



Neutral Citation: [2023] UKFTT 00398 (TC)

Case Number: TC08805

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Appeal reference: TC/2021/10493

*Coronavirus Job Retention Scheme – assessments to recover overpayments – appeal allowed in part*

**Heard on:** 17 August 2022  
**Judgment date:** 05 April 2023

**Before**

**TRIBUNAL JUDGE BEDENHAM  
JULIAN SIMS**

**Between**

**ZOE SHISHA EVENTS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondent**

**The hearing took place on 17 August 2022 with further written submissions on 11 October 2022 and 24 October 2022. With the consent of the parties, the form of the hearing was video with the parties attending through the Tribunal video platform.**

**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.**

**A summary decision was released to the parties on 10 January 2023 in which the parties were directed to either agree the revised quantum of the first assessment or, failing agreement, provide written submissions on that issue. The parties subsequently provided written submissions on the issue of the revised quantum of the first assessment.**

**For the Appellant: Ms Muntean, director of the Appellant company.**

**For the Respondents: Mr Marks, litigator of HM Revenue and Customs' Solicitor's Office.**

## DECISION

### INTRODUCTION

1. This is an appeal by Zoe Shisha Events Ltd against assessments to tax totalling £14,895. These assessments, which were notified by letters dated 11 June 2021, were made because HMRC formed the view that the Appellant had been paid monies under the Coronavirus Job Retention Scheme (“CJRS”) that it was not entitled to. The first assessment (£9060) related to CJRS payments in the Appellant’s accounting period ending 31 August 2020. The second assessment (£5835) related to CJRS payments in the Appellant’s accounting period ending 31 August 2021.

### WERE THE ASSESSMENTS PROPERLY MADE AND NOTIFIED?

2. It is not in dispute that if there is any liability for monies overpaid under the CJRS, that liability sits with Zoe Shisha Events Limited. After the hearing, the Tribunal noticed that the notices of assessment were addressed to “Zoe Muntean”. Ms Muntean is the Appellant’s director. This addressee point is not something that was raised by either party at the hearing. On noticing this potential issue, the Tribunal asked the parties to make written submissions on this point. Those submissions were provided by HMRC on 11 October 2022 and the Appellant on 24 October 2022.

3. In their submissions, HMRC made the following points:

(1) The assessments were correctly made against Zoe Shisha Events Ltd as shown by screenshots from HMRC’s internal systems (which screenshots HMRC attached to their submissions and sought permission to rely on).

(2) The assessments were emailed to the Zoe Shisha Events email address with a cover letter that stated “Please find attached two assessments for the overclaim of the Coronavirus Job Retention Scheme by Zoe Shisha Events Ltd”. The assessments were attached to the emails as PDFs titled “...Zoe Shisha Events Ltd assessment letter...”

(3) The second notice of assessment referred to the tax year ended 5 April 2021 when in fact it should have referred to the tax year ending 5 April 2022. However, the assessment was made in the correct accounting periods.

(4) Making and notifying assessments are two separate processes. Reference was made to *Honig and Ors v Sarsfield (Inspector of Taxes)* [1985] STC 31.

(5) “An error in notification does not invalidate the assessment, but merely prevents the Respondents from relying on an argument that an appeal was submitted out of time, such of [sic] issue does not arise in this matter in any event as the Appellant was able to exercise their right of appeal”. Reference was made to s114(2) of the Taxes Management Act 1970 (“TMA 1970”).

4. In its submissions, the Appellant made the following points:

(1) HMRC have made numerous mistakes in this case.

(2) “Placing [Zoe Muntean’s] name on the assessments, instead of the company name – that wasn’t a mistake, It was on purpose. To damage [Zoe Muntean] directly...”

(the Appellant also made further submissions about other aspects of HMRC’s conduct).

5. We have decided to admit the screenshots into evidence. Prior to (and at) the hearing, neither party raised any issue in relation to the addressees named on the assessment notifications. It is therefore understandable that the screenshots were not included in the hearing bundle. Further, the screenshots contain relevant information, and the Appellant has

had an opportunity to comment on them. In all the circumstances, we consider it consistent with the overriding objective to admit this evidence.

6. On the basis of the screenshots, we are satisfied that HMRC assessed Zoe Shisha Events Limited in relation to the accounting periods ending 31 August 2020 and 31 August 2021.

