father along with a CMS presenting officer. The F-tT dismissed the appeal and confirmed the CMS's May 2015 maintenance calculation. As regards Issue A, the F-tT's decision notice (page 77) recorded that "it is bound by the figures provided by HM Revenue and Customs", while at the same time recognising that there was some apparent inconsistency between regulations 4 and 36 of the Child Support (Maintenance Calculations) Regulations 2012 (SI 2012/2677) ("the CSMC Regulations 2012").

10. The F-tT subsequently produced a full statement of reasons (pages 83–88), which elaborated upon that conclusion. In summary, the F-tT decided that, as regards Issue A, because the CMS had received the father's 2013/14 income data from Her Majesty's Revenue and Customs (HMRC) in May 2015 it was bound to use those figures. This was the case even though in fact the father's tax assessment for the subsequent 2014/15 year had already been finalised by HMRC (but in an apparent error not forwarded by HMRC to the CMS). In those circumstances the F-tT decided it did not need to address Issue B.

11. The F-tT subsequently gave the father permission to appeal to the Upper Tribunal, noting in passing that "there appears to be a tension between Regulations 35 & 36 of the Regulations and Regulation 4".

The Secretary of State changes his mind on Issue B

12. Mrs Massey, in the Secretary of State's first response, supported the appeal, but in one respect only. She argued that the F-tT had erred in law on Issue A but not on Issue B. Ms Leventhal, acting on instructions, maintained that position at the oral hearing. However, after the

oral hearing, and in response to my further directions, the Government Legal Department filed the Secretary of State's second response, abandoning by way of a concession his previous position with regard to Issue B. The Secretary of State now supported the father's appeal on both Issues A and B.

13. In those circumstances I could simply issue a very short decision allowing the father's appeal and setting aside the F-tT's decision, given that the father is content with that course of action and the mother has not put forward any arguments to counter those now advanced by the Secretary of State. However, I consider that it would be helpful to set out in some detail my reasoning, particularly with regard to Issue B. I say that for two reasons. First, the father has raised the same issue (Issue B) on a further appeal against a subsequent CMS annual review calculation. Second, and for reasons that will become clear, I cannot believe that the father's position is in any way unique. On the contrary, the matters raised by Issue B will be common to many other non-resident parents who receive reimbursement from their employers for what might be fairly described as out-of-pocket work-related expenses.

Issue A: the "latest available tax year"

14. Regulation 4 of the CSMC Regulations 2012 provides as follows:

> "**Meaning of 'latest available tax year'**
>
> **4.** – (1) In these Regulations 'latest available tax year' means the tax year which, on the date on which the Secretary of State requests information from HMRC for the purposes of regulation 35 (historic income) or regulation 69 (non-resident parent with unearned income), is the most recent relevant tax year for which HMRC have received the information required to be provided in relation to the non-resident parent under the PAYE Regulations or in a self-assessment return.
>
> (2) In this regulation a 'relevant tax year' is any one of the 6 tax years immediately preceding the date of the request for information referred to in paragraph (1)."

15. Regulation 36(1) and (2) of the CSMC Regulations 2012 is also relevant ("ITEPA", of course, is a reference to the Income Tax (Earnings and Pensions) Act 2003; see the definition in regulation 2):

> "**Historic income – the HMRC figure**
>
> **36.** – (1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year –
>
> (a) under Part 2 of ITEPA (employment income);
>
> (b) under Part 9 of ITEPA (pension income);
>
> (c) under Part 10 of ITEPA (social security income) but only in so far as that income comprises the following taxable UK benefits listed in Table A in Chapter 3 of that Part –

(i) incapacity benefit;

(ii) contributory employment and support allowance;

(iii) jobseeker's allowance; and

(iv) income support; and

(d) under Part 2 of ITTOIA (trading income).

(2) The amount identified as income for the purposes of paragraph (1)(a) is to be taken –

(a) after any deduction for relievable pension contributions made by the non-resident parent's employer in accordance with net pay arrangements; and

(b) before any deductions under Part 5 of ITEPA (deductions allowed from earnings)."

