IN THE UPPER TRIBUNAL **Case No.** CTC/2376/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision:

The decision of the First-tier Tribunal (ref. SC *143/17/00869*) did not involve a material error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

REASONS FOR DECISION

Summary of reasons

1. The structure of the tax credits legislation provides for H.M.R.C. to do one of two things in response to a tax credit claim. Under section 14 of the Tax Credits Act 2002 ("2002 Act"), they may either make an award or make no award.

2. An award under section 14 of the 2002 Act does not embody a final, or conclusive, decision as to a claimant's entitlement to a tax credit for the relevant tax year. That decision comes later when, typically after the end of the relevant tax year, H.M.R.C. do two things in sequence. First, they issue a notice under section 17 of the Tax Credits Act 2002 relating to the tax credit/s award for the tax year. Then, they make a final, or conclusive, entitlement decision under section 18 (which might not be in the same terms as the earlier award of tax credit/s). Section 17 notices and, in turn, section 18 decisions may not be given where H.M.R.C. decide not to award a tax credit/s. There is nothing on which a section 17 notice may 'bite' and, without a section 17 notice, there can be no section 18 decision.

3. Both section 14 award decisions and section 18 entitlement decisions attract a right of appeal. The separation of tax credit awards from formal entitlement decisions has caused practical difficulties where a claimant appeals against a section 14 award decision and H.M.R.C. then give a final section 18 entitlement decision. These difficulties were considered in a comprehensive decision of a three-judge panel of the Upper Tribunal (*LS & RS v H.M.R.C.* [2018] AACR 2; [2017] UKUT 0257 (AAC)), which also addressed appeals against decisions under section 16 of the 2002 Act to alter a section 14 award during the relevant tax year. The panel said, at paragraph 40, "the tax credit scheme makes it clearer that the effect of a section 18 decision is to deprive the decisions under sections 14, 15 and 16 of any operative effect, even within the tax year to which they related".

4. The view of the three-judge panel in *LS & RS* was that certain tax credit appeals in the First-tier Tribunal would lapse upon H.M.R.C. giving a final, or conclusive, section 18 entitlement decision for the relevant tax year. Section 18 entitlement decisions were therefore integral to the panel's reasoning; they constituted the relevant lapsing event. However, the structure of the 2002 Act means that a section 18 entitlement decision may not lawfully be made where H.M.R.C. decided, under section 14, not to make an award of tax credit. Accordingly, the lapsing event identified in *LS & RS* could not lawfully arise. If the panel's comments in paragraph 40 of its reasons were intended to apply to decisions under section 14 of the 2002 Act not to award tax credit, they overlooked that no section 18 decision may be taken in such a case and I would therefore decline to follow them. If the panel's comments were intended to apply to section 14 decisions not to award tax credit, they must have been *obiter* since neither case before the panel involved an appeal against a section 14 decision refusing to make an award of tax credit/s.

5. The correct legal position is that an appeal against a H.M.R.C. decision not to make an award of tax credit/s under section 14 of the 2002 Act cannot be lapsed by the giving of a section 18 final entitlement decision.

Background

6. On 17 May 2016, H.M.R.C. informed Mr C, who was awarded working tax credit for the previous tax year, that, for the purposes of his claim for the current tax year, they needed to confirm "your self-employment is done on a commercial basis, with a view to making a profit and is regular and ongoing" and "we also need to confirm the amount of hours you have declared and those hours are worked for payment or in expectation of payment". The letter asked Mr C to return an enclosed form that requested various items of business-related information for the period 17 February 2016 to 17 My 2016, by 16 June 2016.

7. Mr C claimed to have responded to the 17 May 2016 request by letter of 10 June 2016, which enclosed various documents. H.M.R.C. said they had no record of receiving the letter nor any documents.

8. H.M.R.C. made a repeat request for the information on 30 June 2016 with a deadline of 29 July 2016. But on 30 June 2016 H.M.R.C. informed Mr C they had 'amended' his tax credits award for 2016/17 "because you have not replied to the correspondence dated 17 May 2016".

9. On 26 July 2016, Mr C wrote to H.M.R.C again claiming to have complied with their initial request for information and expressing dissatisfaction with their loss of data. He added that, while he could "more than likely" obtain replacement documents, he would not do so because

H.M.R.C. lost the documents previously sent. Finally, Mr C wrote that he would "probably" complete H.M.R.C's form but it would be supplied late.

10. On 12 September 2016, H.M.R.C. sent Mr C, for the third time, a copy of their form requesting information about self-employment. Mr C completed this form and H.M.R.C. received it on 13 October 2016. It was not accompanied by any supporting documentary evidence.

