[2017] AACR 24

(FQ v Secretary of State for Work and Pensions and MM (CSM)
[2016] UKUT 446 (AAC)

Judge Jacobs **CCS/271/2016**
11 October 2016

Child support – assessment of income – income charged to tax and income on which tax is due – how section 20(7)(b) applies when income charged to tax is changed

Evidence – HMRC – computer interface with Child Maintenance Service

The Child Maintenance Service (CMS) made a child support maintenance decision, based upon information obtained via the computer interface with Her Majesty's Revenue and Customs (HMRC), that the non-resident father had a gross annual income of £137,502 for the tax year 2011/2012. The father appealed against that decision to the First-tier Tribunal (F-tT), arguing that HMRC had wrongly assessed his income, having misunderstood the effect of a tax deferral scheme on tax already paid. The Secretary of State's submission to the F-tT simply confirmed the figure used in the original calculation; it was subsequently explained that the interface was fully automated and so the only possible evidence would be a screenshot of the appropriate page. The F-tT upheld the father's appeal, deciding that his historic income was £34,781 (not £137,502), being the figure on which he was charged to tax and that it should be used to calculate his gross weekly income. The mother appealed against that decision to the Upper Tribunal and among the issues before it was the question of how changes in the historic income figure for a particular year should be considered and the quality of evidence provided to the Secretary of State.

Held, allowing the appeal, that:

1. the F-tT erred in using the figure of £34,781 as that sum had been reached after deducting the father's personal allowance. Under regulation 36(1) of the Income Tax Act 2007 the tribunal had been required to identify the income on which tax was charged under the Income Tax (Trading and Other Income) Act 2005 and was only entitled to take account of deductions allowed under Part 2 of the 2005 Act or under section 83 of the 2007 Act. The personal allowance was deducted when calculating the amount on which tax was due, not the amount on which someone was charged to tax (paragraph 12);

2. it was clear from regulation 36(1) that it was only the non-resident parent's income which was relevant when considering the parent's finances and that it was not permissible to go behind HMRC's approach, which was determinative (paragraph 14);

3. under regulation 14 of the 2012 Regulations only the Secretary of State could revise a decision and if there was an appeal a tribunal could consider the issues again: R(IB) 2/04. In doing so the tribunal must act within the limits imposed by section 20(7)(b) of the Child Support Act 1991; it need not consider any issue not raised by the appeal and should not take into account any circumstances not obtaining at the time of the Secretary of State's decision. In the instant case the F-tT could take account of the new information provided by HMRC as the Secretary of State's decision concerned the amount on which the father was charged to tax for the latest available tax year and was retrospective (paragraphs 18 to 19);

4. (*obiter*) the Secretary of State should routinely provide First-tier Tribunals with a screenshot of the relevant parent's income (paragraph 22).

The judge set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 28 May 2015 at Sutton under reference SC154/14/02662) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 20(7)(a) of the Child Support Act 1991, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the non-resident parent's liability for child support maintenance from and including the effective date of 2 January 2014.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at the time the decision under appeal was made (10 February 2014): see section 20(7)(b) of the Child Support Act 1991. Later evidence is admissible, provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

E. I draw the tribunal's attention to the suggestion by the Secretary of State's representative that the tribunal may benefit from joining Her Majesty's Revenue and Customs to assist in understanding the non-resident parent's tax position: paragraph 6 on page 422.

REASONS FOR DECISION

1. This appeal concerns the child support maintenance payable in respect of Imaan and Danyaal. Their mother is their parent with care and the appellant before the Upper Tribunal; their father is their non-resident parent and a respondent to this appeal. The Secretary of State is the other respondent and is responsible for the implementation of the child support scheme.

A. History and background

2. The case came before the First-tier Tribunal on appeal by the non-resident parent against a decision that he was liable to pay child support maintenance of £291.23 a week from the effective date of 2 January 2014. The decision was notified on 10 February 2014. The decision-maker had based the decision on information provided by the "HMRC interface to the Child Maintenance Service" that the non-resident parent had a gross annual income of £137,502 for the tax year 2011/2012. The non-resident parent objected that the decision-maker had misunderstood the operation of a tax deferral scheme called the Melrose Film Partnership.