16. It is not in dispute that in May 2015, when CMS made its request to the tax authorities, HMRC had in its possession income information for the father for the 2014/15 tax year, namely the latest available tax year, and should have provided that information to the CMS (rather than the 2013/14 data). In the light of the decision by Upper Tribunal Judge Mitchell in *SB v Secretary of State for Work and Pensions (CSM)* [2016] UKUT 84 (AAC), the Secretary of State accepts that in the present appeal the F-tT should have directed the CMS to request the data for the 2014/15 tax year from HMRC and then accordingly recalculate and revise the decision notified on 11 May 2015. Put another way, the F-tT was not "bound" to accept the figures erroneously supplied by HMRC, and so it had erred in law in so proceeding. Mr Delph, for the father, agrees with that analysis, as do I.

17. It follows that the father's appeal succeeds on Issue A. As a result the F-tT's decision must be set aside. Ms Leventhal invited me to adopt the same course of action thereafter as Upper Tribunal Judge Mitchell took in *SB v Secretary of State for Work and Pensions (CSM)*, rather than remit the appeal to a new tribunal for a fresh hearing. I agree that the approach adopted in *SB v SSWP (CSM)* is also appropriate here.

18. I therefore re-make the F-tT's decision as follows. The father's appeal against the Secretary of State's decision dated 11 May 2015 is allowed. I set aside the Secretary of State's decision of that date and remit the case to the Secretary of State for fresh determination. I also direct the Secretary of State to make a fresh request for a HMRC figure (within the meaning of regulation 36(1) of the CSMC Regulations 2012). Unless regulation 34(2) of those Regulations requires the father's current income to be used, I direct the Secretary of State to determine the father's "historic income" and determine his child support liability on the basis of that HMRC figure for 2014/15. The effective date for that calculation is 9 May 2015.

Issue B: the father's employment expenses

Introduction

19. As this appeal has unfolded before the Upper Tribunal, Issue B became the primary focus of contention. By way of background, the first part of the father's HMRC income tax assessment notice for the 2013/14 tax year (page 32) read as follows:

"**Your income for Tax Year 2013-14**		**Income £**
	PAYE income	71542
	Benefits in kind	4645
	Totals	**76187**
Deductions from income		
Job expenses	4645	
***Less* Total deductions**		**4645**
Your income after taking away deductions		**71542**"

20. Assuming that the 2013/14 data were the correct figures to be used – and, in any event. it was not in dispute that the same issue would arise on any subsequent year – the ultimate question was which figure should be used for the father's gross income for the purposes of the relevant child support maintenance calculation. In a sentence, was it £76,187 (including the £4,645 variously described in the HMRC notice of assessment as "benefits in kind" or "job expenses") or £71,542 (excluding that figure)?

The parties' submissions on Issue B

21. The father's fundamental argument on Issue B is simply put. Mr Delph's contention was that the father was only "charged to tax" on £71,542; he was not charged to tax on money which he had spent on his employer's business for which he was then reimbursed (£4,645). The figure of £4,645, he argued, was not the father's income and so had no place also in the child support calculation. As Mr Delph put it with disarming simplicity in his written submission, "It is our view that the regulations provide only for [the father] to be assessed on his income which was charged to tax. His expenses were not charged to tax. They therefore should be excluded from his income" (page 221 at paragraph [29]).

22. As noted above, the Secretary of State's position on Issue B has changed in the course of these proceedings. His original argument, as set out in the Secretary of State's first submission, was that the effect of regulation 36(2) of the CSMC Regulations 2012 was that "the amount of income to be taken into account in the child maintenance calculation is the total of all income received by the NRP that is notified to HMRC and that only the amount of relievable pension contributions are deducted from the sum of that income" (page 202 at paragraph [24]). In short, work-related expenses were a deduction under Part 5 of ITEPA but the father's income had to be taken as it stood before any such deduction was made (see regulation 36(2)(b)).