11. In October 2016 H.M.R.C. apparently decided that Mr C was entitled to working tax credit of £7.59 from 7 April 2016, i.e. for a single day of the 2016/17 tax year. My understanding, derived from other cases, is that the 'award' of a single day's tax credit may be due to some feature of H.M.R.C's software rather than a positive decision that a person met the entitlement conditions for a single day.

12. H.M.R.C. notified Mr C of their decision by letter dated 28 October 2016 giving the reason that Mr C's information did not show that the working tax credit self-employment test was met.

Proceedings before the First-tier Tribunal

13. Mr C's notice of appeal to the First-tier Tribunal argued that he needed working tax credit to make up for a low weekly working wage. He added that he could not trust H.M.R.C. to keep safe any documents he supplied.

14. On 11 February 2017, the Tribunal wrote to Mr C giving fairly detailed suggestions about how he might prepare his case, including:

- a suggestion that he "study" H.M.R.C's written response to his appeal;
- "if you do have documents you want to use in support of your case, please send them to us as early as possible";
- "please remember that it is your responsibility to obtain the evidence…you need to support your case. You cannot assume that the Tribunal will obtain that evidence for you".

15. A further Tribunal letter of 11 February 2017 stated:

- "you should have now received a copy of the appeal response from the office that made the decision on your appeal";
- "it is important that you send us any further evidence that you wish the Tribunal to consider as soon as possible";
- Mr C could still request a hearing of his appeal.

16. In accordance with Mr C's wishes, on 14 March 2017 the First-tier Tribunal decided his appeal without holding a hearing. The Tribunal dismissed the appeal. There is no evidence within the Tribunal's appeal bundle that Mr C supplied the Tribunal with the documentary evidence he said H.M.R.C. had lost or, for that matter, any other documentary evidence.

17. Mr C's appeal was dismissed by the First-tier Tribunal for the reason that his self-employment was not done for payment or in expectation of payment. There was no suggestion that Mr C's work was realistically done for payment as shown by his earnings for the previous tax year of £845 (in fact, that sum was described by Mr C as his household income for the tax year). However, the Tribunal accepted that Mr C had supplied H.M.R.C. with the information sought by their initial request for information. His reply, and accompanying documents, must have been lost in the post.

Legal Framework

Self-employment

18. Section 10(1) of the 2002 Act provides that "the entitlement of the person...by whom a claim for working tax credit has been made is dependent on him...being engaged in qualifying remunerative work". Regulation 4(1) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 ("2002 Regulations") provides that "a person shall be treated as engaged in qualifying remunerative work if, and only if, he satisfies" a number of specified conditions including:

> (a) "The person is ... self-employed;
> (b) "is aged at least 25 and undertakes not less than 30 hours work per week"
> (c) "The work is done for payment or in expectation of payment".

19. "Self-employed" is defined by regulation 2(1) as "engaged in carrying on a trade, profession or vocation on a commercial basis and with a view to the realisation of profits, either on one's own account or as a member of a business partnership and the trade, profession or vocation is organised and regular".

Section 14 award decisions and rights of appeal

20. Section 14(1) of the 2002 Act provides:

> "On a claim for a tax credit [H.M.R.C] must decide—
> (a) whether to make an award of the tax credit, and
> (b) if so, the rate at which to award it."

21. In other words, H.M.R.C. may decide not to award a tax credit.

22. Section 17(10) of the 2002 Act provides:

> "Where a tax credit has been awarded for the whole or part of a tax year—
>
> (a) for awards made on single claims, the Board must give a notice relating to the tax year to the person to whom the tax credit was awarded…".

23. Section 17 of the 2002 Act confers no power on H.M.R.C. to give a notice where a tax credit has not been awarded.

24. After giving a section 17 notice, section 18(1) of the 2002 Act requires H.M.R.C. to decide whether a claimant was entitled to a tax credit for the relevant tax year and, if so, the amount.

25. Section 38(1) of the 2002 Act confers a right of appeal to the First-tier Tribunal against various H.M.R.C. decisions including a decision under section 14(1) and "the relevant section 18 decision in relation to a person… and a tax credit for a tax year".

26. After I granted permission to appeal in this case, Upper Tribunal Judge Poynter decided, *AC v HMRC* (CTC) [2018] UKUT 233 (AAC). The Judge said:

> "20. It follows that there can be no entitlement to tax credits where no in-year award has been made under section 14. Without such an award, no section 17 notice can be given and, in the absence of a section 17 notice, no section 18 decision can be made".