3. The First-tier Tribunal sat with a judge and a financially qualified member. It allowed the appeal. The judge set out the tribunal's reasoning in its decision notice:

> "5. We decided that the 'historic income' figure in relation to [the non-resident parent] was not £137,502.00 as calculated by the Agency from the 2011/12 Tax Calculation Notice, but was £34,781.00 being the figure on which he was 'charged to tax' (Regulation 36).
>
> 6. We then went on to consider whether his 'current income' differs from his 'historic income' by at least 25% (Regulation 34(2)(a)). We assessed his 'current income' by reference to his 2012/2013 Tax Calculation Notice in accordance with Regulation 39(2). That figure was £76,387.00 and differed from £34,781 by at least 25%, and accordingly that is the figure to be used to calculate his gross weekly income."

4. The judge elaborated on the reasoning in paragraph 5 in the tribunal's written reasons. Referring to the tax calculation notice, he wrote:

> "4.2 The wording used by HMRC of '*Total income on which tax is due*' we equated with the wording of Regulation 36(1) which is '*the sum of the income on which the non-resident parent was charged to tax*'."

5. I gave the parent with care permission to appeal to the Upper Tribunal against that decision.

B. The non-resident parent's film partnership – the Melrose Film Partnership (MFP)

6. The non-resident parent explained his participation in the film partnership like this:

> "**Basic explanation**
>
> Film partnerships were aimed at people with income tax bills of more than £50,000. They enable investors (like myself) to receive a rebate on tax they have already paid in up to three years or, as in my case, to defer an outstanding tax liability in the 2006/2007 tax year.
>
> There are basically two types. The first, and most common, is a 'sale and leaseback' arrangement; the second is a film/TV production scheme. In my case it is a 'sale and leaseback' scheme.
>
> **Sale and leaseback explanation**
>
> These are legitimate vehicles for deferring income tax or CGT liability for 15 years. You could shelter a tax liability for the current year, last year or go back three years to reclaim income tax paid in the 2010/2011 tax year.
>
> Let's say, for instance, you received a £100,000 bonus last year on which you paid 40 per cent tax. By investing £100,000 in a film partnership, you could recoup the £40,000 in the following way.
>
> First, you pay 18% (£18,000) cash into the scheme. This covers fees to the partnership and fees payable to the film producer. The partnership (MFP) will then arrange for a bank loan to raise the £82,000 balance.
>
> With the money raised for investors in this way, the partnership (MFP) buys a number of films and immediately leases them back to the film producers. The producers commit to pay the partnership (NOT investors) a guaranteed income stream over the next 15 years, which will pay off the bank borrowings.
>
> Investors get tax relief of 100 per cent on the £100,000. The initial £18,000 qualifies you for the £40,000 tax relief, leaving you with a cash 'profit' of around £20,000.
>
> Experts calculate that the £20,000 'profit' would have to achieve a return of 4 per cent per year to ensure that enough funds are available over the next 15 years to repay the tax due on the lease payments from the producers which create a tax liability.
>
> The tax repayment from HMRC would have needed to be invested and yield a 4% return year on year to break even at the end of the term. This 4% income is used exclusively to repay the tax due on the lease payments (the difference between producers income and banks interest schedule).
>
> Once the above is understood it becomes clear that investors DO NOT see an actual income other than the initial 'profit' however they continue to account for the Partnership income against which they were originally able to defer their tax liability."

7. The lawfulness of that arrangement in tax law, the morality of employing it, and the wisdom of allowing its operation to affect a person's liability for child support are not matters for me. What concerns me is how the child support legislation applies.

C. The Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677)

8. The non-resident parent's liability is calculated by reference to his gross weekly income. Paragraph 10 of Schedule 1 to the Child Support Act 1991 provides for this amount "to be determined in such manner as is provided for in regulations". The 2012 Regulations are made under that authority. These are the relevant provisions:

