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 Leeds First-tier Tribunal dated 12 December 2017 under file reference SC007/17/01377 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

Introduction

1. The practical question in issue in this appeal is the date from which the Appellant's claim for tax credits should start. Should it be 24 July 2014 or 9 January 2017?

2. The Appellant's case is that his tax credits claim should have been backdated to 24 July 2014, being the date on which he claimed asylum in the United Kingdom.

3. Her Majesty's Revenue & Customs (HMRC)'s case is that the Appellant's entitlement starts from 9 January 2017, being the date one month before his claim form for tax credits was received. The difference between that date and the date in the previous paragraph means that there is obviously a considerable sum of money at stake. However, that is not a consideration which can affect the proper interpretation of the relevant legislation.

4. The First-tier Tribunal (the FTT) disagreed with the Appellant and confirmed the decision taken by HMRC. The Appellant has since appealed to the Upper Tribunal, following a grant of permission to appeal by Upper Tribunal Judge Markus QC. The case has now been transferred to me for decision.

The relevant law

5. The general rule is that where a claim for tax credits is made in the course of a tax year, then the award begins on the date that claim is made: see Tax Credits Act 2002, section 5(2). However, if the claimant would have been entitled at the earlier date, a claim can be treated as having been made up to 31 days earlier: regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002 (SI 2002/2014; 'the 2002 Regulations'), sometimes referred to as the 'one-month backdating rule'. On the basis that the Appellant made his tax credits claim on 9 February 2017, this rule supports HMRC's original decision (and that of the FTT on appeal).

6. However, there is a special rule for refugees, set out in regulation 3(4)-(8) of the Tax Credits (Immigration) Regulations 2003 (SI 2003/653; 'the 2003 Regulations'):

> "(4) Where a person has submitted a claim for asylum as a refugee and in consequence is a person subject to immigration control, in the first instance he is not entitled to tax credits, subject to paragraphs (5) to (9).
> (5) If that person—
> (a) is notified that he has been recorded by the Secretary of State as a refugee, and
> (b) claims tax credit within one month of receiving that notification,
> paragraphs (6) to (9) and regulation 4 shall apply to him.
> (6) He shall be treated as having claimed tax credits—
> (a) on the date when he submitted his claim for asylum, and
> (b) on every 6th April (if any) intervening between the date in sub-paragraph (a) and the date of the claim referred to in paragraph (5)(b),
> rather than on the date on which he makes the claim referred to in paragraph (5)(b).
> (7) Regulations 7, 7A and 8 of the Tax Credits (Claims and Notifications) Regulations 2002 shall not apply to claims treated as made by virtue of paragraph (6).
> (8) He shall have his claims for tax credits determined as if he had been recorded as a refugee on the date when he submitted his claim for asylum."

7. The reference in regulation 3(5)(b) of the 2003 Regulations to claiming a "tax credit within one month of receiving that notification" previously used to refer to a period of 3 months, not 1 month, but the time limit was radically shortened by an amendment to the law made in April 2012: see regulation 7 of the Tax Credits (Miscellaneous Amendments) Regulations 2012 (SI 2012/848).

8. The Appellant claimed asylum on 24 July 2014. He was not issued with refugee status until 25 November 2016. He promptly telephoned HMRC's tax credits office on 1 December 2016. If that telephone call was a claim for tax credits, then he was entitled to have his tax credits award backdated to the actual date he first claimed asylum, as that call was made within one month of notification from the Secretary of State about his refugee status – see regulation 3(5)(b) of the 2003 Regulations. What constitutes a 'claim' is governed by regulation 5 of the 2002 Regulations, discussed below.

The First-tier Tribunal's decision

9. In summary the FTT decided that (i) the date of claim was 9 February 2017; (ii) so the tax credits award could only be backdated to 9 January 2017; and (iii) there was no discretion vested in the FTT to extend that one-month time limit. The FTT accordingly dismissed the Appellant's appeal against HMRC's decision on backdating.

The Appellant's grounds of appeal

10. The Appellant advanced various grounds of appeal. However, Judge Markus QC ruled that most of the proposed grounds of appeal were not arguable. She gave permission to appeal on one point only – namely the question of whether the FTT should have considered whether the telephone call on 1 December 2016 amounted to a claim for tax credits within regulation 5(2)(b) of the 2002 Regulations. It follows I need only address that issue.

The proceedings in the Upper Tribunal

11. I have had helpful and detailed written representations from Mr Joe Gough on behalf of HMRC and from the Appellant himself. Even if I have not covered every point in this decision, I have considered all the matters raised in those submissions.

The Upper Tribunal's analysis

12. Given the limited terms on which Judge Markus QC gave permission to appeal – a restriction with which I entirely concur – this appeal ultimately turns on the proper interpretation of regulation 5(2)(b) of the 2002 Regulations.

13. It is important to read regulation 5(2)(b) in context. Regulation 5(1)-(3) of the 2002 Regulations (as amended) provide as follows (paragraphs (4)-(8) deal with national insurance numbers and other matters not relevant to the present appeal, so are not reproduced here):

> **Manner in which claims to be made**
> 5.—(1) This regulation prescribes the manner in which a claim for a tax credit is to be made.
> (2) A claim must be made to a relevant authority at an appropriate office—
> (a) in writing on a form approved or authorised by the Board for the purpose of the claim, or
> (b) in such other manner as the Board may decide having regard to all the circumstances.
> (3) A claim must contain the information requested on the form (or such of that information as the Board may accept as sufficient in the circumstances of the particular case)."