7. We note that s 29(5) TMA 1970 requires a notice of assessment to be served on the person assessed. We are of the view that whilst the notices of assessment were addressed to “Zoe Muntean”, they were nonetheless properly served on the Appellant and the Appellant was properly notified of the assessments in circumstances where they were sent to the Appellant’s email address and the cover email made clear that the assessments had been issued to the Appellant company.

8. We further find, based on s 114(2) TMA 1970, that the errors in the notice of assessment (i.e. addressing them to Ms Muntean and, in the case of the second assessment, referring to the tax year ending 5 April 2021 instead of 2022) do not impeach or otherwise affect the assessments. We similarly find that the submissions made by Ms Muntean concerning HMRC’s conduct do not affect the validity of the assessments.

9. Whilst we have found that the assessments were properly made and notified to the Appellant company, HMRC really ought to have taken more care in relation to notification.

## **THE CJRS**

10. The CJRS was introduced at the start of the Covid-19 pandemic to provide funding to employers who furloughed their employees rather than making them redundant when businesses were effectively forced to suspend their operations as a result of the national lockdown announced in March 2020.

11. Section 76 of the Coronavirus Act 2020 provided that HMRC “are to have such functions as the Treasury may direct in relation to coronavirus...”.

12. On 15 April 2020, the then Chancellor of the Exchequer signed the Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction which provided that HMRC was to be responsible for the payment and management of amounts to be paid under the CJRS.

13. The substance of (and conditions applicable to) the CJRS were then set out in a schedule to the 15 April 2020 Direction.

14. Paragraph 5 of the Schedule provided:

“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.

(b) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.”

15. Paragraph 7 of the Schedule then set out further conditions for CJRS claims.
16. The parties proceeded on the basis that Ms Muntean was a fixed rate employee within the meaning of paragraph 7.6 of the Schedule and did not ask us to find otherwise.
17. Paragraph 7.7 of the Schedule provided that the “reference salary” for a fixed rate employee (by which the appropriate CJRS payment would be calculated) is “the amount payable to the employee in the latest salary period ending on or before 19 March 2020”.
18. Paragraph 7.3 of the Schedule makes clear that in calculating the reference salary “no account is to be taken of anything which is not regular salary or wages”. Accordingly, no account should be taken of any payments made by way of dividends.
19. Further directions in relation to the CJRS were subsequently made by the Treasury. These were summarised by Judge Poole in *Carlick Contract Furniture Ltd v HMRC* [2022] UKFTT 00220 (TC). These later directions allowed for “flexible furlough”. Part of the Appellant’s CJRS claim (in relation to Ms Muntean) related to flexible furlough.
20. Paragraphs 8 and 9 of Schedule 16 to the Finance Act 2020 provide that where HMRC are satisfied that a person has received an amount of a CJRS payment to which that person was not entitled, HMRC may assess that person in relation to that amount.
21. The appeal to the Tribunal is brought under s49G of the Taxes Management Act 1970 as a result of which the Tribunal is to “determine the matter in question”. By section 50 of the TMA 1970, an assessment shall stand good unless the Tribunal decides that the assessment overcharges or undercharges the taxpayer.

#### **BACKGROUND**

22. The following was apparent from the documents in the hearing bundle and the evidence we heard at the hearing:
23. The Appellant operates a shisha establishment which is based at an outdoor terrace of a central London hotel. The Appellant serves shisha, drinks, and food. The business commenced trading in 2017.
24. Due to the Covid-19 pandemic, on 11 March 2020 the Appellant decided to close the business for a few weeks. However, thereafter the UK went into lockdown. Prior to the business closing it had been staffed by Ms Muntean (director) and a Mr El Sayed (referred to as a “shisha boy”).
25. The Appellant made claims under the CJRS. In the Appellant’s accounting period ending 31 August 2020, the claim related to Ms Muntean and Mr El Sayed. In the Appellant’s accounting period ending 31 August 2021, the claim related only to Ms Muntean.
26. On 24 September 2020, HMRC wrote to the Appellant notifying it that HMRC were opening a compliance check into CJRS payments received by the Appellant. By that letter, HMRC asked the Appellant to provide various information in relation to each employee included in the CJRS claims made by the Appellant. One of the pieces of information asked for was “whether you paid each of your employees at least the amount on the claim and provide evidence of this – for example a BACS list, payslip or employee signature for receipt of payment.”
27. On 1 October 2020, the Appellant (through Ms Muntean) replied by email with the following information:
  - (1) For both Ms Muntean and Mr El Sayed, the “Furlough start date” was said to be 12 March 2020.

