The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, Great Britain, Stationery Office, 2009, 0111472997, 9780111472996, . Enabling power: Tribunals, Courts and Enforcement Act 2007, ss. 30 (1) (4), 31 (1) (2) (9), 38 , sch. 5, para. 30 & Finance Act 2008, s. 124 (1) to (7). Issued: 29.01.2009. Made: -. Laid: -. Coming into force: 01.04.2009. Effect: 61 acts; 51 SIs amended & 22 SIs revoked. Territorial extent & classification: E/W/S/NI. General. Supersedes draft S.I. (ISBN 9780111471197) issued on 11.12.2008. With correction slips dated June 2009 and Octoober 2010.

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Explanatory Memorandum sets out a brief statement of the purpose of a Statutory Instrument and provides information about its policy objective and policy implications. They aim to make the Statutory Instrument accessible to readers who are not legally qualified accompany any Statutory Instrument or Draft Statutory Instrument laid before Parliament from June 2004 onwards.

It is a great pleasure to serve under your chairmanship this morning, Mr Crausby. It is a requirement that I confirm that the provisions contained in the order and regulations before the Committee today are compatible with the European convention on human rights, so before I begin properly, let me confirm that.

The order makes a small but important change to the Tax Credits Act 2002. It inserts a reference to the first-tier tribunal in Great Britain into sections 63(5) and 63(8) of the Tax Credits Act. This corrects an error in the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009. As the legislation stands, the settlement process at the review stage of the appeals process for tax credits applies only to appellants living in Northern Ireland. The order will update the legislation so that appellants in Great Britain are also covered, just as they were before the functions were transferred from the former appeals bodies to the new tribunals.

Let me provide the Committee with further detail on the tax credits appeals review process. There has been an appeals review process in place since April 2003, when tax credits were first introduced. When a claimant lodges an appeal against a tax credit decision, the first step is for Her Majestyâ€™s Revenue and Customs to confirm whether the information used to make the tax credit decision is correct, which is a substantial undertaking on the part of HMRC. In 2010-11, for example, it had to deal with around 40,000 appeals against tax credit decisions, but by actively seeking settlement, around 80% of those cases have been revised and agreed at the settlement stage. Where HMRCâ€™s review indicates that the original decision is incorrect, HMRC will revise it. However, if the appellant does not agree to settle, HMRC will forward the appeal to the tribunal to decide. Once the tribunal receives the appeal request, it will contact all parties to arrange for the case to be heard and may require the appellant to present their case. Even at this stage, if the parties involved agree a settlement, the case will not proceed to tribunal and the appeal will be

withdrawn. Of the 20% of cases that go to tribunal, HMRCâ€™s decision is upheld 87% of the time.

That brings me to the need for the order today. According to the appeals process as it currently stands, all tax credits appeals in Great Britain should be sent by HMRC directly to the first-tier tribunal without it having the opportunity to review the case and offer the possibility of a settlement. As I am sure the Committee will appreciate, the settlement process saves appellants from going through what can be an emotionally demanding

The order embeds that process in law for the whole of the UK, not just Northern Ireland. It ensures that the legislation in the whole of the UK is restored to what was the intended policy position when the former appeals bodies were abolished in Great Britain and their functions were transferred to the new first-tier tribunal. That important reference to the first-tier tribunal in Great Britain was inadvertently omitted when tax tribunal functions were transferred to the new tribunal system in 2009. The omission occurred when amendments were made to the Tax Credits Act 2002, and only came to the Departmentâ€™s notice in January 2011. Let me reassure the Committee that no claimants have been affected by this missing reference in the Tax Credits Act. HMRC has continued to seek settlement for appeals in the normal manner in Great Britain, as well as in Northern Ireland, and when the appellant agrees with the settlement they are asked to withdraw their appeal. Only when the appellant does not wish to settle is the case passed to the tribunal to decide, and even then there remains the option of reaching settlement. The order seeks legally to embed that process for the whole of the UK and ensure that legislation is restored to the intended policy position.

So, the order seeks to remedy an inadvertent omission in legislation from when the tax tribunal functions were transferred to a new tribunal system in 2009. I hope that the Committee will recognise the need for this order so that individuals appealing tax credit decisions in Great Britain do not need, by law, to have their case heard by a tribunal. It ensures that we embed a fair, efficient and transparent system of tax credit appeals across the entire UK and it avoids the unnecessary and burdensome process of taking tax credit appeals to tribunal, thereby freeing HMRC time to focus on its core function of collecting tax revenue. I commend the order to the Committee.

Owen Smith (Pontypridd) (Lab): It is a pleasure, Mr Crausby, to serve under your chairmanship this morning. As the Minister said, the change simply places on the statute book, as intended in the legislation introduced by the previous Government, a policy designed to produce a more coherent and consolidated appeals process. The Minister will not be surprised to learn that we will not oppose todayâ€™s change. He revealed that in preparing for todayâ€™s Committee he looked beyond the superficial technicalities of the few words we are inserting into the statute book to the underpinning objectives of the policy. He will know that those objectives were to provide a better quality service through the development of a more coherent set of procedures across all the tribunalsâ€”in this case, in relation to the tax credit tribunals.

