Neutral Citation: [2023] UKFTT 00357 (TC)

Case Number: TC08781

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02302

Coronavirus Job Retention Scheme – clawback of payments – payments made in respect of employees whose employment had commenced before 19 March 2020, but where the first RTI return to include information about them post-dated 19 March 2020 – whether payments to those employees represented "qualifying costs" for the purposes of the Coronavirus Act 2020 and Functions of HMRC (Coronavirus Job Retention Scheme) Direction of 15 April 2020 as amended by subsequent Directions made on 20 May 2020, 25 June 2020, 1 October 2020 and 12 November 2020

Heard on: 28 February 2023
Judgment date: 4 April 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER JULIAN SIMS

Between

ORAL HEALTHCARE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Manu Patel

For the Respondents: Shelina Begum, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is the appellant's appeal against an assessment dated 9 July 2021 in the sum of £35,243.67 for the tax year ending 5 April 2021. It was issued pursuant to paragraph 9 of Schedule 16 to the Finance Act 2020 ("FA 20").

2. HMRC request that the Tribunal exercise their power under section 50(7) of the Taxes Management Act 1970 ("TMA") to increase the amount of the assessment to £35,739.64 because of five errors in the calculations. That increase and the explanation for it had been notified to the appellant on 3 August 2022.

3. The assessment charges income tax as the result of the appellant receiving an amount of Coronavirus Support Payment ("Support Payment") in relation to 13 employees under the Coronavirus Job Retention Scheme ("CJRS").

4. The CJRS was introduced urgently at the start of the Covid-19 pandemic on 20 March 2020 to help employers affected by the pandemic to retain their employees and to protect the UK economy. The CJRS provided funding for employers who furloughed their employees rather than making them redundant when businesses, like the appellant, were effectively forced to shut down as the result of the first lockdown.

5. Employers could only claim the CJRS for furloughed employees for whom HMRC received PAYE Real Time Information ("RTI") in the form of a Full Payment Submission ("FPS") by specific dates. In summary, for CJRS grants covering periods up to 31 October 2020 the RTI FPS had to be received by 19 March 2020, disclosing the employees' 2019/20 pay from the employer. For grants covering periods from 1 November 2020 to 30 April 2021 employees must have been included in the RTI FPS submission received by 31 October 2020.

6. Employers had to apply special rules to decide whether or not employees would be eligible for any CJRS, including whether they were on Statutory Maternity Leave ("SML"), receiving Maternity Allowance and whether they had been furloughed prior to starting SML. There were also special rules to calculate employees' "usual pay", as the basis for CJRS claims.

7. Where HMRC decide that an employer has claimed CJRS grants incorrectly, HMRC can recover the overpaid amount by making a tax assessment for the amounts to which the employer was not entitled.

8. This appeal concerns the clawing back by HMRC of overpayments.

9. We had a hearing bundle extending to 408 pages. I had previously allowed HMRC's application dated 17 February 2023 to amend the previously lodged bundle. We also had a skeleton argument for HMRC. We heard evidence from Officer Peter Smith and from Mr Patel.

The facts

10. HMRC paid seven CJRS grants totalling £55,965.19 for which the appellant had made claims for April 2020 to September 2020 and for December 2020.

11. On 10 March 2021, Officer Smith opened a compliance check to ensure that the claims had met the eligibility conditions. He subsequently engaged in extensive correspondence with the director of the appellant and his father, Mr Manu Patel, who looked after payroll matters.

12. On 14 April 2021, Mr Patel provided a Schedule setting out a disclosure of a net overclaim of £350.85 stemming from overclaims totalling £950.24 in the April and May 2020 claims and under-claims totalling £599.39 for the August and December 2020 claims. He

confirmed that the claims for June, July and September were believed to be accurate. It was confirmed that all of the employees included in the claims had been included in the RTI FPS sent to HMRC on or before 19 March 2020. He also confirmed that the payroll was done at the end of each month.

13. On checking the RTI system, Officer Smith ascertained that nine of the employees in the claims were not included in the RTI FPS before 19 March 2020. In fact, five of the nine including those who joined the appellant in March 2020, were first included in the RTI FPS which was received on 3 May 2020. Three were included in the RTI FPS received on 30 July 2020 and one in the RTI FPS received on 1 September 2020.

14. He therefore checked the RTI system to see if both employees included in the December 2020 claim were included in an RTI FPS received by HMRC on or before 31 October 2020 because the eligibility rules had changed on 1 November 2020. One of those employees was not included and the first intimation was in the RTI FPS received on 5 November 2020.

15. On 15 April 2021, the officer contacted the appellant to confirm that not all of the information required by a Schedule 36 Finance Act 2008 Information Notice that he had issued had been provided.

16. On 28 April 2021, further information was provided but there was still information that was outstanding.

17. On 5 May 2021, Officer Smith contacted the appellant to point out that further information was still required and a telephone interview was subsequently arranged for 10 June 2021.

