Neutral Citation: [2024] UKFTT 00011 (TC)

Case Number: TC09016

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/13261

INCOME TAX - Coronavirus Job Retention Scheme – assessments under paragraph 9 Schedule 16 FA 2020 – director's remuneration before 19 March 2020 comprising a combination of salary and dividend - remuneration after that date reflecting an increased salary and no dividend - interaction between paragraphs 7.2 and 7.12 of First Coronavirus Direction - appeal dismissed

Heard on: 28 November 2023
Judgment date: 22 December 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR LESLIE BROWN

Between

BANDSTREAM MEDIA AND CORPORATE COMMUNICATIONS LIMITED
Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr John Tann of John Tann & Co accountants

For the Respondents: Mr Asif Razzak litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns claims made by the appellant in respect of coronavirus support payments ("**support payments**") under the Coronavirus Job Retention Scheme ("**CJRS**" or "**the scheme**") on 18 occasions from 1 April 2020 to 30 September 2021 in respect of Mr Graham Smith, an employee and director of the appellant.

2. Throughout the majority of that period, claims for support payments were based on a salary of £2,500 per month. It is HMRC's view that they should have been based on a salary of £600 per month.

3. For reasons given later in this appeal, we agree with HMRC's position and therefore dismiss the appeal.

THE LAW

4. There was little disagreement between the parties about the relevant law which we set out in the appendix to this decision. Expressions defined in the appendix have the same meanings in the body of this decision.

EVIDENCE AND FINDINGS OF FACT

5. We were provided with a bundle of documents. Mr John Tann, who is the appellant's and Mr Smith's individual, accountant, represented the appellant and also gave oral evidence on its behalf. Oral evidence on behalf of HMRC was given by officer Kirsty Macrae. From this evidence we find as follows:

(1) The appellants RTI (real-time information) records show that throughout 2019 and up until and including 31 March 2020, Mr Smith's taxable pay was £600 per calendar month. This was confirmed by Mr Tann.

(2) During that time, the company had been paying dividends to Mr Smith at a rate of £2,500 per month. It was Mr Tann's evidence, which we accept, that Mr Smith would not have been able to live purely on his salary.

(3) Mr Tann had watched a televised parliamentary debate concerning the introduction of the scheme. His evidence was, and we accept this, that when a question was asked of the Chancellor of the Exchequer by Ed Davey, about how directors who had previously been paying themselves by dividends and only a small salary, could make a claim under the scheme, he was told that they should make use of the scheme. This was in the context of Mr Davey suggesting that the scheme would generate unfairness to those who had previously remunerated themselves by way of dividend, compared with those who had remunerated themselves by way of salary.

(4) Following this, Mr Tann recommended to Mr Smith that he should effectively "replace" (our words) the dividends that he had previously received, with additional salary. And this should enable him to make a claim under the scheme for support payments equivalent to 80% of the increased salary (i.e., £2,000 per month).

(5) It was Mr Tann's evidence that the company then paid Mr Smith a salary of £2,500 per calendar month, something which is borne out by the company's RTI payment records. The first such record we have which post dates 19 March 2020 is that for 30 June 2020, but we infer that the RTI information for 30 April 2020 and 31 May 2020 would have been the same.

(6) However, it is equally clear from the RTI information up to and including 31 March 2020, the salary paid to Mr Smith was £600 per month. The RTI record for 31 March 2020 declares taxable pay in the period of £1,800, but there are three monthly periods included within that overall period, thus averaging out at £600 per month.

(7) The company then made claims for support payments as follows:

(a) £15,250 for the period from 1 April 2020 to 30 November 2020.

(b) £8,000 for the period from 1 December 2020 to 31 March 2021.

(c) £10,000 for the period from 1 April 2021 to 30 September 2021.

(8) The claims for the period 1 July 2021 to 31 July 2021 were made on the basis of 70% of the gross salary, and the claims for the periods 1 August 2021 to 30 September 2021 were made on the basis of 60% of the gross salary.

(9) On 26 October 2020, HMRC opened a check into the appellant's claim for support payments and sought information from the appellant. This was provided on 10 March 2021, and resulted in a letter dated 7 July 2021 in which HMRC indicated that as far as their RTI records are concerned, the claims should have been based on a salary of £600 a month and not on the increased salary paid on 31 March 2020.