I have a few questions for the Minister regarding this crucial area, which is becoming more crucial as we come to the point in this financial year when significant changes will be made to tax credits. For the tribunal service and the people potentially affected by those changes it represents a watershed in the nature of the tax credit system and the volume of appeals. Having looked at the more profound underpinning issues, the Minister will know that over the past 18 months of his

Government the volume of tax credit appeals has risen significantly, as has the time taken by the tribunal system to deal with them. The time taken from referral to disposal has risen from 15.4 weeks to 17.9 weeks. It is a significant increase, but not as significant as the overall increase in respect of all appeals which has gone up from 14 weeks under the previous Labour Government to 24 weeks under his Government. Those changes occurred before the significant amendments to the tax credit system in April.

What concerns does the Minister have as a Treasury representative about the increased cost of the expansion in the time being taken for tax credit appeals from referral to disposal? Secondly, what assessment do he and the Treasury make of the forecast for the volume of appeals likely to be dealt with by the tribunals as a result of the changes being brought in? I was rather surprised to find that

in the 2010-11 financial year the anticipated number of overall appeals, which is not broken down to tax credit appeals, was 415,000, whereas the anticipated number for this financial year is just 422,000â€”an increase of just 7,000 appeals. That surprised me, given that we expect more than 200,000 households in Britain to be dramatically affected by the changes to the tax credit system being introduced in April. I suggest that if the Government simply think that a further 7,000 appeals are likely, there has been a significant underestimate of the knock-on effect those changes will have for the tribunal system. What assessment has the Treasury made of the cost of an increase in the volume of appeals, particularly in respect of tax credits? Are the Minister and the Treasury content that the forecasts being conducted by other Departments, notably the Department for Work and Pensions, are accurateâ€”or might they be inaccurate and lead to greater costs as a result of a larger number of appeals?

Mr Gauke: I thank the hon. Member for Pontypridd for his questions. He has sought to broaden the debate from the specific contents of the draft order to the wider issue of tribunal appeals. Let me see if I can address his concerns. He asked about the time that appeals take in the tribunal service and about the HMRC response to that. That is essentially a matter for the tribunal service, as that process is not governed by HMRC processes as such.

Owen Smith: I hope the Minister will forgive me for intervening, but he will know that HMRC is reducing its staff to 50,000â€”a reduction of some 10,000 over the spending review periodâ€”so if he is right that more people are working on appeals, in addition to there being more people working on tax avoidance, how many extra people are working on appeals? Does that reflect the

Mr Gauke: As far as the number of appeals is concerned, the hon. Gentleman has set out the numbers provided by the DWP, and there is no reason why I would question them. He is broadening the debate out to something that clearly is not directly related to the matter at hand and I have nothing to add to what he has quoted. I do not have the precise figures in front of me, but I stress that HMRC is ensuring that the settlement process is working as smoothly as possible. In that context, the number of staff dealing with tax credit appeals has increased of late.

Mr Gauke: Yes, I will certainly write to the hon. Gentleman and provide him with more information. On the cost of the process, perhaps I could address that in my letter to him setting out our assessment. We believe that the arrangements in the new system will result in, and have resulted in, a saving for the taxpayer, but let me provide further detail of that in writing on the broader issue of the appeals process. I thank him for his support for the purpose of the order, which is to try to regularise the position.

Mr Gauke: We will certainly follow the normal procedure. The hon. Member for Bolsover has considerably more experience of this place than I have and he will be aware of the normal procedures when a letter is written following questions in Committee. That letter will be made available to the trade unions and others. I am tempted to move into a broader debate on HMRC staffing numbersâ€”

Mr Gauke: Mr Crausby, I will take your indication seriously and will not be drawn into that debate and the new-found interest in staffing numbers within HMRC from the Opposition. None the less, I am grateful to the Committee for ensuring that the tax credit appeal process will be on a proper legal footing for the whole of the UK and that tax credit appeals will first go through a settlement process with HMRC, which is something that all will welcome. It will avoid the costly burden to HMRC and the difficulty for tax credit claimants of unnecessarily forcing cases to the tribunal stage. I therefore commend the draft order to the Committee.

In JI v HMRC (TC) [2013] UKUT 199 (AAC), Judge Rowland expresses the opinion that there is no power for either the HMRC, or the First-tier Tribunal, to extend the time for appealing in a tax credit case. This means that any appeal submitted more than 30 days after the decision notice is issued is not valid.

HMRC has reassured CPAG that it does not intend for claimants to lose the right of appeal.

However, if the decision in JI v HMRC is correct, then a problem exists: whatever HMRCâ€™s intentions, an HMRC decision maker cannot give a tribunal jurisdiction to deal with an appeal where none exists. Therefore, it is important for advisers to understand what can be done in such cases.