- (2) For Mr El Sayed a “furlough end date” of 30 June 2020 was given.
- (3) “The furlough payment was calculated at 80% from the salary, based on a 40 hours per week for [Mr El Sayed]. My salary is fixed £3,000 per month, however my hours are between 40 to 60 per week. Never below 40 hours.”
- (4) The business re-opened on a “part-time” basis on 16 July 2020.
- (5) “I had an accountant up until the beginning of July 2020 and then I switched for another accountant”. This is why I have two different types of payslips...Both accountants have submitted RTI”.

Attached to the Appellant’s email were payslips for Ms Muntean and Mr El Sayed. In relation to Ms Muntean, payslips for January 2020 and February 2020 showed her pay as £3000 per month. The January 2020 payslip showed the “year to date” pay as £8,400 (£5400 plus £3000 in January - reflecting that Ms Muntean’s monthly salary for April to December 2019 had been £600). Ms Muntean’s payslips for March, April, May and June 2020 showed her pay as £2400 per month. Ms Muntean’s payslips for July, August and September 2020 showed her pay as £3000 per month. In relation to Mr El-Sayed, payslips for January and February 2020 showed his pay as £1448 per month.

28. There was some further contact between HMRC and the Appellant in October and November 2020.

29. On 2 February 2021, Mr Paul Dickson, a CJRS Compliance Caseworker at HMRC, emailed the Appellant asking for copies of all payslips from the 2019/20 tax year for all employees. Mr Dickson followed up with further correspondence on 15 February 2020 and 1 March 2020. Mr Dickson also made unsuccessful attempts to contact the Appellant by telephone. Mr Dickson had taken over the compliance check from the officer previously allocated.

30. On 5 March 2021, Ms Muntean replied to Mr Dickson stating that she had not answered the telephone as she was concerned the call was a “phishing” call. Ms Muntean explained this concern had been caused by contact from the previous case officer which contact had made her concerned that she was being targeted for fraud.

31. On 8 March 2021, Mr Dickson responded to Ms Muntean stating that he accepted her explanation for not responding to him earlier. He went on to repeat the request for payslips for the tax year 2019/20 and explained “these are required to check your wages pre-March 2020 against amounts declared to HMRC through RTI as this will determine the eligible CJRS claim.” Mr Dickson went on to state that the payslips provided to date only went back as far as January 2020 with none provided for the earlier months of the tax year.

32. On 8 March 2021, the Appellant (through Ms Muntean) replied to Mr Dickson. Ms Muntean stated that Mr Dickson could call her on 11 March 2021.

33. On 11 March 2021, a conference call took place between HMRC (Mr Dickson and Rizwan Gul) and the Appellant (Ms Muntean). HMRC’s note of that call was in the hearing bundle. Ms Muntean did not suggest that note was in any way inaccurate. The note recorded the following:

- (1) Ms Muntean stated that she had submitted the Appellant’s CJRS claims because “my accountant was busy with other clients”.
- (2) When asked how she had determined what each employee’s usual pay was, Ms Muntean stated “I am on a fixed salary, and the other employee was on a fixed monthly salary as well”.

(3) Ms Muntean then stated that she was on a fixed salary of £3000 per month and had been since January 2020.

(4) In response to the question “what was your salary before Jan 2020?”, Ms Muntean stated “£600 a month until December 2019 and from January 2020 I asked my accountant to put me on £3000 a month salary”.

(5) When asked why RTI submissions showed Ms Muntean as receiving £600 per calendar month, Ms Muntean stated “I was being paid £3000 a month from January 2020, the accountant was previously putting through £600 a month and they explained that the rest was in dividend. I did repeatedly ask different accountants to change this for me so that everything went through PAYE”.

34. On 13 March 2021, the Appellant (through Ms Muntean) sent Mr Dickson a long email stating, *inter alia*:

(1) The RTI submissions for September 2019 onward were made late.

(2) As at September 2019, the Appellant did not have an accountant “as I let go of my first [accountant because] we couldn’t agree on many things, including my desire to have a bigger salary for £3000 per month”.

(3) The Appellant approached new accountants in March 2020 but they were very busy and could not take the Appellant on as a client at that stage.

(4) Because the Appellant did not have an accountant, Ms Muntean called HMRC on 22 May 2020 to make a CJRS claim on behalf of the Appellant. “If the HMRC man didn’t say anything, then for me the whole situation is fine.”