(10) An email from John Tann to the investigating officer states that Mr Smith had received taxable dividends of between £10,000 to £60,000 for the past six years; that the Chancellor of the Exchequer in answering a question in Parliament from Mr Davey as to the unfairness of the lockdown to those directors who paid themselves by dividends, said that directors should "make use of the furlough system"; following the Chancellor's advice, Mr Tann asked his client to increase Mr Smith's salary to £30,000 per year from April 2020 to make use of the furlough system; his view the Chancellor had made an exception from the strict rules of the scheme for directors who had paid themselves by dividends.

(11) This did not sway HMRC who, in a letter of 15 November 2021, indicated that it was their view, based on the last RTI submission made on or before 19 March 2020, that Mr Smith's earnings were £600, and the claim should have been based on that amount.

(12) On 4 February 2022, HMRC issued notices of assessment under paragraph 9 of Schedule 16 to the Finance Act 2020 in the sum of £282.50 for the year ending 5 April 2020, £10,244.98 and £7,853.33 for the year ending 5 April 2021 and £7,167.67 for the year ending 5 April 2022 ("**the assessments**").

(13) Following a complaint brought by Mr Tann about the behaviour of the officer in charge of the initial investigation, which was treated by HMRC as an appeal against the assessments, conduct of the investigation passed to Officer Macrae.

(14) Her evidence, which we accept, was that when she took over the case, her first action was to review the previous officer's decision. She started from scratch. She considered the

PAYE information which showed that Mr Smith's reference pay should have been based on £600 per calendar month. This was because the fixed rate wage for Mr Smith reported to HMRC via the RTI system on a full payment submissions on or before 19 March 2020 was £600 per calendar month. This was the same conclusion reached by the previous officer.

(15) She also checked the payment dates for the claims and concluded that the assessments overstated the appellant's liability, which should have been £25,264.98, rather than £25,547.40.

(16) It was her view that the appellant had included dividends within its calculation of Mr Smith's reference salary as demonstrated by Mr Tann's email of 9 July 2021.

(17) Offficer Macrae issued her view of the matter letter to Mr Tann on 4 August 2022. She also issued revised assessments. Mr Tann responded to that letter, by way of an email dated 11 August 2022. In that email he submits that paragraph 7.12 in the relevant coronavirus direction allows further payments to be made to the original payment provided the two amounts added together meet the requirements of 7.1 (b) ii. In his view that "paragraph, coupled with the Chancellor's advice to "make use" of the CJRS mean that the claim made by me for the client is within the rules." He asked that that email be treated as a formal appeal against the revised assessments.

(18) On 1 September 2022, HMRC notified the appellant that they were withdrawing the revised assessments as the original assessments were under appeal.

(19) On 6 October 2022, HMRC issued their review conclusion letter to the appellant which confirmed Officer Macrae's view of the matter set out in her letter of 4 August 2022 and upheld the amounts set out in the revised assessments.

(20) On 27 October 2022, the appellant appealed to the tribunal.

DISCUSSION

6. HMRC accept that the burden of establishing that the assessments are valid in time discovery assessments rests with them.

7. Mr Tann does not seriously challenge the fact that a discovery was made, nor that the assessments were validly served on his client, nor that they are out of time. It is our view that they are validly made and in time and was served on his client and we find this as a fact.

8. The burden then shifts, and it is up to the appellant to show that, on the balance of probabilities, the assessments overstate its liability to tax.

9. Mr Tann's submission is that even if it is right that the support payments had to be based on RTI information submitted prior to 19 March 2020, and that information showed that Mr Smith's salary was £600 per month, paragraph 7.12 of the Coronavirus Direction allows for support payments to be based, after that date, on amounts additional to the original base salary. And this enables the appellant to base its claims for support payments after that date on the revised salary of £2,500 per month which was paid to Mr Smith. The fact that these payments were made a salary (under deduction of tax and national insurance) is evidenced by the company's RTI records.