A close reading of JI v HMRC shows that the reasons which explain why, in the view of the Upper Tribunal, there is no power to extend time for late appeals in tax credits cases are not a binding part of its decision. At paragraph 47, the judge explains that HMRC regards the last appealable decision as having been sent to the claimant on 8 December 2009 and the appeal as having been received on 15 March 2011. This means that, regardless of whether there is a power to extend time, on the facts of this particular case, the appeal was outside the absolute â€˜long stopâ€™ time-limit of 30 days plus 12 months, and therefore any comments the judge had to make about whether there would have been a right of appeal had this not been the case were obiter dicta â€“ ie, not binding. The point reserved by the Upper Tribunal for further decision (effectively whether, on the facts of the case, there was an in-time appeal against a different decision that also carried a right of appeal â€“ see â€˜Appeals against refusals to revise for official errorâ€™ below) is not capable of changing the fact that the Upper Tribunalâ€™s views on late appeals are not binding. In summary, either the appeal was outside the â€˜long stopâ€™ time limit (so even if there is a right to extend time, that would not help the claimant) or, as remains to be determined, it was an appeal made within the 30-day time limit (and so no issue as to extending time arises).

Things started to go wrong when the appeal tribunal was abolished and replaced with the new First-tier Tribunal. From 3 November 2008, the Appeals No.2 Regs were amended by the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI No.2683). Article 6 applied the amendments in Schedule 1. Paragraph 209 of the Schedule amended the Appeals No.2 Regs so that reg 5 no longer allowed a tribunal to extend time for appealing. The drafter presumably thought that this could be provided for in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No.2685). However, those rules could not change the date for a time limit in tax credit cases as that had already been put in the TCA:

Tribunal Procedure Rules cannot permit an extension or shortening of the time for complying with a provision in primary legislation unless there is a specific enabling provision in primary legislation permitting such a rule (Mucelli v Government of Albania [2009] UKHL 2; [2009] 1 WLR 287). There is no such provision in primary legislation relevant to the present case.

But that is not the end of the story; the situation was made even worse in 2009. From 1 April 2009, the situation was made even more complex. The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI No.56) amended the TCA: s63(8) from that point onwards had no application outside of Northern Ireland. That was problematic because, as explained above, this was the enabling provision under which the Appeals No.2 Regs had been made in as much as it allowed the power to make regulations extending time limits for appeal in section 12(7) of SSA 1998 to apply to tax credits. Once there was no primary legislation allowing their existence in Great Britain, the Appeal No.2 Regs ceased to be valid altogether. Thus, there was, outside Northern Ireland, from 1 April 2009, not even any power for the HMRC to admit a late appeal.

The Revenue and Customs Appeals Order 2012 (SI No.533) sought to undo some other unforeseen consequences of the 2009 Regulations (in particular restoring the power of the HMRC to settle cases under the Taxes Management Act 1970). It ensured that section 63(8) of the TCA 2002 should again apply to cases in Great Britain. But the judge is of the view that this did not have the effect of restoring the validity of the Appeals No.2 Regs.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Conventionâ€™s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be

compatible with Article 6 (1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

similarly, the 2009 amendments inadvertently removed the basis in primary legislation for extending time (on the part of either the tribunal, although that was already removed), or indeed the HMRC (outside of Northern Ireland). Again that was inadvertent â€“ the judge finds this to be the case at para 44).

Both of these changes appear to be limitations on the right of access to a tribunal. It can be seen from Denson and Stubbings v UK that limitations on the right of access to a court must be proportionate and in pursuit of a legitimate aim. It can be argued that the particular limitations that appear to remove the power to make a late appeal cannot have been in pursuit of a legitimate aim. The consequences for extending time to appeal and the way in which they thus limited the right of access to the tribunal were mistakes rather than things done in

Advisers should still encourage claimants to submit appeals in tax credit cases, even when the appeal appears to be late. Advisers can argue that both the HMRC and the First-tier Tribunal still have the power to admit a late appeal. CPAG has drafted a submission setting out the argument about why there is a right of appeal, and specifying the relevant provisions of secondary legislation which should be either disapplied or have words read into them so as to allow a late appeal to be admitted. The submission is available on the right hand panel.

If the First-tier Tribunal wishes to either decline to extend time itself because it believes that it has no power to do so, or strikes out an appeal in which the HMRC has purported to extend the time itself, then claimants will have a right of appeal to the Upper Tribunal against such a decision. CPAG has seen many cases where appeals have been struck out and the notes sent with the decision by HM Courts and Tribunals Service does not explain that there is a right of appeal, or a right to request a statement of reasons for the decision. Cases such as LS v LB Lambeth (HB) [2011] UKUT 461 (AAC); [2011] AACR 27, make clear there is a right of appeal to the Upper Tribunal against such decisions.
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