(5) When the Appellant later engaged a new accountant, “the accountant said verbally over the phone that [my furlough claim] might not be correct, but never told me why. I believe the accountant should’ve sent me an email with the information and say this is what I believe that you need to claim for yourself and for the employee.”

(6) In 2020, the Appellant changed accountants on a number of occasions. Ms Muntean was dissatisfied with the service provided by several of the Appellant’s accountants.

35. On 14 March 2021, the Appellant (through Ms Muntean) emailed Mr Dickson a copy of the payslips for Ms Muntean and Mr El Sayed for the period March 2019 to December 2019. Ms Muntean’s payslips showed a monthly salary of £600 in each of those months. Mr El-Sayed’s payslips showed a monthly salary of £1280 for March 2019 and £1038 for December 2019. For the other months, Mr El-Sayed’s salary was shown as £800.

36. On 15 March 2021, Mr Dickson replied to the Appellant and a number of the points raised in the Appellant’s email of 13 March 2021. Mr Dickson then stated:

“To simplify where we are with this compliance check. For HMRC to decide on your allowable claim amount we look at what your business told us you were earning before March 2020 in the tax year 19/20. The only amounts we have submitted on record for you before then are monthly payments of £600. It seems that on your behalf someone – likely your accountant – has sent us in the amendment to your 19/20 pay and tax figures but as these were sent to us in 2021 we are no able to consider these when calculating your allowable claim because they’ve not been received before March 10<sup>th</sup> 2020. The sole issue in this case and your claims is that you based these on your new monthly salary of £3000 but not once before the cut-off date of March 19<sup>th</sup> 2020 did anyone from or representing your company tell HMRC of this updated salary. We therefore need to go by what your business did tell us before 19<sup>th</sup> March – a monthly salary of £600.”

37. On 19 March 2021, Mr Dickson sent to the Appellant his “initial calculations” of the CJRS overpayment. The amount said to have been overpaid to the Appellant was £14,895.

38. On 19 March 2021, the Appellant (through Ms Muntean) emailed Mr Dickson. In that email the Appellant expressed disagreement with Mr Dickson’s view that there had been an overpayment to the Appellant.

39. On 25 March 2021, Mr Dickson replied to the Appellant. In that email, Mr Dickson acknowledged that the Appellant had reported that it had experienced difficulties with accountants during 2020 but went on to say that he did not consider that to be relevant to the underlying liability. Mr Dickson reiterated:

“For [Zoe Muntean] we have **only** RTI returns of £600 per month, for Mr El-Sayed we have **only** RTI submissions of £800 per month. Your business has submitted these amounts only to HMRC. When we are calculating the amount of claim we allow we do so by looking at what your business told HMRC you were earning before the Covid crisis through RTI...

...

I apologise if I am being blunt but...your company claimed based on wages of £3000 for yourself. Your company...did not once tell HMRC of this increase before March 2020. Therefore we simply cannot allow claims based on these wage increases and must use the wages you did tell us about.”

40. On 9 April 2021, Mr Dickson wrote to the Appellant to notify a “very recent policy decision...which means we are now able to accept further evidence when considering if claims can be accepted and not only rely on the RTI submissions and payslips”. It was then explained “we will require evidence of communication between yourself and the company which done your payroll wherein you have notified them of the increase to the salaries...[and] the business bank statement from January 2020 and February 2020 which evidence the higher salaries being paid from the company to yourself and your employee.”

41. On 10 April 2021, the Appellant provided its business bank statement for January and February 2020. In the cover email, Ms Muntean stated:

“The shisha boy [Mr El-Sayed] was paid per day. Not per week, nor month, as this is how he preferred and I agreed. Sometimes upon his request, I would pay him cash...then I would deduct from his salary.

For me, except the payment transferred in one of my bank accounts, I would also have cash from my business which I didn’t place in the business bank account nor my personal one, as I spend it for my personal needs.

The January bank statement showed total payments to Mr El-Sayed of £1277 (all with the reference “commission”). The January bank statement showed total payments to Ms Muntean of £1612 (all with the reference “salary”). The February bank statement showed total payments to Mr El-Sayed of £1135 (all with the reference “commission”). The February bank statement showed total payment to Ms Muntean of £2160 (all with the reference “salary”).