18. During the course of the interview the appellant's representative confirmed that all of the employees included in the claims had been included in an RTI FPS sent to HMRC on or before 19 March 2020. Officer Smith stated that that was not the case and told him the names of the employees who had been included in the RTI FPS. He pointed out that the nine employees appeared to be ineligible. In response Mr Patel said that employees who were employed in March 2020 would have been notified to HMRC at the end of March 2020 but the end of March RTI FPS was not made on time due to technical difficulties. In fact it was submitted on 6 April 2020.

19. That interview was followed by further correspondence in which Mr Patel described difficulties experienced with the RTI system at the end of March and in April 2020.

20. On 23 June 2021, Officer Smith emailed the appellant a pre-assessment letter and pre-assessment calculations advising that the CJRS claim calculation contained three types of error amounting to an overall overclaim of £35,243.67. Those were:-

(a) There were ten ineligible employees because HMRC had not received a RTI FPS by the relevant cut-off date. This was 19 March 2020 for nine of the employees. In the case of the tenth, the first RTI FPS was received on 5 November 2020 which after the cut-off date.

(b) One employee was only partially eligible due to having been on maternity leave for part of the period and therefore entitled to statutory maternity pay ("SMP"). (Mr Patel was advised to make a claim for SMP).

(c) There was an incorrect figure for the "usual pay" used in the claim calculations for one employee.

21. On 25 June 2021, Mr Patel emailed the officer explaining that he had had difficulties operating the HMRC PAYE Tool in April 2020 and had had to contact HMRC for assistance.

22. Officer Smith responded on 28 June 2021 advising that technical difficulties in April 2020 would not explain why employees were not notified to HMRC on or before 19 March 2020.

23. Correspondence ensued and on 9 July 2021, the assessment was issued.

24. On 18 October 2021, Mr Patel emailed the officer asking that the assessment be reconsidered and attached several documents supporting his view that the ten employees were eligible. He confirmed that four employees had commenced work on 3, 5 12 and 12 March 2020. One had commenced on 6 April 2020, one on 6 July and two on 21 July 2020. One had commenced on 1 August 2020 and the last on 23 October 2020.

25. On 7 November 2021, the appellant appealed the assessment on the grounds that it was wrong to use 19 March 2020 as the date by which HMRC had to be notified. Mr Patel also appealed a penalty but no penalty had been raised.

26. On 30 November 2021, Officer Smith responded explaining:-

(a) That the time limit for appealing the assessment had expired but reasons for the delay should be provided.

(b) That there was no penalty assessment.

(c) He clarified the legislation regarding relevant dates.

(d) He said the position in regard to a penalty had not been finalised.

27. On 4 January 2022, Officer Smith issued a View of the Matter letter and offered a review. That offer was accepted.

28. On 28 February 2022, the Review Conclusion Letter was issued and that increased the assessment to £36,031.14.

29. On 21 March 2022, the appellant appealed to the Tribunal pointing out that employees who commenced employment in March 2020 were first paid at the end of the month so could not be included in RTI FPS by 19 March 2020.

30. On 3 August 2022, Ms Begum, the litigator responsible for the appeal, wrote to the appellant stating that it was noted that the Notice of Appeal had accepted that:-

(a) There was an incorrect calculation for one employee resulting in an overclaim in the amount of £1,263.80.

(b) There had been incorrect claims for another employee due to SMP and that had resulted in an overclaim in the amount of £2,610.88. She adjusted the assessment.

31. In light of the adjustments, the total overclaim, including the claims for ten employees for whom an RTI had not been submitted by the relevant dates, was confirmed to be £35,739.64.

32. The issue in dispute in this appeal is the eligibility of the ten employees.

The Law

33. Section 76 of the Coronavirus Act 2020 provided that "Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease." Section 71 of the same Act provided as follows:

> **"71 Signatures of Treasury Commissioners**
>
> (1) Section 1 of the Treasury Instruments (Signature) Act 1849 (instruments etc required to be signed by the Commissioners of the Treasury) has effect as if the reference to two

or more of the Commissioners of Her Majesty's Treasury were to one or more of the Commissioners.

(2) For the purposes of that reference, a Minister of the Crown in the Treasury who is not a Commissioner of Her Majesty's Treasury is to be treated as if the Minister were a Commissioner of Her Majesty's Treasury

The First CJRS Direction

34. Pursuant to those powers, on 15 April 2020 the Chancellor of the Exchequer signed a Direction, entitled "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction" ("the First Direction").

35. The main body of the First Direction, running to just three paragraphs, provided as follows:

"1. This direction applies to Her Majesty's Revenue and Customs.

2. This direction requires Her Majesty's Revenue and Customs to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule to this direction (the Coronavirus Job Retention Scheme).

3. This direction has effect for the duration of the scheme."

The substance of the CJRS is then set out in the Schedule to the First Direction.

36. After an introduction to the CJRS and its purpose, paragraph 3 defines qualifying employers (essentially any employer with a PAYE scheme registered on HMRC's RTI system on 19 March 2020). It is agreed that the appellant meets this requirement.

37. Paragraph 5 of the Schedule is headed "Qualifying costs" and reads:

"5. The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which –

(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), and

(b) meets the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee."