Proceedings before the Upper Tribunal

27. I did not grant Mr C permission to appeal on most of his grounds, which argued that the First-tier Tribunal proceedings were unfair or that H.M.R.C. provided the Tribunal with inaccurate information. The grounds on which I granted permission to appeal were that, arguably, the First-tier Tribunal erred in law by:

(a) failing to distinguish between the test for calculating income for tax credits purposes and the identification of turnover for the purposes of applying the self-employment test; and/or

(b) making inadequate findings of fact. The 2015/16 household income figure relied on by the Tribunal may have described Mr C's self-employed income after deducting allowable expenses. Arguably, the Tribunal should have made

> findings as to whether it did. It might be said that Mr C would have no cause for complaint had the Tribunal approached this issue on the basis that, in the absence of an explanation from Mr C as to how his 2015/16 household income related to his business turnover, it would infer it represented turnover. But that was not how the Tribunal dealt with the matter…"

28. H.M.R.C's written response argued that, in Mr C's case, they took a decision under section 14(1) of the 2002 Act not to award him working tax credit on his re-claim for the tax year 2016/17. After the First-tier Tribunal dismissed Mr C's appeal, H.M.R.C. took a final entitlement decision under section 18 for tax year 2016/17 that Mr C was entitled to working tax credit for a single day, 6 April 2017.

29. H.M.R.C. went on to argue that, once they had taken their section 18 decision, their section 14 decision ceased retrospectively to have any effect (*LS & RS v H.M.R.C.* [2017] UKUT 0257 (AAC). Accordingly, the present proceedings were academic. If Mr C wished to challenge the section 18 decision, he would first have to request a mandatory reconsideration and only then would he have a right of appeal against that decision.

30. I decided that H.M.R.C. should supply a further written submission and gave the following case management directions:

> **"Background**
>
> 1. HMRC's written response to this appeal states that HMRC decided under section 14(1) of the Tax Credits Act 2002 not to award Mr [C] working tax credit from 7 April 2016. Section 14(1) provides:
>
> "On a claim for a tax credit the Board must decide—
>
> (a) whether to make an award of the tax credit, and
>
> (b) if so, the rate at which to award it."
>
> 2. Given the terms of section 14(1), HMRC's response appears to argue that HMRC decided not to make an award of tax credit.
>
> 3. Section 18 of the 2002 Act (decisions after final notice) deals with final entitlement decisions. A section 18 decision must be preceded by a section 17 notice. However, section 17(1) only provides for issue of a final notice where a tax credit has been awarded for the whole or part of a tax year.

4. If the section 14 decision is not to make an award of tax credit, I find it difficult to see how a subsequent section 17 notice could lawfully be issued.

5. HMRC argue that, in Mr [C's] case, a section 18 decision was taken on 29 July 2017. They go on to argue that, as a result, Mr [C's] appeal against the section 14 decision lapsed or was academic. HMRC rely on… [the decision of the] Upper Tribunal in *LS & RS v HMRC* [2017] UKUT 0257 (AAC)… Arguably, however, the Upper Tribunal overlooked that, where no award is made under section 14(1), there cannot in law be any section 17 notice and, consequently, no section 18 lapsing event either. For this reason, my provisional view is that I should not follow the Upper Tribunal's *obiter* comments insofar as they concern the lapsing of section 14 appeals against decisions not to award a tax credit. On that basis, my provisional view is that, where HMRC under section 14 refuse to award tax credit, any purported section 18 decision would be a nullity since there was no power to give the preceding section 17 notice.

6. I recognise that the HMRC submission states that, on 29 July 2017, a section 18 decision was taken that Mr [C] was entitled to one day's working tax credit during the relevant tax year. That appears to reflect the payment history. But, if HMRC were always of the view that Mr [C] failed to satisfy the entitlement conditions, why was he paid one day's working tax credit? Are HMRC saying that they knowingly made a tax credit award under section 14 to a person despite having determined that he was not entitled? If so, how does such an award provide a proper legal basis for a section 17 notice?

7. HMRC's description of the relevant events is also difficult to square with sections 3(2) of the Tax Credits Act 2002, which provides:

> "(2) Where the Board—
>
> (a) decide under section 14 not to make an award of a tax credit on a claim...
>
> (subject to any appeal) any entitlement, or subsequent entitlement, to the tax credit for any part of the same tax year is dependent on the making of a new claim."

8. If HMRC decided under section 14 not to award tax credit, how did Mr [C] become entitled to tax credit, for one day, without having made a new claim?".

The arguments

31. H.M.R.C now concede that they had no power to make a section 18 entitlement decision in Mr C's case. Their supplementary submission argues:

> "H.M.R.C. now accept that as the section 14 decision was not to award the claimant tax credits as he failed to satisfy the entitlement conditions, no section 17 notice should have been issued and as a result no section 18 decision should have been taken".

32. H.M.R.C's submission also explains why the appeal papers might suggest that Mr C was awarded a single day's working tax credit:

> "Due to the computer system's limitations, it has not been possible to update so as to show the claimant was not due an award at all. The workaround in this case does not reflect the actual decision made and for this H.M.R.C. apologise."