42. On 10 and 11 April 2021, the Appellant (through Ms Muntean) forwarded to Mr Dickson several emails with the Appellant’s previous accountants explaining several issues with the Appellant’s payroll and RTI submissions.

43. Mr Dickson having said he would review the further information provided by the Appellant and let the Appellant know whether he had any further information requests, the Appellant (through Ms Muntean) replied “...any more information that you’ll need from me, I will not provide anything and I’m fully aware of what I’m writing here. This case it’s taking too long...”



44. The assessments under appeal were made on HMRC's internal system on 10 June 2021. The Notices of Assessment were dated 11 June 2021. We note that, despite being dated 11 June 2021, the Notices were emailed to the Appellant on 10 June 2021. However, we take the view that nothing turns on this as it is clear that the Appellant received the relevant notifications and responded to them.

45. On 10 June 2021, the Appellant (through Ms Muntean) wrote to Mr Dickson stating that it wished to appeal against the assessments.

46. On 21 June 2021, Mr Dickson provided his "view of the matter":

"Ms Muntean advises that claims were based on a considerable wage increase for herself taking her wage from £600 to a fixed monthly salary of £3000 and a new wage for Mr El-Sayed of £1250.

Neither the company, nor their accountant, notified HMRC of this new wage on an RTI submission prior to the announcement of the [CJRS] on 20 March 2020. Company owner/director, Zoe Muntean, states that this is the fault of her accountant who didn't notify HMRC of this wage increase. With that in mind...I requested evidence of the wage increase...Correspondence between Ms Muntean and accountants was provided, but there was no mention of the increased wage. Bank statements from January and February were provided, these did not show the increased wage of £3000 per month for Ms Muntean. Contracts reflecting the new wage were not provided. Payslips were provided but these were created after the furlough scheme was in place...I planned to request further documentation and explanation, but Ms Muntean advised she would send no further information and requested the assessment..."

47. On 28 June 2021, the Appellant (through Ms Muntean) replied to Mr Dickson's view of the matter letter stating, *inter alia*:

- (1) The Appellant did not know that there was any need to notify HMRC of any salary increase. Any failure in this regard was due to the accountants.
- (2) There were no written contracts between the Appellant and Ms Muntean or Mr El Sayed.
- (3) The Appellant paid an accountant to deal with payroll and RTI submissions for the period September 2019 to June 2020 which done in May 2020.
- (4) The January and February 2020 bank statement "didn't show the increased wage of £3000 per month, HOWEVER it didn't show £600 either. It showed above £2000. January and February could be tricky months..."
- (5) The Appellant's accountant would often call rather than send emails.
- (6) "If my salary doesn't show £3000 per month for January and February 2020...it doesn't show £600 either. It shows above £2000 and I've paid taxes on £3000. So, I lose again."
- (7) "You've seen the bank statements from January and February 2020, where I've paid my former employee the amount stated in the payslip, even more. Whatever was more wasn't an increase of salary. It was just my personal choice to pay him more."
- (8) The Appellant's CJRS claim was based on examples given on GOV.UK.
- (9) The Appellant accepted the offer of a review

48. In July 2020, there was correspondence between the parties as to whether the offer of a review had been validly accepted by the Appellant. The Appellant made clear that the offer of a review *was* accepted.

49. By letter dated 26 August 2021, the Appellant was notified that the assessments had been upheld on review. In upholding the assessments, the review officer stated:

“According to HMRC records, the last RTI return received was on 31 August 2019, it included declarations of monthly income for Mr Mohamed Elsayed of £800 pounds...and the director, Miss Zoe Muntean, of £600 per month...

The next return submitted was an Earlier Year Update on 13 January 2021 showing additional pay for the year for Mr Elsayed...and Ms Muntean. This was after the issue of the initial inquiry letter dated 24 September 2020 in respect of the company’s CRJS claim.

...

The last return submitted in respect of the company’s employees prior to 19 March 2020, was dated 31 August 2019. It included amounts lower than the CJRS claim submitted. The RTI submission after 19 March 2020 included increased wages for both Miss Muntean and Mr Elsayed which has not been reflected in any earlier full payment submissions.

...

The [bank] statements show various payments made to the director, more than the £600 previously declared as the director’s PAYE income. However, the company has already stated that the company’s accountant had advised the company to pay the director £600 per month and the balance would be paid via dividend payments. The bank statements do not evidence the amounts included on the payslips.

...”