23. In support of that argument Mrs Massey for the Secretary of State relied upon the learned commentary by Judge Jacobs in *Child Support: The Legislation* (2015/16, 12th edition, at page 741). The relevant part to the annotation to regulation 36 reads as follows: "This regulation governs the relevant income that is taken into account. Broadly, the tax calculation is used, except for pension payments and carry forward relief. There is no scope to use any other evidence of gross income, however reliable it may be."

24. As also already noted, Ms Leventhal maintained that same position (on instructions) at the hearing. In doing so, she sought to rely on the observations of Judge Jacobs in *FQ v Secretary of State for Work and Pensions and MM (CSM)* [2016] UKUT 446 (AAC) at [12] (a decision to which I return further below). There Judge Jacobs held that the personal allowance is not deducted when calculating the amount on which a person is charged to tax. Ms Leventhal submitted that the same argument applied by analogy to the figure for expenses in the present case.

25. Faced with this argument at the hearing, Mr Delph gave every appearance of a man who had been banging his head against a brick wall in his various dealings with the CMS but who was beginning to despair of making any real progress, notwithstanding his confidence in the correctness of his arguments. In an attempt to gain a better understanding of the underlying accountancy issues, I therefore asked Mr Delph to explain the origin of the figure of £4,645 and why that figure was labelled on the HMRC notice of assessment both as "benefits in kind" and "job expenses".

26. Mr Delph helpfully explained that the total figure was derived from the information entered on that year's P11D form as returned to HMRC. He added that the P11D, entitled "Expenses and benefits", was a form that the employer had to return to HMRC by 6 July each year for any director or employee earning more than £8,500 in the immediately preceding tax year. The P11D was designed to pick up any employer payments that might potentially be taxable in the hands of the employee; accordingly the employer had to include (amongst other matters) details of both work-related expenses (eg reimbursement for a train fare incurred on the employer's business) and benefits in kind (eg gym membership or discounted health insurance). Mr Delph explained that in the father's case, and regardless of the labels used, the entries totalling £4,645 all fell into the former category (this was not disputed by the Secretary of State). In the light of the information contained in the PD11 returns, HMRC then adjusted the relevant employee's income tax coding.

27. I observe therefore that in this particular case the HMRC notice of assessment simply included an aggregate figure for all payments itemised in the P11D return without distinguishing between (i) payments for out-of-pocket work-related expenses and (ii) payments which constituted benefits in kind. The HMRC notice also used the rubric "benefits in kind" which, on the face of it, was a misleading description. At first blush and as a matter of first principle, and without reference to any statutory authority, there would appear to be a qualitative difference between those two types of payment. One can envisage all sorts of policy reasons why payments that amount to fringe benefits or benefits in kind should properly count as an employee's income for both tax and child support purposes. Where, however, the payment is a straight reimbursement for a genuine work-related expense which would qualify under section 336 of ITEPA (eg the cost of a batch of printer labels), the same arguments do not necessarily hold good. With that (admittedly rather crude) distinction in mind, I issued some further Observations on the appeal after the oral hearing, requesting the Secretary of State to address a series of supplementary questions.

28. Those Observations prompted the volte-face by the Secretary of State referred to above. The Secretary of State's second submission made the following three points.

29. First, the Secretary of State conceded as follows:

> "For the avoidance of doubt, the Secretary of State's position is that where a person receives a sum of money on account of expenses which they can deduct from as the expenses arise, this would be income charged to tax within the meaning of Regulation 36 of the Regulations, and the figure the Secretary of State would use to calculate maintenance would include this figure. However, the Secretary of State now concedes that in situations such as that of the Appellant, where the individual incurred expenses for which he has been reimbursed, so in effect he had not actually received any income or any sort of benefit in kind, these expenses would not be 'income on which the non-resident parent was charged to tax'" (ie within regulation 36(1) of the CSMC Regulations 2012).

30. Second, the Secretary of State no longer sought to rely on the argument by analogy from the decision of Judge Jacobs in *FQ v Secretary of State for Work and Pensions and MM (CSM)*.