10. His justification for this submission is, as set out above, that there needed to be a mechanism within the scheme to compensate for the unfairness, which was recognised in the

televised parliamentary debate, which would prevent owner managers who had compensated themselves by way of dividend, being prejudiced compared with those owner managers who had previously compensated themselves by way of salary (the former being unable to claim support payments based on the amounts paid by dividend, whereas the latter would be able to claim based on an equivalent amount paid as salary).

11. It is clear to us that HMRC are correct that the qualifying costs on which support payments are based are determined by the earnings shown on an RTI return which is made "on or before a day that is a relevant CJRS day". In this appeal, the relevant The CJRS day is 19 March 2020.

12. The documentary evidence shows that up until 30 March 2020, the company was paying Mr Smith a salary of £600 per month. The RTI return which immediately preceded 19 March 2020 would have been that for 29 February 2020, and that return showed a salary of £600.

13. And this is something which Mr Tann wholly accepts. He does not dispute that up until 30 March 2020, Mr Smith was paid £600 per month by way of salary. His point is that thereafter the support payment should have been based on his increased salary £2,500 per month and the statutory basis for this submission is paragraph 7.12 of the Coronavirus Direction.

14. It is worth making two further points at this stage. Firstly, HMRC appear to have been confused by Mr Tann's reference to dividends, as evidenced by the references in HMRC correspondence and in Officer Macrae's witness statement that the claims for support payments were incorrectly based on dividend income. This is clearly not what Mr Tann has said. What he has clearly stated is that in order to obtain larger support payments in respect of Mr Smith the company should pay an amount equivalent to the dividends formally paid to him, by way of salary.

15. Secondly, it was suggested that this was only done to take advantage of the scheme and thus ensure that the government paid for Mr Smith's remuneration rather than the company. We reject any submission that Mr Tann advised his client to increase Mr Smith's salary, at the expense of dividend payments, for improper motives. Mr Razzak suggested that there was no evidence whatsoever of the Parliamentary exchange referred to above, between the Chancellor and Mr Davey. This is wrong. Mr Tann gave evidence of the fact that he viewed this exchange on television and it was the Chancellor's suggestion that those prejudiced by the fact that they had been previously taking remuneration by way of salary should use the furlough scheme, which provided the basis for the advice he gave to Mr Smith (and which was taken) regarding the replacement of dividend by salary. As we have said above, we accept, unreservedly, Mr Tann's evidence on this. And it was indeed done to rectify what he perceived as an injustice which would otherwise have been done given that his client had paid (perfectly properly) Mr Smith by substantial dividends rather than by salary.

16. Paragraph 7.12 is set out below.

> "7.12 This paragraph applies where-
>
> (a) in the period beginning on 1 March 2020 and ending on the third day after the making this direction an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee,
>
> (b) the original payment is less than the amount required by paragraph 7.1(b)(ii) for the purpose of claiming CJRS,

(c) before making a CJRS claim in respect of the original payment the employer pays the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and

(d) the sum of the original payment and the further amount meets the requirements of paragraph 7.1(b)(ii)".

17. Paragraph 7.1 is also set out below.

"7.1 Costs of employment meet the conditions in this paragraph if-

(a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and

(b) the employee is being paid-

(i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or

(ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary".

18. Prior to 19 March 2020 Mr Smith was receiving £600 per month by way of gross salary. This fell within the ambit of paragraph 7.1 (b) ii. Because of this, paragraph 7.12 is potentially engaged as it only applies to payments made under that subparagraph.

19. Paragraph 7.1 sets out the conditions for costs to be qualifying costs of employment. Where, as in this case, an employee has been paid less than £2,500 per month, the employee must be paid an amount equal to at least 80% of his or her reference salary for their salary to be a qualifying cost. Reference salary in this case is £600 per month. These costs qualify because Mr Smith was actually paid an amount equal to that salary. It is to be noted that the 80% cap on costs which can be claimed by way of support payments appears not in this paragraph but in paragraph 8. Paragraph 7.1 is simply to identify employees whose salary comes within the definition of qualifying costs.