50. The Appellant appealed to the Tribunal on 6 September 2021. In the grounds of appeal, the Appellant stated:

“I’ve requested my salary to be £3000 per month from September 2019, as I’ve requested countless of times...but that accountant said that its best if I have £600 per month and the rest to go as dividends. When I’ve finally gone to another accountant...[in May 2020, that accountant] advised me to have the salary £3000 from January 2020, not September 2019...

My former employee...had a salary of £800 and £1200 from January 2020....I did pay him more than £1200, which was considered tips for me to him...”

#### **HMRC’S SUBMISSIONS**

51. HMRC’s case was that the Appellant had received a CJRS overpayment because it has submitted an inflated claim. The claim was inflated because it was based on Ms Muntean receiving a monthly salary of £3000 per month and Mr El Sayed receiving a salary of £1250 per month whereas, on HMRC’s case, at all relevant times (i.e. before the announcement of the CJRS) Ms Muntean was paid £600 per month and Mr El Sated £800 per month.

52. However, during the course of the hearing, HMRC accepted that the bank statements for January and February 2020 supported that Mr El Sayed was paid £1250 per month in each of those months. HMRC therefore agreed that the Appellant’s CJRS claim in relation to Mr El Sayed was correct and, to that extent, the Appellant’s appeal should be allowed, and the amount of the first assessment reduced.

53. HMRC maintained, however, that the Appellant's CJRS claim in relation to Ms Muntean was inflated and, in particular, relied on the following:

(1) The last RTI return submitted by the Appellant prior to the commencement of the CJRS showed Ms Muntean receiving a monthly salary of £600 per month.

(2) The Appellant says it asked its accountant to increase Ms Muntean's salary to £3000 per month from September 2019. However, the accountant advised that it was best if Ms Muntean had a salary of £600 per month and any further monies were paid as dividends.

(3) There is no evidence (such as emails) to support that, despite the advice apparently provided by its accountant, the Appellant instructed the accountant to increase Ms Muntean's salary or otherwise took steps to increase her salary.

(4) The payslips for January and February 2020 which show Ms Muntean being paid £3000 per month were not created until June 2020 so are not contemporaneous evidence of Ms Muntean being paid £3000 in January and February 2020.

(5) The Appellant's bank statements for January and February do not show Ms Muntean being paid £3000 per month. Whilst those statements show payments exceeding £600 per month, there is no proof that the amounts over and above £600 were being paid as anything other than dividends (consistent with the advice previously received by the Appellant). The Appellant did not put into evidence bank statements from earlier period to demonstrate that there was a change in the way payments were made to Ms Muntean in January and February 2020 (when her salary was apparently £3000 per month) when compared to earlier periods (when Ms Muntean's salary was £600 per month with other monies being paid as dividends).

#### **THE APPELLANT'S SUBMISSIONS**

54. The Appellant raised various complaints about HMRC and its former accountants. We found those complaints to be largely irrelevant to the issues we need to determine. What is at the core of this case is whether, prior to the announcement of the CJRS, Ms Muntean was, as the Appellant claims, being paid £3000 per month. In relation to that issue, the Appellant submitted that Ms Muntean was paid £3000 per month from January 2020 onwards and:

(1) The Appellant has asked its accountant to reflect an increase in Ms Muntean's salary (to £3000 per month) from September 2019 but the accountant "did not listen" and advised that it was best if Ms Muntean was paid £600 per month as a salary and any further monies were paid as dividends.

(2) The Appellant parted ways with the accountant in August 2019 and this is why no RTI submissions were made from August 2019 until after the CJRS had commenced (the Appellant being without an accountant until May/June 2020).

(3) The bank statements for January and February 2020 show Ms Muntean was being paid more than £600 per month. The bank statements do not show the full £3000 per month being paid to Ms Muntean because January and February 2020 were difficult months for the business, so the full amount was not paid.

(4) Because the Appellant was without an accountant, no payslips were prepared until the Appellant instructed a new accountant.

(5) The new accountant was instructed by the Appellant in May/June 2020, and prepared payslips for the periods August 2019 onwards. These payslips recorded that Ms Muntean was paid £3000 per month from January 2020 onwards.