33. Nevertheless, H.M.R.C. continue to oppose this appeal. They argue that Mr C, despite a number of requests, provided no evidence to show the number of his customers, what computer games he had developed and sold, nor the profit per game developed. Without evidence to illustrate any commercial activity, income or expenditure, Mr C had to fail the 'commercial basis and with a view to the realisation of profits' test.

34. H.M.R.C. also rely on their procedure for determining claims by self-employed persons:

> "When a claimant submits a new claim for tax credits, they are advised to enter the self-employed profit for the previous tax year. Without evidence to the contrary, HMRC will accept that information from the claimant. There was no indication on this case that the claimant had also deducted his "living expenses" (as per p.65 of the bundle) until after the case had been selected for checking and the initial decision of 2016/17 had been given. As a result the award for 2015/16 and the provisional payments for 2016/17 were based on the 845 as declared".

35. H.M.R.C. submit there was no error on a point of law in the First-tier Tribunal's decision.

36. Mr C's supplementary reply argues that, at no point, did he receive three requests from H.M.R.C. for information. He argues that he has no idea from where H.M.R.C. obtained the

information on which they now rely and ends with "no matter how much they want to claim I'm not self-employed I am".

Conclusions

37. I agree with H.M.R.C's supplementary submission that the section 17 notice purportedly given in Mr C's case was of no effect. In the absence of an award of tax credit, H.M.R.C. had no power to issue a section 17 notice and, in turn, there could be no valid section 18 decision to cause Mr C's appeal to the First-tier Tribunal to lapse. The remarks in paragraph 40 of *LS & RS v HMRC* (see paragraph 3 above) were, if intended to apply to section 14 decisions not to award tax credit/s, *obiter* and overlooked that, under section 14 of the 2002 Act, H.M.R.C. may decide to make no award. To the extent that the comments apply to such section 14 decisions, I do not follow them.

38. H.M.R.C. also argue that their payment of a single day's working tax credit to Mr C did not reflect a positive decision that he satisfied the entitlement conditions on that day. I accept that, at no point, did H.M.R.C. decide that Mr C satisfied the conditions on a single day. Presumably, therefore, the apparent payment of a single day's working tax credit was made on some extra-statutory basis.

39. I now turn to the appeal itself. The issue before the First-tier Tribunal was whether Mr C satisfied the following conditions:

(a) was he carrying on a trade on a commercial basis (definition of "self-employed" in regulation 2(1) of the 2002 Regulations)?

(b) was the trade carried on with a view to the realisation of profits (definition of "self-employed")?

(c) was the trade organised and regular (definition of "self-employed)?

(d) was Mr C's work done for payment or in expectation of payment (fourth condition for being treated as being in qualifying remunerative work in regulation 4)?

40. In support of his appeal to the First-tier Tribunal, Mr C supplied the following information:

(a) in the self-employment enquiry form, he wrote that he had already supplied evidence of customers and work done, self-employment bank statements, evidence of prices, relevant trade qualification, profit projection and business plan (pp. 39 and 40 of the Tribunal bundle). But I observe that none of that evidence was taken into account by H.M.R.C. because they said it was never received;

(b) he expected to make a profit of "£4,500+" in the tax year 2016/17 (self-employment enquiry form, p.41);

(c) he stated that, in the 12 weeks from 11 July 2016, he worked from between 35 and 40 hours per week (p.41).

41. It may be seen that the First-tier Tribunal had no evidence, as opposed to Mr C's assertions, about the nature of his work: no accounts; no business plan; no invoices nor receipts. Now I accept that Mr C argued, and the First-tier Tribunal accepted, that he did post certain financial information to H.M.R.C. The Tribunal found that the information was not received. However, Mr C was aware of this; they told him so on a number of occasions. Further, Mr C was aware that the First-tier Tribunal had no documentary evidence about the nature of his work. He did not rectify that nor did he attend a hearing before that Tribunal. If Mr C had lost faith in the postal system, it was open to him to attend a hearing and supply documentary evidence in person.

42. I dismiss this appeal. While there may have been flaws in the First-tier Tribunal's analysis, in my judgment it had no alternative but to dismiss Mr C's appeal. Only he could provide the information necessary to support a finding that he was self-employed for the purposes of the Regulations. He did not do so. The previous year's financial information, which indicated income of £845, but without any evidence to support an argument that this was his turnover minus expenses, was no proper basis for a finding that the self-employment test was met. Even if the inferences drawn from that information by the Tribunal were flawed, taking into account Mr C's unwillingness to engage with the appeal process, the Tribunal made the only decision open to it on the evidence. This appeal is dismissed.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
20 February 2019