Neutral Citation: [2022] UKFTT 00353 (TC)

Case Number: TC08606

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2021/17234

CORONAVIRUS JOB RETENTION SCHEME - Information Notices - Finance Act 2008 Schedule 36 - Whether bank statements were statutory records? - Yes - Appeal in that regard struck-out, but if not struck-out, would have been dismissed - Comments on discontinuous run and redactions to bank statements - Whether other documents and information reasonably required? - Yes - Remainder of appeal dismissed

Heard on: 13 September 2022
Judgment date: 21 September 2022

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL

Between

FRESH CONSULTING AND SUPPORT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: No appearance or representation

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

DECISION

INTRODUCTION

1. This is my decision in relation to the appeal by Fresh Consulting and Support Limited ('the Appellant') against an Information Notice ('the Information Notice') issued to it on 28 May 2021 by the Commissioners for Her (now, His) Majesty's Revenue and Customs ('HMRC'). The decision to issue the Information Notice (and the contents) were challenged by the Appellant but were confirmed by a departmental review.

2. The Information Notice was issued by HMRC in relation to payments, coming to approximately £73,000, made to the Appellant pursuant to claims which it made, for the period 16 March 2020 and 30 September 2021, under the Coronavirus Job Retention Scheme (often called, colloquially, 'the furlough scheme'): 'the Scheme'.

3. For the reasons set out more fully below, I have decided to strike-out part of the Appellant's appeal, and to dismiss the remainder of the Appellant's appeal in its entirety.

4. I therefore confirm the Information Notice, as it stands, unamended, and I order that it be complied with by the Appellant, in full, within 30 days of the release of this Decision.

HEARING IN THE ABSENCE OF THE APPELLANT

5. In consequence of the various restrictions imposed by the Pandemic, the Tribunal modified its procedures to allow for hearings to take place remotely wherever possible - usually using the 'Cloud Video Platform' or 'CVP'. Hundreds of hearings - from short procedural hearings to lengthy multi-day trials - have taken place in this way. But this does not happen automatically. The Tribunal ordinarily seeks the views of the parties as to the most appropriate manner of hearing the case. This is done by way of a so-called 'Video Hearing Attendance Form'.

6. In this appeal, the Appellant (a company which provides IT services) indicated on 20 April 2022 that it did not have the capability to participate in a video hearing, and so the hearing was listed to take place on a 'face-to-face' basis, at the Tribunal's principal hearing centre at Taylor House, London.

7. The hearing was listed to begin at 10.00am, but the parties were later notified that it was to begin at 10.30am. When called into the Tribunal room at 10.30am sharp, there was no attendance by or on behalf of the Appellant. There was nothing in the papers before me to suggest that the Appellant had indicated to the Tribunal that it would not be able to attend the hearing.

8. It is the taxpayer's responsibility to provide the Tribunal with a number at which it can be reached. Unfortunately, the Appellant had not given a contact phone number in its Notice of Appeal. However, the extensive correspondence included in the hearing bundle contained a mobile phone number for a Mr Casey Farquharson, the Appellant's sole director. I ordered a short adjournment to allow Mr Ellis, HMRC's representative, some time to phone that number to see if he could make contact with the Appellant.

9. Upon the resumption of proceedings, Mr Ellis told me that he had phoned that number, and that it had rang out.

10. Rule 33 of the Tribunal's Rules deals with "Hearings in a party’s absence". Rule 33 says that, if a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing and (b) considers that it is in the interests of justice to proceed with the hearing.

11. Therefore, both (a) and (b) must be satisfied.

12. As to (a), I was satisfied that the Appellant had received the Notice of Hearing. It was sent to the Appellant by the Tribunal on 15 July 2022, by email, and to the email address given by the Appellant in its Notice of Appeal. It had not been returned as undelivered. In my view that was enough to satisfy (a). But even if it was not, reasonable steps were taken to notify the Appellant of the hearing, namely the attempt to phone the number which it had given.