### **MR DICKSON'S EVIDENCE**

55. Mr Dickson provided a witness statement and gave evidence before us.
56. Mr Dickson:
- (1) Set out the steps taken by him once the compliance check into the Appellant's CJRS claims was allocated to him.
  - (2) Explained:
    - (a) the Appellant's RTI submissions for the 19/20 tax year showed monthly payments to Ms Muntean and Mr El Sayed of £600 and £800 respectively.
    - (b) Earlier Year Updates for the 19/20 tax year were received from the Appellant in relation to Ms Muntean and Mr El Sayed. These showed higher taxable payments as having been made to Ms Muntean and Mr El Sayed. These updates were not received by HMRC until after the Appellant had been notified of the commencement of the compliance check.
    - (c) No satisfactory evidence of the asserted monthly wage increase was provided to HMRC.
    - (d) A review of the metadata of the payslips provided by the Appellant to show the increased monthly payments in January and February 2020 showed that the payslips were created in June 2020.
  - (3) Stood by the decision to assess the Appellant on the basis that Ms Muntean's monthly wage for January and February 2020 was £600 but accepted that Mr El Sayed's monthly wage was as claimed by the Appellant (and, accordingly, the assessment amount should be reduced).
  - (4) Stated that he would have asked the Appellant to provide further documentation (such as bank statements for October to December 2019) but for Ms Muntean stating that the Appellant would not provide any further material.
57. Ms Muntean asked Mr Dickson a number of questions in cross-examination. The majority of these questions were simply not relevant to the issues that fall to be determined in this appeal. We found Mr Dixon to be a straightforward witness and we accept his evidence.

### **MS MUNTEAN'S EVIDENCE**

58. Ms Muntean gave evidence before us. For reasons explained below, we did not find her a credible witness and only accept her evidence to the extent it was agreed or was supported by documentary or other evidence.
59. Ms Muntean's evidence was as follows:
- (1) The Appellant's shisha terrace was typically open Wednesday to Saturday. However, on occasion, it opened on other days for private events.
  - (2) Mr El Sayed commenced work for the Appellant in February 2019. He was paid £1280 per month for working Wednesday to Saturday from 7pm to midnight. If the shisha terrace opened on other evenings or if Mr El Sayed worked longer hours, he was paid an extra £10 per hour. When it was pointed out by the Tribunal that the assertion that Mr El Sayed was paid £1280 per month from February 2019 onwards was inconsistent with what had been said in the grounds of appeal (which was that, prior to January 2020, Mr El Sayed was paid £800 per month), Ms Muntean repeated that Mr El Sayed was paid £1280 per month. When asked whether tax was stopped from the extra £480 per month given that "extra" payment was not reflected in the payslip, Ms Muntean stated "my

accountant knew exactly what was happening”. Ms Muntean then stated “lots of it was tips”. Later in her evidence Ms Muntean confirmed that Mr El Syed never had a salary of £800 per month and that his basic pay was £1280 plus extra for tips and any overtime or events work. Ms Muntean said she had only said £800 per month in the grounds of appeal because that is what was on the payslips. We found Ms Muntean’s evidence here to be far from satisfactory. If, as she stated in her evidence, Mr El Syed was being paid £1280 per month (as a basic wage) from February 2019, she caused the Appellant to file with the Tribunal grounds of appeal which, to her knowledge, contained a material inaccuracy. In view of this, we found Ms Muntean was not a credible witness.

(3) She had repeatedly told the Appellant’s then accountant (“Accountant 1”) that she wanted her salary to be increased to £3000 per month and for this to be reflected in her payslip but the accountant did not listen to her and said her salary should be £600 per month with the rest payable as dividends. Ms Muntean said she was unsure if there were any emails with this accountant on this issue (and none were provided to the Tribunal). In the absence of such emails, we are not willing to accept Ms Muntean’s account in this regard. As set out above, we do not think she was a credible witness.

(4) The Appellant dispensed with the services of Accountant 1 in August 2019.

(5) The Appellant did not file RTIs from August 2019 because it did not have an accountant. Ms Muntean was concerned that instructing a new accountant would be costly as they would need to “repair” the work undertaken by Accountant 1.

(6) In March 2020, the Appellant approached a new accountant (“Accountant 2”) but, because that accountant was very busy, the Appellant was not onboarded as a client until June 2020.

(7) In May or June 2020, Ms Muntean told Accountant 2 that she wanted her salary to be £3000 per month from August 2019 onwards. Accountant 2 said she could not do that but could increase the salary from January 2020 onwards.

(8) In June 2020, Accountant 2 was instructed to (and did) produce payslips for the period from August 2019 to date. These recorded that Ms Muntean was paid £3000 per month from January 2020 onwards. Ms Muntean has accounted for tax on that basis.