> **Interpretation**
>
> **2.** In these Regulations –
>
> …
>
> 'current income' has the meaning given in regulation 37; …
>
> 'gross weekly income' means income calculated under Chapter 1 of Part 4 [regulations 34 to 42];
>
> 'historic income' has the meaning given in regulation 35;
>
> 'HMRC' means Her Majesty's Revenue and Customs;
>
> 'the HMRC figure' has the meaning given in regulation 36; …
>
> 'ITTOIA' means the Income Tax (Trading and Other Income) Act 2005; …
>
> **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).
>
> **Calculation – information applicable**
>
> **5.** Information required for the purposes of making a calculation decision or a decision in relation to an application for a variation is the information applicable at the date from which that decision (assuming that the decision was a decision to make or amend a maintenance calculation) would have effect.
>
> **The general rule for determining gross weekly income**
>
> **34. –** (1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.
>
> (2) The non-resident parent's gross weekly income is to be based on historic income unless –
>
> (a) current income differs from historic income by an amount that is at least 25% of historic income; or
>
> (b) no historic income is available; or
>
> (c) the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC.

(2A) For the purposes of paragraph (2)(a), current income is to be treated as differing from historic income by an amount that is at least 25% of historic income where—

(a) the amount of historic income is nil; and

(b) the amount of current income is greater than nil.

(3) For the purposes of paragraph (2)(b) no historic income is available if HMRC did not, when a request was last made by the Secretary of State for the purposes of regulation 35, have the required information in relation to a relevant tax year.

(4) '*Relevant tax year'* has the meaning given in regulation 4(2).

(5) This regulation is subject to regulation 23(4) (change to current income outside the annual review or periodic current income check).

Historic income – general

35. – (1) Historic income is determined by –

(a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;

(b) adjusting that figure where required in accordance with paragraph (3); and

(c) dividing by 365 and multiplying by 7.

…

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 –

…

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

…

(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.

Current income – general

37. – (1) Current income is the sum of the non-resident parent's income –

…

(b) from self-employment; …

calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42.

…

Current income from self-employment

39. – (1) The non-resident parent's current income from self-employment is to be determined by reference to the profits of any trade, profession or vocation carried on by the non-resident parent at the effective date of the relevant calculation decision.

(2) The profits referred to in paragraph (1) are the profits determined in accordance with Part 2 of ITTOIA for the most recently completed relevant period or, if no such period has been completed, the estimated profits for the current relevant period.

(3) The weekly amount is calculated by dividing the amount of those profits by the number of weeks in the relevant period.

(4) In paragraphs (2) and (3) the '*relevant period'* means a tax year or such other period in respect of which the non-resident parent should, in the normal course of events, report the profits or losses of the trade, profession or vocation in question to HMRC in a self-assessment return.

(5) In the case of a non-resident parent who carries on a trade, profession or vocation in partnership, the profits referred to in this regulation are the profits attributable to the non-resident parent's share of the partnership.

(6) The profits of a trade, profession or vocation that the non-resident parent has ceased to carry on at the effective date of the relevant calculation decision are to be taken as nil.

Estimate of current income where insufficient information available

42. – (1) Where –

(a) current income applies by virtue of regulation 34(2)(b) (historic income nil or not available); and

(b) the information available in relation to current income is insufficient or unreliable,

the Secretary of State may estimate that income and, in doing so, may make any assumption as to any fact.

(2) Where the Secretary of State is satisfied that the non-resident parent is engaged in a particular occupation, whether as an employee, office-holder or self-employed person, the assumptions referred to in paragraph (1) may include an assumption that the non-resident parent has the average weekly income of a person engaged in that occupation in the UK or in any part of the UK."

D. The Income Tax (Trading and Other Income) Act 2005

9. Regulation 36(1)(d) refers to Part 2 of this Act, which comprises sections 3 to 259. I need only cite:

"**Charge to tax on trade profits**

5. Income tax is charged on the profits of a trade, profession or vocation.

Income charged

7. – (1) Tax is charged under this Chapter on the full amount of the profits of the tax year."

E. The Income Tax Act 2007

10. Regulation 36(1) refers to the sum of the income on which the non-resident parent was charged to tax for the latest available tax year. Section 23 helps us understand what "charged to tax" means:

> "**23. The calculation of income tax liability**
>
> 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 tax for the tax year.
>
> …
>
> *Step 2*
>
> Deduct … the amount of any relief …
>
> *Step 3*
>
> Deduct … any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act … (individuals: personal allowance and blind person's allowance).
>
> …"

I have omitted steps 4 to 7.