13. As to (b), "the interests of justice" are not defined, but in general terms include the need to discharge the Tribunal's business in a way which is efficient and cost-effective (bearing in mind that its costs are borne by the public purse), and which makes proportionate use of the Tribunal's (finite) resources, allocating a fair share of those resources to any individual case, bearing in mind the Tribunal's overall case-load.

14. Moreover, HMRC had prepared for, and were present, at the hearing, together with a witness who had travelled to London to give evidence from the north-east of England. In the absence of anything from the Appellant as to why it was not in attendance, an adjournment would not have served any useful purpose because there was nothing to say that the Appellant would attend any adjourned hearing. In short, the only consequence of an adjournment would have been still further delay, and additional burden, without any apparent benefit.

15. The decision to go ahead with a hearing in a party's absence is a discretionary decision, even when (a) and (b) have been satisfied. Rule 33 has to be read in the light of the overriding objective in Rule 2. I was entirely satisfied that it was fair and just to proceed with the hearing.

THE LAW

16. HMRC's powers to obtain information and documents, contained in Schedule 36 of the *Finance Act 2008*, are well-travelled ground.

17. The starting point is that an officer of HMRC may, by notice in writing, require a taxpayer "(a) to provide information, or (b) to produce a document, if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position or for the purpose of collecting a tax debt of the taxpayer": Schedule 36 Paragraph 1. Such a notice is an 'Information Notice', and "may specify or describe the information or documents to be provided or produced": Paragraph 6.

18. The right of appeal is given by Paragraph 29(1), but this does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, "that forms part of the taxpayer's statutory records".

19. All these powers relate to tax. The various taxes are listed in Schedule 36 Paragraph 63. There is no reference there to payments made under the Coronavirus Job Retention Scheme.

20. However, Schedule 16(2) of the *Finance Act 2020*, headed "Taxation of Coronavirus Support Payments", and made in support of section 106 of the 2020 Act, provides as follows:

> *"Accounting for coronavirus support payments referable to a business.*
>
> (2) So much of the coronavirus support payment as is referable to the business is a receipt of a revenue nature for income tax or corporation tax purposes and is to be brought into account in calculating the profits of that business (a) under the applicable provisions of the Income Tax Acts, or (b) under the applicable provisions of the Corporation Tax Acts".

21. Therefore, for the sake of completeness, and in relation to this Tribunal's jurisdiction, I am satisfied that Schedule 16 forms the jurisdictional 'bridge' or nexus between Schedule 36

and the Coronavirus Job Support Scheme. As such, payments made under the Scheme which are referable to the business can lawfully be the subject matter of an Information Notice under Schedule 36.

22. For the sake of completeness, I am also satisfied that HMRC, and not some other agency, has the responsibility for management of the amounts paid under the scheme. This arises from a Ministerial Direction called "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction" given by the then-Chancellor of the Exchequer, the Rt Hon Rishi Sunak MP, on 15 April 2020. That direction also sets out the Scheme, and was done in lieu of a Statutory Instrument or Order-in-Council during the early days of the first UK-wide 'lockdown'.

23. The Direction sets out the rules of the Scheme for the relevant period, which include definition of 'furloughed employees':

> (1) Paragraph 6.1 provides that a furloughed employee is one who has been instructed by the employer to cease all work in relation to their employment, for 21 calendar days or more, with that instruction being given by reason of circumstances arising as a result of coronavirus or coronavirus disease;
>
> (2) Paragraph 6.7 provides that an employee has been instructed by the employer to cease all work in relation to their employment "only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment".

24. Paragraph 5 of the Direction provides for "Qualifying Costs" which are, in summary, only those costs which relate to an employee to whom the employer made a payment of earnings in the tax year 2019/20 shown in a return made on or before a certain date, who had not ceased employment, and who was a furloughed employee (as defined) and who meet the conditions in Paragraph 7 (which, in summary, relate to the payment of earnings, and the level of them).

25. The detailed provisions of the Scheme are important because they lay down the conditions which applied to claims under the Scheme, and enable the differentiation of valid claims from invalid claims.