31. Third, the Secretary of State confirmed that the policy intention throughout had been to include fringe benefits (ie benefits in kind) in the assessment of a non-resident parent's gross income for child support purposes but not to include payments that fell within section 336 of ITEPA.

The Upper Tribunal's analysis

32. I consider that the Secretary of State was right to make the concession noted in [29] above for the following two principal reasons.

33. First, the Secretary of State's original position on Issue B and as had been set out in his first submission failed to have proper regard to both the full drafting and wider context of regulation 36 of the CSMC Regulations 2012. The terms of regulation 36(1) and (2) have been set out above. For completeness, the full text of regulation 36 reads as follows:

> "**Historic income – the HMRC figure**
>
> **36.** – (1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year –
>
> (a) under Part 2 of ITEPA (employment income);
>
> (b) under Part 9 of ITEPA (pension income);
>
> (c) under Part 10 of ITEPA (social security income) but only in so far as that income comprises the following taxable UK benefits listed in Table A in Chapter 3 of that Part –
>
> (i) incapacity benefit;
>
> (ii) contributory employment and support allowance;
>
> (iii) jobseeker's allowance; and
>
> (iv) income support; and

(d) under Part 2 of ITTOIA (trading income).

(2) The amount identified as income for the purposes of paragraph (1)(a) is to be taken –

(a) after any deduction for relievable pension contributions made by the non-resident parent's employer in accordance with net pay arrangements; and

(b) before any deductions under Part 5 of ITEPA (deductions allowed from earnings).

(3) The amount identified as income for the purposes of paragraph (1)(b) is not to include a UK social security pension.

(4) The amount identified as income for the purposes of paragraph (1)(d) is to be taken after deduction of any relief under section 83 of the Income Tax Act 2007 (carry forward trade loss relief against trade profits).

(5) Where, for the latest available tax year, HMRC has both information provided in a self-assessment return and information provided under the PAYE Regulations, the amount identified for the purposes of paragraph (1) is to be taken from the former."

34. It is a fundamental canon of statutory interpretation that a legislative provision must be read in its statutory context rather than in splendid isolation. The problem with the Secretary of State's first submission in these proceedings was that it focussed unduly on regulation 36(2) and failed to construe that provision in the context of regulation 36 as a whole (and especially regulation 36(1), given that paragraphs (3) to (5) are further explanatory provisions which do not bear on the issue in dispute). Regulation 36(2) certainly provides that a non-resident parent's employment income under Part 2 of ITEPA is to be taken as it stands after deductions for relievable pension contributions (sub-paragraph (a)) but before any deductions under Part 5 of ITEPA (sub-paragraph (b)). Part 5 includes the general rule for the deduction of employees' expenses, namely that a deduction is allowed where the employee pays a sum and "the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment" (section 336(1)). Part 5 further provides that, for the purposes of Chapter 2 governing deductions for an employee's expenses, a person may be regarded as paying an amount despite its reimbursement (section 334(1)). All this might suggest at first sight that for child support purposes any deduction for allowable expenses under section 336 is disregarded when calculating the non-resident parent's income.

35. However, this does not tell the whole story. In particular, it fails to have regard to the fact that regulation 36(2) is in effect a definition provision which is subsidiary to regulation 36(1). Regulation 36(1) itself is not concerned exclusively with the non-resident parent's employment income under Part 2 of ITEPA. Rather, it is concerned with "the sum of the income on which the non-resident parent was *charged to tax* for the latest available tax year" (emphasis added) as aggregated from a range of potential sources, including "the income on which the non-resident parent was charged to tax ... under Part 2 of ITEPA (employment income)". So when the opening words of regulation 36(2) refer to "the amount identified as income for the purposes of paragraph (1)(a)", it must be referring to the relevant type of income that is actually "charged to tax for the latest available tax year".