11. Regulation 36(4) refers to relief that may be deducted in applying regulation 36(1):

> "**83. Carry forward against subsequent trade profits**
>
> (1) A person may make a claim for carry-forward trade loss relief if –
>
> (a) the person has made a loss in a trade in a tax year, and
>
> (b) relief for the loss has not been fully given under this Chapter or any other provision of the Income Tax Acts or under section 261B of TCGA 1992 (use of trading loss as a CGT loss).
>
> (2) The claim is for the part of the loss for which relief has not been given under any such provision ('the unrelieved loss') to be deducted in calculating the person's net income for subsequent tax years (see Step 2 of the calculation in section 23).
>
> (3) But a deduction for that purpose is to be made only from profits of the trade.
>
> (4) In calculating a person's net income for a tax year, deductions under this section from the profits of a trade are to be made before deductions of any other reliefs from those profits.
>
> (5) This section applies to professions and vocations as it applies to trades (and section 84 is to be read accordingly).
>
> (6) This section needs to be read with –
>
> (a) section 84 (how relief works),
>
> (b) section 85 (use of trade-related interest and dividends if trade profits insufficient),
>
> (c) section 86 (trade transferred to a company),
>
> (d) section 87 (ring fence trades),

(e) section 88 (carry forward of certain interest as loss), and

(f) sections 17(3) and 852(7) of ITTOIA 2005 (effect of becoming or ceasing to be UK resident)."

F. Income charged to tax and income on which tax is due

12. The tribunal took the figure of £34,781 from the tax calculation for 2011–2012 on page 52 of the papers. That calculation shows that the non-resident parent's personal allowance was deducted in reaching that figure. I accept the argument by the Secretary of State's representative that the tribunal was wrong to use that figure. That was the "Total income on which tax is due". As the judge explained in the tribunal's written reasons, the tribunal equated that expression with the sum of the income on which the non-resident parent was charged to tax under regulation 36(1). That regulation requires the tribunal to identify the amount of income on which tax was charged under, in this case, Part 2 of ITTOIA. It was only entitled to take account of deductions from total income that were allowable under Part 2 of that Act or, by virtue of regulation 36(4), under section 83 of the 2007 Act. The personal allowance is not deducted when calculating the amount on which a person is charged to tax. It is only deducted when calculating the amount on which the person is liable to tax: the amount on which tax is due. That is clear from section 23 of the 2007 Act. Under that section, step 1 is to identify the income on which the person is charged to tax. The personal allowance is then, under step 3, deducted in order to reach, after steps 4 to 7, the amount on which the person is liable to tax.

G. Why the mistake was material – shared care

13. Tribunals make mistakes, but some mistakes are more important than others. The important ones are the ones that made, or may have made, a difference to the outcome. In this case, the tribunal decided that the non-resident parent's current income was more than double the figure it used as historic income. Even if the tribunal had not wrongly deducted the amount of the personal allowance, the current income would still have exceeded its historic income figure by well over 25 per cent. That would suggest that its mistake was not material. However, that is not the only issue in this appeal. The parent with care has argued that she did not see all the evidence relating to the shared care issue. That is sufficient to justify a rehearing so that her arguments can be based on knowledge of all the evidence. The income issue will be reconsidered as part of the rehearing.

H. The non-resident parent's income

14. The non-resident parent has argued that the investment in the film partnership was a joint one by himself and the parent with care, and that it was only in his name for technical reasons. The parent with care has denied that. Whatever the correct position on the investment, the position in child support law is the same. It does not matter who provided the money that was invested or in whose name the investment was made. What matters is how Her Majesty's Revenue and Customs treated the investment for tax purposes. Regulation 36(1) refers to "the sum of the income on which *the non-resident parent was charged to tax*". That makes clear that it is the non-resident parent's income alone that is relevant. It also makes clear that, in deciding that issue, the approach of the Revenue is determinative; it is not permissible to go behind that.