14. It follows that the normal rule is that a claim for tax credits must be made in writing on the appropriate official form (see regulation 5(2)(a)). As a backstop, a tax credits claim may be made "in such other manner as the Board may decide having regard to all the circumstances" (see regulation 5(2)(b)). The distinction between a claim being made "*in writing* on a form approved or authorised" and "*in such other manner* as the Board may decide" (emphasis added in both places) implies that in principle a claim for tax credits may be made orally under the latter provision. This is by way of contrast to the position with social security benefits, where the claim (whether on an approved form or "in such other manner") must be in writing (see Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968 ('the 1987 Regulations'), regulation 4(1)).

15. This might at first sight suggest the FTT should have explored whether the telephone call on 1 December amounted to an oral claim for tax credits. However, there are two main reasons why this argument is doomed to fail.

16. The first reason is that in any event a FTT has no jurisdiction over any decision by HMRC on whether to accept a claim for tax credits under regulation 5(2)(b) – see *CTC/31/2006*, where Mr Commissioner (now Upper Tribunal Judge) Levenson ruled as follows:

> '27. The acceptance of a "manner" of claiming is, on the face of it, an administrative act involving the exercise of discretion (even though it does not necessarily require "a measure of professional knowledge or experience"). If that discretion is exercised so unreasonably that no reasonable administrator could have exercised it in that way, judicial review is available and is an adequate remedy. As far as the merits of the way in which the exercise of discretion are concerned, there is no guidance in the legislation or regulations as to how the discretion is to be exercised. That seems to make it a non-justiciable determination in the sense of *R(H) 3/04* and *CH/4234/2004*. On that basis the tribunal would in any event be limited to considering the equivalent of the grounds that are available for obtaining judicial review. Accordingly, judicial review is an adequate remedy and there is no basis for reading into Section 38

> of the Tax Credits Act 2002 a right of appeal to the tribunal in respect of determination made under the provisions of regulation 5(2)(b)."

17. Likewise, in *ZM v Her Majesty's Revenue and Customs (TC)* [2013] UKUT 547 (AAC); [2014] AACR 17 Upper Tribunal Judge Ward recognised that "several of the issues arising under regulation 5 are clearly matters of discretion for the respondent, such as whether something may be accepted as a claim when not made on the relevant form: see *CTC/31/2006*". Although *ZM v HMRC (TC)* resulted in a finding that in the circumstances of that case judicial review was not an adequate remedy for the purposes of Article 6 of the European Convention of Human Rights and the Human Rights Act 1998, it was accepted in both *CTC/31/2006* and *ZM v HMRC (TC)* that the answer might not be the same under all limbs of regulation 5 (see *CTC/31/2006* at paragraph 29 and *ZM v HMRC (TC)* at paragraph 58). *CTC/31/2006* remains clear authority for the proposition that HMRC's decision under regulation 5(2)(b) of the 2002 Regulations is not susceptible to appeal to the FTT, but may only be challenged by way of judicial review.

18. The second reason, very simply, is that in any event no reasonable FTT could have come to the conclusion that the telephone call of 1 December 2016 amounted to a claim. Section 3(1) of the Tax Credits Act 2002 provides that "entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it". Regulation 5 then makes provision for the "manner in which claims [are] to be made". As Mr Gough for HMRC argues, the telephone call was a request for a claim form, not a claim itself. I note the HMRC records show the call on 1 December 2016 lasted no more than 4 minutes, with the call-handler's remarks noted as "Advice given … TC claim form sent". By definition, the telephone call was not a defective claim in writing which was then subsequently regularised (see e.g. *Novitskaya v London Borough of Brent* [2009] EWCA Civ 1260; [2010] AACR 6). Nor can *JI v Commissioners for Her Majesty's Revenue and Customs* (TC) [2013] UKUT 199 (AAC) provide the Appellant with any assistance. It is also noteworthy that there is no equivalent in the tax credits legislation to regulation 6(8) of the 1987 Regulations, which provides that where a claim for attendance allowance or disability living allowance is made within 6 weeks of a request for such a claim form, then the date of claim is the date of the original request.

19. Finally, I note that Judge Markus referred in passing in her grant of permission to regulation 5(5) (a typographical error for regulation 5(6)). However, this does not assist the Appellant as it is not a general relaxation of the statutory requirements for any person who "had a reasonable excuse for making a claim which did not comply with the requirements". Rather, as Judge Markus noted, it applies only to the requirement to provide a national Insurance number as stipulated by regulation 5(4) 0f the 2002 Regulations.

20. I understand that this decision will be a disappointment to the Appellant. He asked for a tax credits claim form in good time. It failed to arrive, either because of a failure by HMRC or the Royal Mail. He then thought it might have been held up in the Christmas post. He was inadvertently misled by advice on a website that referred to a three-month time limit (rather than the one-month rule). If the issue was whether he had good cause for making the claim when he did, those factors might well have been relevant. However, that is not the relevant statutory test. The FTT here was entitled to find that the Appellant's tax credits claim was not actually made until 9 February 2017 and so the award commenced on 9 January 2017. The law is clear and does not permit any further backdating of his tax credits award.

Conclusion

21. For those reasons the decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss this appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 18 July 2018

Nicholas Wikeley
Judge of the Upper Tribunal