36. The question then is what is meant by "income … charged to tax". That statutory expression was considered by the Court of Appeal in *R v General Commissioners of Income Tax for Southampton ex parte Singer* [1917] 1 KB 259, but in a rather different context which does not assist for present purposes. Rather more illuminating, as Upper Tribunal Judge Jacobs observed in *FQ v Secretary of State for Work and Pensions and MM (CSM)*, is section 23 of the Income Tax Act 2007. This assists in our understanding what is meant by "charged to tax". The relevant parts of section 23 read as follows:

> "**The calculation of income tax liability**
>
> **23.** – To find the liability of a person ('the taxpayer') to income tax for a tax year, take the following steps.
>
> *Step 1*
>
> Identify the amounts of income on which the taxpayer is charged to income tax for the tax year.
>
> The sum of those amounts is 'total income'.
>
> Each of those amounts is a 'component' of total income.
>
> *Step 2*
>
> Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year.
>
> See section 25 for further provision about the deduction of those reliefs.
>
> The sum of the amounts of the components left after this step is 'net income'.
>
> *Step 3*
>
> Deduct from the amounts of the components left after Step 2 any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act or section 257 or 265 of ICTA (individuals: personal allowance and blind person's allowance).
>
> See section 25 for further provision about the deduction of those allowances.
>
> *[Steps 4-7, which are immaterial for present purposes, are omitted]*
>
> The result is the taxpayer's liability to income tax for the tax year."

37. It will be seen that section 23 of the Income Tax Act 2007 starts with "the amounts of income on which the taxpayer is charged to income tax for the tax year" (*Step 1*) – in other words, the aggregate income figure which is the starting point of regulation 36(1). There is then a series of further *Steps* mandated by section 23 including *Step 3*, which involves deducting the individual's personal allowance (at issue in *FQ v Secretary of State for Work and Pensions and MM (CSM)*). However, there is no *Step* within section 23 which provides for the deduction of the type of expenses that fall within section 336 of ITEPA. Logically that can only be because

section 336 expenses are deducted before arriving at the figure which is "the sum of the *income* on which the non-resident parent *was charged to tax*" at the outset of *Step 1*. This analysis supports the arguments advanced by Mr Delph on behalf of the father.

38. This reading is also consistent with the structure of modern income tax legislation. ITEPA is the statute which "imposes charges to income tax" on "employment income" (section 1(1)(a)), and Part 3 of ITEPA (sections 62–226) "sets out what are earnings and provides for amounts to be treated as earnings" (section 3(1)). The charge to tax on employment income is, in part, "a charge to tax on (a) general earnings" (section 6(1)). As well as actual earnings, "employment income" and "general earnings" both include "any amount treated as earnings" (section 7(2)(b), (3)(b) and (5)). That in turn refers to any amount treated as earnings under the benefits code in Chapters 2 to 11 of Part 3 of ITEPA (see section 7(5)(b)). The benefits code includes expenses payments under Chapter 3 of Part 3 (section 63(1)). Furthermore, although sums paid by way of expenses to an employee are treated as earnings from the employment (section 72(1)), this does not prevent allowable deductions under eg section 336 (section 72(2) and (3)). The first provision in Part 5 of ITEPA is section 327, which states the purpose of Part 5 as being to provide "for deductions that are allowed from the taxable earnings from an employment in a tax year in calculating the net taxable earnings" (section 327(1)). This is a reference back to section 11(1), which provides that "net taxable earnings" are to be arrived at by deducting the total amount of deductions from the total amount of taxable earnings. In addition, section 9(2) declares that in the case of general earnings, "the amount charged [to tax] is the net taxable earnings from an employment in the year". Furthermore, section 9(6) provides as follows:

> "(6) Accordingly, no amount of employment income is charged to tax under this Part for a particular tax year unless –
>
> > (a) in the case of general earnings, they are taxable earnings from an employment in that year;".

39. In a nutshell, revenue law deems payments of expenses to be part of an employee's earnings for income tax purposes, only to deduct allowable expenses before arriving at the amount of earnings which are "charged to tax". While regulation 36(2)(b) stipulates that a non-resident parent's ITEPA Part 2 employment income is to be assessed *before* allowable deductions under Part 5, that individual's historic income as identified by HMRC is the sum of the various income sources which is actually "charged to tax". The expenses payments here were not charged to tax and so did not form part of the father's historic income.