I. Changes to the historic income figure

15. The Secretary of State's representative has reported a development on the treatment of the non-resident parent's loan interest payments under the film partnership:

> "Further investigations with HMRC in this matter have turned up the fact that NRP's self-assessment tax return for 11/12 now lists a different figure for loan interest payments than is shown on his tax calculation notice. This figure is £137,502 (the same as his total income from all sources) which means that for the tax year the 'Total income on which tax is due' is now £0. This is the historic income figure for the tax year 11/12 which we now understand is arrived at on the basis that the NRP has no access to the partnership income since it is not income that is at his disposal. The bank has control of the monies. So whilst this arrangement is in operation, the NRP's income for the purposes of liability for child maintenance on the basis of historic income is nil, which then calls into question what the NRP's income actually is, since he must have some income."

I have typed that passage as presented. It appears to make the same mistake as the tribunal made, by equating income on which tax is due with income on which tax is charged. Maybe it is simply a typing mistake.

16. That point aside, the representative's submission raises the question of how changes in the historic income figure for a particular year are dealt with. In accordance with standard drafting practice, the child support legislation sets out a scheme for use by the decision-maker. It does not attempt to unravel the difficult questions that can arise when the same provisions have to be applied later on an appeal. The Upper Tribunal has already had to consider two appeals in which there were problems with the historic income figure provided.

SB v Secretary of State for Work and Pensions and TB (CSM) [2016] UKUT 84 (AAC),

17. In this case, decided by Upper Tribunal Judge Mitchell, the figure provided by Her Majesty's Revenue and Customs was wrong in that it was not the amount relevant to the latest available tax year. Before the First-tier Tribunal, the Secretary of State had argued that the computer interface through which the figure was obtained allowed only one request a year. Before the Upper Tribunal, the Secretary of State's representative took a different approach. He explained the reason why the interface operated in that way:

> "… the 'drawdown' system … is set up in such a way that only one request can be made per year. This is to prevent that original benchmark 'historic income' figure from being changed over the course of the following year (prior to the next child maintenance review date). This should not normally happen as the 2012 scheme is designed specifically so that there are long term (i.e. of at least a year) assessments in place, except in prescribed circumstances, e.g. where there is a significant change of income (25% or more)."

The representative then accepted that a further request could be made when "there is good reason to doubt the validity of the figure provided by HMRC". The judge decided that the decision-maker was entitled, indeed required, to make a further request if it is shown that the figure provided was wrong. This was not prevented by the fact that the regulations referred to "request" in the singular and was so regardless of the way that the computer system was programmed.

18. The case before me is different from *SB* in that the figure provided was correct at the time, but has been changed. The Secretary of State has power to revise a decision to take account of changes under regulation 14 of the 2012 Regulations. Two grounds for revision are relevant. Regulation 14(1)(c) applies if there is an appeal pending before the First-tier Tribunal. Regulation 14(1)(e) applies if there has been an official error, which is defined by regulation 14(4) as:

> "(4) In paragraph (1)(e) 'official error' means an error made by an officer of the Department for Work and Pensions or HMRC acting as such to which no person outside the Department or HMRC materially contributed, but excludes any error of law which is

> shown to have been an error by virtue of a subsequent decision of the Upper Tribunal or the court."

I do not know whether the change to the non-resident parent's tax position was a result of an error by an officer of Her Majesty's Revenue and Customs. Whether it was or not, the First-tier Tribunal has no power to apply regulation 14; that power is given to the Secretary of State. On appeal, the First-tier Tribunal has to undertake a fresh consideration of the issues raised by the appeal in accordance with R(IB) 2/04:

> "25. In our judgment, that approach to the nature of an appeal as a rehearing, which is how it was understood in the social security context before the 1998 Act changes, is to be applied to the current adjudication and appeal structure, subject only to express legislative limitations on its extent. Taking the simple case of an appeal against a decision on an initial claim, in our view the appeal tribunal has power to consider any issue and make any decision on the claim which the decision-maker could have considered and made. The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim. As to the nature of an appeal to a tribunal, we therefore agree with the position stated by Mr Commissioner Jacobs in paragraphs 11 and 12 of CH/1229/2002."

And in doing so, the tribunal must act within the limits imposed by section 20(7)(b) of the Child Support Act 1991:

> "(7) In deciding an appeal under this section, the First-tier Tribunal-
>
> (a) need not consider any issue that is not raised by the appeal; and
>
> (b) shall not take into account any circumstances not obtaining at the time when the Secretary of State made the decision or imposed the requirement."