20. We now turn to paragraph 7.12. Wages were paid to Mr Smith in the period beginning on 1 March 2020 and ending on 18 April 2020. To fall within the ambit of paragraph 7.1(b) ii. that original payment must be less than £2,500. So, in this case, it must be the £600 which Mr Smith was paid up until 30 March 2020 and which was reflected in the appellant's RTI return.

21. For the provisions of paragraph 7.12 to bite, Mr Smith would have had to have been paid less than 80% of the amount which he was required to have been paid under paragraph 7.1(b) ii.

22. But he was not. He was required to have been paid £600 per month and was paid £600 per month.

23. We were told by HMRC that the purpose of paragraph 7.12 was to cater for situations where an employee was due to be paid a certain amount but as a matter of fact, was paid less than 80% of that amount. So, an employee who was due to be paid £1,000 received only £750 for some reason. Paragraph 7.12 enables the employer to pay the additional £250 and thus

calculate a support payment on the basis of the salary of £1,000 rather than being restricted to the £750 which was actually paid to the employee.

24. And paragraph 7.12 certainly caters for this situation.

25. We have based the foregoing interpretation on a literal interpretation of the legislation. And we have arrived at the same conclusion based on a purposive interpretation. This allows us to consider the purpose for which the legislation was introduced, but it must be emphasised, that the question is whether the construction of the statutory provision applies to the facts as found. Words are to be given ordinary meanings, and it is to be presumed that Parliament did not intend that to be either injustice or absurdity when introducing those statutory provisions.

26. It is our view that the purpose of the legislation is, as submitted by HMRC, to cater for the situation which has been suggested by them, at [23] above. It was not intended to allow an employer, after the introduction of the scheme, to inflate an employee's wages and thus, effectively, have the taxpayer underwrite an employee's salary. This would drive a coach and horses through the legislation which was designed to fix an employee's salary to that recorded on the latest RTI submission prior to 19 March 2020. To interpret the legislation otherwise would lead to an injustice.

27. Furthermore, notwithstanding the televised debates witnessed by Mr Tann, we cannot allow that to influence our interpretation of the clear language of the statutory provisions. We must look at the actual words used by the legislation and cannot (save in exceptional circumstances which do not apply here) consider the parliamentary debates which preceded the enactment of that legislation.

28. So, for the purposes of this appeal, it is our view that paragraph 7.12 does not allow the appellant to claim support payments on the increased salary of £2,500 which it made to Mr Smith during the periods under assessment.

29. Mr Tann has also submitted that HMRC have failed to adhere to their obligations under their Charter, and that because this was a legal requirement, we have jurisdiction to consider that failure. We disagree with him. It is absolutely true that the introduction of the HMRC Charter is legally required under the Finance Act 2009. But this tribunal has no general supervisory jurisdiction, and it certainly has no jurisdiction to police the behaviour of HMRC pursuant to its Charter.

30. Similarly, we have no jurisdiction to direct HMRC to use their care and management powers in the case of this appellant, nor to impugn them should they fail to have done so. Finally, we have no general jurisdiction to consider the fairness or otherwise of HMRC's behaviour towards the appellant.

DECISION

31. For the foregoing reasons, we dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 22nd DECEMBER 2023

APPENDIX

THE RELEVANT LAW

1. Under paragraph 2.1 of the Schedule to the Coronavirus Direction dated 15 April 2020 ("**the Coronavirus Direction**"), the CJRS was established to provide support payments to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus. The scheme allowed a qualifying employer to apply for reimbursement of the expenditure incurred by the employer in respect of the employees entitled to be furloughed under the scheme.

2. Sections 71 and 76 of the Coronavirus Act provide the Treasury with the power to direct HMRC's functions in relation to coronavirus.

3. Pursuant to these powers, the Treasury introduced the Coronavirus Direction to govern HMRC's administration of the CJRS on 15 April 2020 (subsequently followed by a number of updated Directions in relation to CJRS during the pandemic).

4. Under paragraph 3 of the Coronavirus Direction, an employer can make a claim for Support Payments under the CJRS if they have a PAYE scheme registered on HMRC's Real Time Information (RTI) system for PAYE by 19 March 2020.

5. Paragraph 5 of the Coronavirus Direction details Qualifying Costs an employer is entitled to claim for under the CJRS.