26. It is also relevant to note that the Scheme was introduced at great pace, in a time of national emergency, where both taxpayers and HMRC were endeavouring to come to grips with it. Indeed, in its Compliance Check series - CC/FS48 - "Coronavirus Job Retention Scheme - receiving grants you were not entitled to", HMRC acknowleged that "mistakes can happen, especially in the present circumstances", and explained that its priorities were "tackling deliberate non-compliance and criminal attacks. We'll not be actively looking for innocent errors in our compliance approach".

THE FACTS

27. On the basis of the documents in the bundle, and the evidence of Officer Paul Ramsey, contained in his witness statement dated 16 May 2022, and his oral evidence, I find the following facts.

28. The Appellant states its business to be IT consultancy.

29. The Appellant was deregistered for VAT in 2014.

30. The Appellant has not made any Corporation Tax returns since 2016.

31. The Scheme was established on 15 April 2020.

32. The Scheme's portal opened for claims on 20 April 2020.

33. The Appellant made claims in the Scheme. One was in relation to Mr Farquharson. Two were in relation to employees said to have commenced employment on 16 March 2020.

34. On 26 October 2020, Officer Webster wrote to the Appellant in relation to a compliance check.

35. On 10 November 2020, Officer Webster asked for bank statements.

36. On 21 December 2020, Mr Farquharson wrote that "I do [not] agree to providing you bank statements as I see that as an intrusion of privacy which you are not entitled to make".

37. An Information Notice was issued on 24 December 2020, by Officer Webster.

38. On 21 January 2022, Markel Tax, instructed by Mr Farquharson under the auspices of his membership of the Federation of Small Businesses, wrote a lengthy letter to HMRC setting out objections to the provision of documents and information. Markel stated that they considered the issue of the initial Information Notice 'to be highly spurious', and had advised their client to provide redacted bank statements.

39. HMRC treated that letter as a complaint and responded (at length) on 9 February 2021. Officer Webster accepted that the issue of the December 2020 information notice was 'premature'.

40. A further Information Notice - the subject matter of this appeal - was issued on 24 May 2021 by Officer Ramsey.

41. That was appealed to HMRC (by way of an email) on 7 June 2021.

42. On 9 July 2021, HMRC issued a penalty notice, but then administratively withdrew the penalties because of the extant appeal.

43. On 26 October 2021, the Appellant provided a narrative to be considered as part of the statutory review process.

44. The review concluded on 12 November 2021, and upheld the Information Notice.

45. The appeal to this Tribunal was made on 12 December 2021.

MY ANALYSIS

46. I remind myself that, in general terms, and subject to the exception for statutory records, that the burden is on HMRC to show that information and documents are "reasonably required". The standard of proof is the balance of probabilities.

All business Bank statements for the period 16 March 2020 to 31 December 2020

47. In my view, the bank statements are statutory records. That was the conclusion of this Tribunal (Judge Anne Redston and Mrs Myerscough) in *Joshy Mathew v HMRC* [2015] UKFTT 139 (TC) at Para [89] and I respectfully agree.

48. That means that, insofar as the Information Notice seeks the Appellant's bank statements, the Appellant does not actually have any right to appeal to this Tribunal: Schedule 36 Paragraph 29(2) (there is no right of appeal in relation to "a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records"). As such, the appeal in that regard must be struck-out, under Rule 8(2)(a) of the Tribunal's Rules, because the Tribunal does not have jurisdiction.

49. Lest that conclusion should fall for reconsideration, what follows is without prejudice to that conclusion, and reflects the unusual manner in which the Appellant has approached this aspect of the Information Notice.

50. A complete run of statements for the period 16 March 2020 to 31 December 2020 has *not* been provided. The Appellant accepts that it has not provided "full bank statements". It has provided only certain sheets. By my reckoning, based on the (unredacted) sheet numbers, at least 13 sheets are missing.

51. A complete run should have been provided. A selection does not answer to the Information Notice.

52. I reject the taxpayer's argument - which, in my view, is fundamentally misconceived - that HMRC's request for full bank statements was "vexatious", "fraudulent", "dishonest", "a fishing exercise" and/or "an intrusion of privacy". It was none of these things.