40. The second reason why I accept the concession as contained in the Secretary of State's second submission in these proceedings is that it is consistent with principles that are well established in the older revenue case law. In *Owen v Pook (Inspector of Taxes)* [1970] AC 244 the majority of the House of Lords held that, on the basis that a travelling allowance paid by an employer was a reimbursement for actual expenditure incurred, it was not an emolument of the taxpayer's office or employment and so did not fall to be charged to tax. Lord Pearce, in the majority, concluded his opinion in the following terms (at 259B):

> "The reimbursements of actual expenses are clearly not intended by 'salaries', 'fees', 'wages' or 'profits.' It is contended that they are 'perquisites.' The normal meaning of the word denotes something that benefits a man by going 'into his *own* pocket.' It would be a wholly misleading description of an office to say that it had very large perquisites merely because the holder had to disburse very large sums out of his own pocket and subsequently

> received a reimbursement or partial reimbursement of these sums. If a school teacher takes children out for a school treat, paying for them out of his (or her) own pocket, and is later wholly or partially reimbursed by the school, nobody would describe him (or her) as enjoying a perquisite. In my view, perquisite has a known normal meaning, namely, a personal advantage, which would not apply to a mere reimbursement of necessary disbursements. There is nothing in the section to give it a different meaning. Indeed, the other words of the section confirm the view that some element of personal profit is intended."

41. Lord Pearson dissented as to the outcome of that appeal, holding that the reimbursement or car allowance was a benefit to the taxpayer and a perquisite, profit or emolument of the employment. However, his Lordship also added (at 266X) that:

> "There is a quite different position when the employee incurs an expense in performing the duties of his employment – e.g. making a journey from head office to branch office and back to head office, or buying stamps and stationery for the firm – and has it reimbursed to him. In such a transaction there is no benefit – no profit or gain – to the employee. He does not receive any emolument."

42. Finally, I also observe – although I need not rely on this for the purposes of my decision – that the construction of regulation 36 adopted here is entirely consistent with the policy intention of the legislation, as acknowledged in the Secretary of State's second submission. This can also be seen in the paper issued by the Child Maintenance Enforcement Commission entitled *The Child Support Maintenance Calculation Regulations 2012: A technical consultation on the draft regulations*, which envisaged a non-resident parent's taxable income for the purposes of a child support calculation as including "an employee's *taxable* expenses payments and benefits in kind" (emphasis added, Annex C, page 36, paragraph 13.2).

43. For the avoidance of doubt, I am satisfied that there is nothing in Judge Jacobs's decision in *FQ v Secretary of State and MM* which casts doubt on the above analysis. There is no direct analogy between the reimbursement of legitimate work-related expenses and the role of the personal allowance in the calculation of an individual's income as "charged to tax". Likewise, the decision on this appeal is not inconsistent with Judge Jacobs's *ex cathedra* commentary in the annotated volume of child support legislation. That commentary was expressed in terms of a high level generality and did not deal with the specific issue raised in these proceedings.

The father's further appeal

44. The father has a subsequent appeal against a later child support assessment, which has sensibly been adjourned by the First-tier Tribunal pending the outcome of these proceedings. That later appeal is not before me now. However, the legal principles as set out in this decision are binding on both the Secretary of State and the First-tier Tribunal in any further decisions they make as to the father's child support liabilities going forward.

A final observation

45. This decision has necessarily been concerned with the legal issues arising on this appeal. The actual mechanics of the process by which the CMS requests historic income information from HMRC has not been considered. However, that process may need to be revisited to ensure

that CMS is provided with the correct information as regards the requirements of regulation 36(1).

Conclusion

46. For the reasons above I conclude that the F-tT's decision involves an error of law and so the father's appeal to the Upper Tribunal is allowed (Tribunals, Courts and Enforcement Act 2007, section 11). The decision of the F-tT is therefore set aside and re-made in the terms as set out above at the head of these reasons.