Neutral Citation: [2024] UKFTT 00161 (TC)

Case Number: TC09087

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/12934

Self-employment income support scheme – claim made incorrectly - assessment for income tax

Heard on: 11 December 2023
Judgment date: 26 February 2024

Before

TRIBUNAL JUDGE MCGREGOR
JULIAN SIMS

Between

SHANE ELLIS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Shane Ellis represented himself

For the Respondents: Mr Liam Ellis, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which we were referred are a document bundle of 268 pages and HMRC's skeleton argument of 16 pages, which had been annotated by Mr Shane Ellis.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This appeal concerned claims made by Mr Shane Ellis (the Appellant) under the Self-Employed Income Support Scheme (SEISS) during the COVID-19 pandemic. HMRC raised an assessment to income tax for £14,070 in relation those claims. The Appellant appealed to this Tribunal against the assessment.

4. There was some confusion at the hearing as to whether the notice of appeal included penalties that had been charged on the Appellant for late payment of the SEISS repayments. After the hearing, HMRC confirmed that the penalties had been removed and therefore we consider them no further in this decision.

BACKGROUND FACTS

5. The following background facts were not in dispute:

(1) The Appellant was a franchisee for Snap on tools. He had traded for a number of years as a self-employed franchisee.

(2) On 28 February 2018, a Limited Company, Ellis SAJ limited, was incorporated, of which the Appellant is the sole director.

(3) On 14 May 2020, the Appellant made a claim under the SEISS scheme, which was paid to him on 22 May 2020 (SEISS payment 1).

(4) On 18 August 2020, the Appellant made a claim under the SEISS scheme, which was paid to him on 26 August 2020 (SEISS payment 2).

(5) The Appellant's tax return for the tax year ended 5 April 2019 was submitted on 15 January 2020. This return included self-employed income but also included a declaration that self-employment had ceased on 27 September 2018;

(6) The Appellant's tax return for the tax year ended 5 April 2020 was submitted on 18 January 2021. This return did not include any self-employment income, only PAYE income derived from Ellis SAJ Limited.

(7) In October 2020, HMRC emailed the Appellant alerting him to the possibility that he had incorrectly claimed the SEISS grants because he had stopped trading prior to the end of the tax year 2019/20.

(8) Following a conversation with HMRC on the telephone, on 30 October 2020, the Appellant submitted an online voluntary disclosure that he had stopped trading and had therefore claimed the SEISS payments in error. The form did not offer any opportunity to explain further.

(9) On 7 December 2020, the Appellant submitted a further online voluntary disclosure. By this time, the form had more fields and facilitated an explanation, which

the Appellant provided, broadly along similar lines to the grounds of appeal explained below.

(10) On 28 December 2020, the Appellant submitted a further online voluntary disclosure, again with some further explanation.

(11) On 4 August 2021, HMRC issued an assessment to recover £14,070 in respect of incorrectly claimed SEISS payments.

(12) On 1 September 2021, the Appellant appealed to HMRC.

(13) On 13 April 2022, HMRC issued their view of the matter latter to the Appellant confirming their assessment.

(14) On 16 May 2022, the Appellant requested an internal review.

(15) On 22 September 2022, HMRC issued their review conclusion letter, upholding the assessment.

(16) On 5 October 2022, the Appellant submitted his Notice of Appeal to this Tribunal.

(17) On 6 March 2023, HMRC submitted an application to strike out the appeal.

PARTIES ARGUMENTS

6. HMRC's core submissions are:

(1) The Appellant was not entitled to the SEISS payments because he ceased to operate as a sole trader in the 2018/19 tax year.

(2) The notice of assessment was validly issued under paragraph 9(1) of Schedule 16 to Finance Act 2020.

(3) The Appellant's appeal is not within the jurisdiction of this Tribunal because his concerns relate to either complaint or breach of legitimate expectation and must therefore be struck out in accordance with Rule 8(2)(a) of the Tribunal Procedure Rules.

(4) In the alternative, the Appellant's appeal should be struck out under Rule 8(3)(c) on the basis that it has no reasonable prospects of success.

7. With regards to the circumstances surrounding the application and HMRC's procedures, HMRC submits:

(1) The delay of 12 months from the Appellant's disclosure up until the point that he could make an appeal was due to the need for there to be an assessment for the Appellant to appeal against;

(2) The letters sent out to taxpayers were invitations to consider whether SEISS was available to them, not a statement from HMRC that the person was entitled to SEISS. Further the application process required the taxpayers to make declarations about their eligibility and contained links to guidance which explained that eligibility.

8. The Appellant's arguments are:

(1) He now understands why he was not eligible to claim the SEISS relief, but he considers that the wording of the form was and remains confusing and debatable – the words "continue to trade" could, in his view, encompass trading through a limited company, as he then was.