53. Whilst it is true to say that HMRC did not initially request bank statements, nothing material turns on the point. Nothing stood in the way of HMRC later deciding - as it did - that it did want to see the Appellant's bank statements. I was told by Mr Ramsey, and accept, that HMRC (entirely unsurprisingly, given the pace with which the Scheme was introduced, and its novelty) was to some extent learning as it went along in terms of the types of documents and information which it wanted to see for compliance checks. The position was evolving. Bank statements were not originally required, but the institutional view in that regard later changed.

54. Despite careful consideration of the taxpayer's lengthy representations (both in its correspondence and in its Notice of Appeal) I apprehend no reason whatsover, let alone any good reason, why a complete run of bank statements has not been provided.

55. It is self-evidently unarguable that provision of a full run of bank statements is "disproportionate" when the taxpayer itself has taken the time and effort to provide what appears to be a carefully curated, but incomplete and discontinuous, run of statements.

56. The second point is this. The bank statements provided are very heavily redacted. They should have been provided in an unredacted form, and must now be so. Treating them as statutory records, the self-same point was dealt with by the Tribunal (Judge Jonathan Cannan and Mr John Agboola) in *Andreasberg Developments LLP v HMRC* [2017] UKFTT 756 (TC), which said (at Paras 17 and 18):

> " There is simply no basis for the appellant to argue that whilst the bank statement is a statutory record, the Appellant is entitled to redact information in the statutory record before providing a copy to HMRC. There is no authority to support such a submission and it is inconsistent with the scheme of Schedule 36 ... where a document is a statutory record, HMRC are entitled to full unredacted copies of that document ..."

57. Although that decision is not binding on me, I respectfully agree with it, and its reasoning.

58. I observe in passing that the outcome and reasoning (which, in my view, apply now and applied at the time of asking) are inconsistent with the approach initially taken by this Appellant's advisers in their correspondence on behalf of this Appellant. I do not know whether that approach has been taken by them, or any other advisers, acting on behalf of any other members of the Federation of Small Businesses, but it does not reflect the established practice and caselaw of this tribunal, referred to above.

59. Even if I were mistaken in my conclusion that the bank statements were statutory records, and they were not, I am nonetheless entirely satisfied that a complete, unredacted, run would be reasonably required within the proper meaning and effect of Schedule 36.

60. In this appeal, the reason is obvious. The Appellant's position is that all its employees were furloughed. As such, it would not have been conducting any business, because none of

its furloughed employees, if genuinely answering to the requirements of the Scheme, would have been working for the Appellant.

61. Contrary to the Appellant's stated position, redacted bank statements showing payment are not "proof of payment". As a simple (and hypothetical) illustration (and without expressing any view - which I could not - as to whether this did or did not happen here) payments could have been made and then immediately countermanded by or repaid to the Appellant. It is reasonable to see the unredacted statements to exclude this possibility.

62. The Appellant's provision of payslips does not cure this deficiency, because those are documents produced by the Appellant. The full unredacted bank statements will allow the information on the payslips to be cross-checked.

63. It is striking - to put it neutrally, and without forming any views - that the redactions on the bank statements are extremely extensive, with only a very few transactions (being payments out to employees) unredacted. That indicates that the Appellant was still undertaking or engaged in many banking transactions at the time even though it told HMRC that "The company closed from before the start of the lockdown as there was no work due to Covid".

"A full description of the company's main Business Activities"

64. I agree that this is information which is reasonably required. HMRC are entitled to ask how this business was operating during this period, because knowing how a business operates helps HMRC get an understanding as to whether the Scheme was applicable and whether there was scope for it to continue to trade. Paragraphs 6.1 and 6.7 of the Scheme, and whether the conditions therein were met, are obviously engaged.

65. The information provided so far is extremely scanty and opaque. The Appellant said that its business is "Information Technology" employing, or said to employ, 4 engineers, "providing IT support which involves visits to clients' premises to rectify issues with IT equipment".