19. How does section 20(7)(b) apply when the First-tier Tribunal is aware that the figure for which the non-resident parent was charged to tax was changed after the decision was made by the Secretary of State? The answer depends on what is the circumstance obtaining at the time the decision was made. Was it (i) "the HMRC figure last requested from HMRC" (regulation 35(1)(a)) or (ii) "the amount on which the non-resident parent was charged to tax for the latest available tax year" (regulation 36(1))? If (i), then the new figure is a change of circumstances that cannot be taken into account under section 20(7)(b). If (ii), the new figure operates retrospectively to be the circumstance relevant to the decision that was made, so that the tribunal can substitute it. I consider that (ii) is the better analysis. Regulation 35 is concerned with the mechanics of calculation, where regulation 36 is concerned with the substance of the matter, the non-resident parent's gross income. So, the First-tier Tribunal at the rehearing will be able to take account of the new information provided by Her Majesty's Revenue and Customs.

IW v Secretary of State for Work and Pensions and DW (CSM) [2016] UKUT 312 (AAC)

20. In this case, decided by Upper Tribunal Judge Gray, Her Majesty's Revenue and Customs appeared to have provided the figure for a year that was not the latest available tax year. The judge did not refer to *SB*. She said at [20] that the HMRC figure should be used, but "Should that result in unfairness, as may have been the case here in that HMRC appeared to provide figures for the 2011/12 tax year when, at the date of the request, they would have had figures for the 2012/12 figures [*sic*], the current income provisions may be used." I don't agree with that. There is no justification in the legislation for basing a decision on unfairness. The starting point is the historic income. It is permissible to depart from that only as permitted by regulation 34(2). In *IW*, it seems that Her Majesty's Revenue and Customs had the figure for the correct tax year, but failed to provide it. That is a reason for making another request, but not for using current income.

Regulation 34 is comprehensive on whether historic income or current income is used. The only scope for adjusting the appropriate income that is taken into account lies in the variation provisions in regulations 56 to 75.

J. Evidence of the historic income figure

21. In refusing permission to appeal and, no doubt, in anticipation that the Upper Tribunal might give permission, the Regional Tribunal Judge said:

> "This appeal raises issues about the quality of evidence produced and relied on by the [Secretary of State], which the Upper Tribunal may wish to comment on."

This was prompted by a remark by the presiding judge:

> "We did not have any evidence in the response bundle of what the interface had provided to the Agency …"

In giving permission, I asked the Secretary of State's representative to comment. This is what she said:

> "In the initial submission to the FtT (pages 1-16) the SoS stated that the figure used in the original calculation had been obtained from the 'drawdown interface' with HMRC, although the date on which the figure had been obtained was not stated. No further information was provided by the Secretary of State, nor was any requested by the FtT. As the mechanism for obtaining the last available income information from the HMRC is automated through the new '2012' Scheme' computer system, there are no forms that can be presented into evidence; the only item that would be available is possibly a 'screenshot' of the appropriate page of the system showing the figure that had been populated into it. The 'drawdown interface' has been set up to return the figure which is classed under the regulations as the income figure of the NRP, chargeable to tax, for the latest available complete tax year. This figure would already include any allowable expenses that had been deducted 'at source'. This is in effect what the original submission to the FtT stated. I submit that if the FtT were unhappy or unsatisfied with the evidence as presented by the SoS in the original submission it was open to them to request further information or clarification to inform their decision. I can find no reference in the papers, prior to the Statement of Reasons, to suggest that the FtT were dissatisfied with the evidence that had been provided."

22. Having been involved with computing since 1982 and with computing in the tribunal system since 1992, it comes as no surprise that a system was devised without reference to the needs of the tribunal and its judges, despite the fact that they are (to use the current jargon) stakeholders. Rather than leave it to judges to identify a need for a screenprint, it would be better if the Secretary of State were to provide this as a matter of course in all submissions to the First-tier Tribunal.

K. Why I have not held an oral hearing

23. The non-resident parent has asked for an oral hearing. Given the nature of the legal issues that arise before the Upper Tribunal, a hearing is not necessary. There will be an oral hearing when the case is reheard by the First-tier Tribunal and the non-resident parent will be able to attend then to make any points he wishes.