(2) HMRC had been notified of his change of status to using a limited company and therefore should not have sent him invitations to participate in SEISS.

(3) Although he admits that he made a mistake, he considers that HMRC made mistakes too and therefore it would be unfair for him to have to repay all of the money mistakenly claimed without HMRC taking some responsibility for their mistakes.

(4) He signed up to the scheme at a time when there was no one to call for advice and it is therefore unfair for HMRC to ask him to pay it back in full.

DISCUSSION

9. As already stated, there is no dispute about whether Mr Shane Ellis was entitled to SEISS payments during the pandemic. He was not, because he was no longer trading as a sole trader, but rather through a limited company of which he was a director and shareholder.

10. We therefore do not need to consider further the details of the SEISS scheme itself.

11. Firstly we consider whether the assessment was validly raised by HMRC.

12. Paragraph 8 of Schedule 16 to Finance Act 2020 provides (so far as relevant):

> (1) A recipient of an amount of a coronavirus support payment is liable to income tax under this paragraph if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made.
>
> …
>
> (4) Income tax becomes chargeable under this paragraph
>
> (a) in a case where the person was entitled to an amount of a coronavirus support payment paid under the coronavirus job retention scheme but subsequently ceases to be entitled to retain it, at the time the person ceases to be entitled to retain the amount, or
>
> (b) in any other case, at the time the coronavirus support payment is received.
>
> (5) The amount of income tax chargeable under this paragraph is the amount equal to so much of the coronavirus support payment
>
> (a) as the recipient is not entitled to, and
>
> (b) as has not been repaid to the person who made the coronavirus support payment.

13. Insofar as relevant, paragraph 9 Schedule 16 Finance Act 2020 reads:-

> "Assessments of income tax chargeable under paragraph 8
>
> (1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8.
>
> (2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.
>
> (3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to an assessment under sub-paragraph (1) (for example, section 31 makes provisions about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment). …".

14. The assessment was raised by an officer of HMRC, in an amount equal to the claims for SEISS made and therefore in accordance with paragraph 8(5) of Schedule 16 to Finance Act 2020. The assessment was already raised within the normal 4 year time limit for assessments in accordance with section 34 of the Taxes Management Act 1970, as cross-referenced in paragraph 9(2) of that schedule.

15. On that basis, we find that the assessment was validly raised.

16. Turning to questions of fairness and legitimate expectation, we acknowledge first that there was no question here of the Appellant being accused of deliberately seeking to obtain an advantage by claiming the SEISS payment. He genuinely thought he was entitled to claim it but has now accepted that this was not the case. His case regarding fairness turns on two key issues – HMRC having information available to them that could or should have prevented them from sending him invitations to apply for SEISS; and their delay and behaviour after the claims were made.

17. HMRC submit that this Tribunal does not have an inherent jurisdiction to consider public law arguments regarding fairness and legitimate expectation.

18. There have been a great many cases considering the extent of this Tribunal's powers. As HMRC pointed out in its skeleton argument, they are not all consistent and there have been specific circumstances where the statutory language has been found to enable a consideration of matters of public law.

19. The Upper Tribunal in *Birkett v HMRC* [2017] UKUT 89 (TCC) established the following principles:

> 30. The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: Hok at [36], Noor at [25], BT Trustees at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): Hok at [41]-[43], Noor at [25]-[29], [33], BT Trustees at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In Oxfam at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In Hok at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (Wandsworth LBC v Winder [1985] AC 461), or whether a compulsory purchase order had been vitiated (Rhondda Cynon Taff BC v Watkins [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In Noor at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law

> concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

20. Applying those principles, we must consider the statutory powers that are open to this Tribunal. These are set out in section 50 of the Taxes Management Act 1970 and allow us, on an appeal against an assessment, to increase, decrease or maintain the level of the assessment. There is nothing in the wording of section 50 which enables us to consider wider public law principles of fairness or legitimate expectation.

21. We also note that Judge Scott in *Joshua Peter Taylor v HMRC* [2022] UKFTT 00304, which was another case very similar to this one about a claim for SEISS, adopted the same approach:

> "(60) The Tribunal has no jurisdiction in relation to matters of legitimate expectation. We must simply find the facts and apply the law. The facts are that the appellant did not qualify for Support Payments and in those circumstances the law gives HMRC the authority to raise an assessment. "

DISPOSITION

22. Given that we heard both parties full arguments regarding grounds of appeal, including on whether the assessment was validly raised, we have made a decision on the substantive appeal rather than consider a strike out.

23. On the basis of the findings above, we dismiss Mr Shane Ellis' appeal and uphold the assessment raised by HMRC.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 26th FEBRUARY 2024