38. It is not in dispute that paragraphs 5(a)(ii) and (iii) and 5(b) are satisfied. With regard to paragraph 5(a)(i), HMRC refer to the definition of "relevant CJRS day" in paragraph 13.1 of the Schedule which reads:

13.1 For the purposes of CJRS –

(a) a day is a relevant CJRS day if that day is –

(i) 28 February 2020, or

(ii) 19 March 2020.

39. Paragraph 12 of the Schedule made it explicit that the CJRS would relate to the period 1 March 2020 to 31 May 2020.

40. Subsequent Directions extended the CJRS with some modifications which are not relevant to this appeal. The Second Direction, dated 20 May 2020, and the Third Direction, dated 25 June 2020, extended the CJRS to 30 June 2020 and 31 October respectively but the relevant day remained the same ie 19 March 2020. The Fourth Direction, dated 1 October 2020, imposed a deadline of 30 November 2020 for making claims under the Third Direction. The Fifth Direction, dated 12 November 2020, extended the CJRS to 31 March 2021 and provided at paragraph 6.2(c) of the Schedule that the relevant day for receipt by HMRC of the RTI FPS including the employee's details was after 19 March 2020 and before 31 October 2020.

41. Paragraph 8(1) of Schedule 16 FA 20, provides that a recipient of Support Payments is liable to income tax if they were not entitled to a Support Payment that they received in accordance with the CJRS.

42. Paragraph 8(4)(b) Schedule 16 FA 20, provides that in circumstances where the recipient was never entitled to it, income tax is chargeable at the date the Support Payment was received. The amount charged is equal to the amount of the Support Payment to which the applicant was not entitled. (Paragraph 8(5) Schedule 16 FA 20).

43. Paragraph 9(1) of Schedule 16 FA 2020 provides:

> "(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."

Discussion

44. This was a very sad case and we had sympathy with Mr Patel. The appellant is a company owned by his son and it provides dental services. Mr Patel's background is that he was at one time a costs manager in a construction business but he helps his son by looking after the payroll. The Practice Manager gives him the information. There is a high turnover of staff. He freely admitted to Officer Smith that at times he had had difficulty with the payroll and he did get in touch with the HMRC Help Line for assistance. He did not believe that he would have understood the legislation had he attempted to read it.

45. We accept that Mr Patel had difficulties running the payroll at the end of March and that the RTI FPS for March was only lodged on 6 April 2020. In that regard we note that the RTI FPS for February 2020 was lodged on 28 February 2020 and that for January 2020, on 31 January 2020. The December 2019 RTI FPS was lodged on 17 January 2020. We can therefore see that he has had problems with lodging the information in real time.

46. It had been his understanding that if an employee was in employment and furloughed then the employee would have been eligible for the Support Payment. We accept that the ten employees were all employees at some stage and all were furloughed.

47. As can be seen from paragraph 24 above the dates on which the first nine employees commenced employment and the fact that the payroll was done at the end of each month meant that none of them could ever have been eligible since the relevant day in terms of the legislation was 19 March 2020.

48. The simple fact of the matter is that technical issues at the end of March or the beginning of April 2020 cannot impact on the need to have had an RTI FPS, including the relevant employees details, lodged with HMRC before 19 March 2020. That could not have happened.

49. As far as the tenth is concerned, although he was in employment for a few days before the relevant day, his details were not submitted until 5 November 2020.

50. It is clear that the Directions were drafted with an absolute cut-off date in respect of who counted as an eligible employee. Whilst this prevented abuse of the system, it is clear from this case that it also meant that other employers who had taken on employees in March 2020 or who had RTI filing difficulties were also unable to claim under the scheme for some employees.

51. Unfortunately it is quite clear that payment of earnings to each of the ten employees in question were not included in an RTI FPS on the relevant dates and the law is absolutely explicit in stating that that is a mandatory requirement.

52. Whilst we have sympathy with Mr Patel there is no provision in the legislation for any extension of time or for any remission because of mistakes. There was no entitlement to those payments and therefore the appellant is liable to tax in respect thereof.

53. The assessment was made well within the relevant statutory time limits in sections 34 and 36 TMA.

54. The recalculation in Ms Begum's letter of 3 August 2022 is correct. As requested by HMRC, we vary the assessment to increase the amount of the assessment to £35,739.64.

55. We accept that Mr Patel was trying to do his best and that the appellant had not profited by the incorrect claims.

56. In her Skeleton Argument, Ms Begum very fairly stated that HMRC do not allege that the fact that the claims were incorrect was caused by anything other than a misunderstanding. We agree and hence our sympathy for Mr Patel because unfortunately it is a very expensive misunderstanding.

57. Lastly, for completeness, as we confirmed to Mr Patel in the course of the hearing, whilst we note his argument that the claims were in line with the spirit of the CJRS, in that the employees kept their jobs, nevertheless the Tribunal has no jurisdiction to entertain such an argument. The Tribunal is a creature of statute and has only the powers given to it by statute and must apply the law to the facts. In a similar vein, as the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) made clear, the Tribunal has no jurisdiction to consider whether or not the law is fair.

Decision

58. For all these reasons the appeal is dismissed and we vary the assessment to £35,739.64.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 04th APRIL 2023