> (a) relate to an employee
>
> > (i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,
> >
> > (ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and
> >
> > (iii) who is a furloughed employee (see paragraph 6).
>
> (b) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

6. Paragraph 5 of the Coronavirus Direction refers to Schedule A1 to the PAYE Regulations. Paragraph 67B of the PAYE Regulations states that "on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation".

7. Schedule A1 details what information regarding payments to employees must be given to HMRC. This information includes the date of the payment made and the employee's pay frequency.

8. Relevant day is defined by paragraph 13.1 of the Coronavirus Direction as 28 February 2020 or 19 March 2020.

9. Paragraph 8 of the Coronavirus Direction sets out what expenditure can be reimbursed in a CJRS claim. The reimbursement is Lower of £2500 per month and an amount equal to 80% of the employee's reference salary. Paragraph 8.2(b) makes reference to an employee's "reference salary" and instructs consideration of paragraphs 7.1 to 7.15 when calculating this.

10. Paragraph 7 of the Coronavirus Direction details what is a qualifying cost. Paragraph 7.2 states:

> 7.1 Costs of employment meet the conditions in this paragraph if-
>
> (a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed, and
>
> (b) the employee is being paid-
>
> (i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or
>
> (ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.

11. Paragraph 7.2 states:

> 7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-
>
> (a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and
>
> (b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

12. Paragraph 7.3 states:

> "In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages".

13. Paragraph 7.4 provides the definition of "regular salary or wages" as follows:

> 7.4 In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as–
>
> (a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),
>
> (b) is not conditional on any matter,
>
> (c) is not a benefit of any other kind, and
>
> (d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

14. An employee's reference salary is calculated with reference to one of two tests set out in the Coronavirus Directions depending on whether an employee is a "fixed-rate" employee. A fixed-rate employee is defined at paragraph 7.6:

> "7.6 A person is a fixed rate employee if–
>
> the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),
>
> (a) the person is entitled under their contract to be paid an annual salary
>
> (b) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),
>
> (c) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,
>
> (d) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and
>
> (e) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations".

15. Paragraph 7.7 states that:

> "the reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020".

16. Following the initial Coronavirus Direction there are several further directions. These directions do not alter the legislation set out at paragraph 7.7.

17. Paragraph 7.12 states that where –

> (a) in the period beginning on 1 March 2020 and ending on the third day after the making this direction an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee,
>
> (b) the original payment is less than the amount required by paragraph 7.1(b)(ii) for the purpose of claiming CJRS,
>
> (c) before making a CJRS claim in respect of the original payment the employer pays the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and
>
> (d) the sum of the original payment and the further amount meets the requirements of paragraph 7.1(b)(ii).

18. Paragraph 8 of Schedule 16 to Finance Act 2020 makes a recipient of Support Payments under CJRS liable to income tax where a claim is made incorrectly. Paragraph 8(4) details when income tax becomes chargeable, and in this appeal, income tax is chargeable at the time the Support Payment was received as at the time the Support Payment was received only part of the amount claimed

was due to the Appellant.

19. Paragraph 8(5) details the amount of income tax chargeable as being equal to the amount of support payment to which the applicant was not entitled and has not been repaid. In addition, and as regards Corporation Tax computations, no deduction is allowed in respect of the payment of income tax under paragraph 8(8).

20. Paragraph 9 affords HMRC the power to make assessments to income tax as chargeable under paragraph 8. An Officer, under paragraph 9(1), may make an assessment where he considers that a person has received an amount of Support Payment to which he was not entitled in an amount which ought in the Officer's opinion to be charged under paragraph 8.

21. The assessment may be made at any time under paragraph 9(2), but subject to the statutory assessing time limits pursuant to sections 34 and 36 of the Taxes Management Act 1970 ("**TMA**"). Parts 4 to 6 of the TMA also apply to this appeal, particularly those relating to the appeal provisions.

22. When a person liable to income tax charged under paragraph 8 of Schedule 16 to FA 2020 is a Company that is chargeable to corporation tax, then paragraph 11 also applies. Paragraph 11 sets out how the income tax charge operates in relation to the Company's calculation of their corporation tax liability.