"A breakdown of all Job Retention Scheme Grant claims for the period 1 November 2020 to 30 April 2021; this should include how the employees' usual pay was calculated"

66. Only one calculation was ever sent. HMRC's view was that this had been used for every month.

67. A calculation for one employee (Mr Clarke) used a usual pay figure of £2,500 to calculate his grant as £2,000 per month. However, that differs from HMRC's PAYE records which showed Mr Clarke's pay varying each month, with the last payment of £2,500 being in month 1 of 2019/20.

68. Two other employees were not recorded on the Real Time Information submissions on or before 19 March 2020, meaning that HMRC cannot check their usual pay figures using HMRC's own records.

69. In my view, this item is information which is reasonably required. HMRC is entitled to check the Appellant's compliance with Paragraphs 5 and 7 of the Scheme.

"Regarding employee Samuel Smith: Please provide his employment start date, his role within the business and an explanation why he was employed when the business was closed and all employees were furloughed"

70. Mr Smith was added to the Appellant's claims from 1 November 2020, with him having been included in the Real Time Information return on 15 October 2020. The Appellant has said that he "completed his recruitment process prior to the national lockdown and was due to start as an apprentice on 13 July 2020. The company was advised that it would qualify for [the Scheme] whilst the employee was undergoing training with the training provider."

71. In my view, and despite the explanation given, there are nonetheless still reasonable and proportionate questions as to why Mr Smith was employed - only immediately to be furloughed - during a period when all the Appellant's other employees were, and had been, furloughed for some months and the Appellant was not, on its own account, engaged in any business.

72. This is information which is reasonably required.

Other matters

73. In its Notice of Appeal, the Appellant says, in relation to HMRC's charter that it should "be aware of your personal situation" that "there has been very little consideration for this aspect considering everything going on with illnesses, deaths, mental health, day to day issues and so forth". It is not clear to me whether this referred to anything in the Appellant's particular circumstances (or the circumstances of the natural persons directing and conducting its business) and there is nothing in the papers before me suggestive that the Appellant was (for example) unable to comply with the requests under the Information Notice due to any such factors.

74. The Appellant laid great stress (for example, in Mr Farquharson's email of 11 November 2020) on what it said had been a webchat to HMRC made on or about 27 May 2020 regarding the two employees who commenced employment on 16 March 2020, and whether this was or was not 'due diligence'. Various things are said about that call, what was alleged to have been said, and what was alleged to have been HMRC's acquiescence in the claims in relation to those two employees being made, even though this (in the Appellant's words) 'overrode the system'. HMRC also dedicated a significant amount of time and resources in relation to this webchat.

75. However, for present purposes (and without excluding the possibility about potential relevance at any point in the future) it is my view that none of this matters, because all that is presently underway is a check of whether the payments were or were not compliant with the Scheme.

OUTCOME

76. The appeal in relation to the bank statements is struck-out, on the basis that they are statutory records and the Tribunal does not have jurisdiction. Even if that conclusion were wrong, I would still have upheld the Information Notice in that regard.

77. The rest of the appeal is dismissed.

78. The Information Notice must now be complied with, in full, and as it stands.

79. I canvassed the views of HMRC as to the appropriate length of time for compliance. HMRC had no particular view. It seems to me that 30 days is an appropriate time for compliance.

80. The Appellant's Notice of Appeal requests that "the case should be closed". But the Information Notice relates to a compliance check, and not to an Enquiry, and so the Tribunal has no jurisdiction to issue a Closure Notice.

RIGHT TO APPLY TO SET ASIDE

81. Because the Appellant was neither present nor represented at the hearing, then, pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Appellant may make a written application to the Tribunal, so that it is received within 28 days of the date of this decision being sent to the Appellant, to set aside this decision or any part of it and to re-make it, or any relevant part of it, if the Tribunal considers that it is in the interests of justice to do so.

NO RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, this decision is final. There is no right of appeal in relation to this decision: see Finance Act 2008 Part 5 Schedule 36 Paragraph 32(5).

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 21st SEPTEMBER 2022