(9) In July 2020, the Appellant moved to a further firm of accountants (“Accountant 3”) who made various errors.

(10) In her view, none of the accountants instructed by the Appellant provided a satisfactory service and they made multiple mistakes.

(11) When asked by the Tribunal why a figure of £3000 per month for Ms Muntean has been used when calculating the CJRS claim, Ms Muntean stated that she “didn’t know the exact amount” she had received from the Appellant “but wanted to be paid £3000 so claimed that for January and February”.

(12) Ms Muntean made the CJRS claims on behalf of the Appellant. The first claim was made in May 2020 over the telephone. Subsequent claims were made online. The Appellant did not instruct an accountant to make the claims on its behalf as that would have cost £30 + VAT per employee.

(13) She would never claim (or cause the Appellant to claim) for something she didn’t believe she/the Appellant was entitled to.

(14) During cross examination, Ms Muntean accepted that Accountant 2 had told her that a CJRS claim based on Ms Muntean receiving a monthly salary of £3000 per month

might not be correct, and then said that she thought Accountant 2 was “jealous of the amount I received”. Ms Muntean then said if Accountant 2 thought there was an error they should not have prepared payslips showing £3000 per month for January and February 2020.

#### DISCUSSION AND DECISION

60. HMRC conceded (albeit somewhat belatedly) that the Appellant’s CJRS claim was correct to the extent that it related to Mr El Sayed.

61. The matter to be determined by us, then, is whether the Appellant received payments in relation to Ms Muntean that it was not entitled to. At the crux of this issue is whether Ms Muntean’s “reference salary” (i.e. the amount payable to [Ms Muntean] in the latest salary period ending on or before 19 March 2020, not taking into account anything which was not regular salary or wages) was £3000 as claimed by the Appellant or £600 as contended for by HMRC.

62. Having considered all of the evidence put before us, we are satisfied that the correct reference salary for Ms Muntean was £600 as contended for by HMRC. We have reached this view because:

(1) We do not accept that, at any time prior to 19 March 2020, the Appellant decided to, less still did, increase Ms Muntean’s salary to £3000 per month. There was no contemporaneous record of this having occurred (such as emails to Accountant 1 instructing them to take this action). As set out above, in the absence of supporting evidence (or agreement on a given factual matter by HMRC) we are not willing to accept Ms Muntean’s evidence on this issue (or more generally).

(2) The bank statements provided to the Tribunal by the Appellant did not show payments of £3000 per month to Ms Muntean in January and February 2020. Whilst we recognise that the payments made to Ms Muntean in those periods exceeded £600 per month (and were all made with the reference “salary”), we are satisfied that payments over and above £600 were not salary and instead were most probably dividend payments made in accordance with the advice given by Accountant 1 (see paragraph 59(3) above). The Appellant could, for example, have supplied the Tribunal with bank statements for earlier periods to demonstrate that there was a change in the way payments were made to Ms Muntean in January and February 2020 (when her salary had apparently increased to £3000 per month) when compared to earlier periods (when the Appellant accepts that Ms Muntean was paid a salary of £600 per month with other sums being paid as dividends). However, no such bank statements were provided to us. In all the circumstances, we conclude that the bank statements provided to us support that the Appellant continued in January and February 2020 to pay Ms Muntean on the basis advised by Accountant 1 (namely a £600 salary and further monies as dividends).

(3) The RTI submissions that were submitted before 19 March 2020 (for the period up to August 2019) show Ms Muntean’s salary as £600 per month. No RTI submissions showing Ms Muntean’s salary as £3000 per month were filed with HMRC until *after* the CJRS was announced. Those RTI submissions do not, then, provide contemporaneous evidence that Ms Muntean’s salary had been increased from £600 prior to 19 March 2020.

(4) The payslips (for January and February 2020) showing Ms Muntean’s salary as £3000 per month were not created until June 2020. Those payslips do not, then, provide contemporaneous evidence that Ms Muntean’s salary had been increased prior to 19 March 2020.

63. In light of the way that the reference salary is calculated under the CJRS, the Appellant may now wish that it had, prior to 19 March 2020, paid Ms Muntean a higher salary (rather than £600 per month and the rest by way of dividends). However, as explained above, we are satisfied that is not what in fact occurred.

64. A recurring theme in the submissions made by the Appellant was that someone else (either the Appellant's various accountants or HMRC officers) was "to blame" for the issues now faced by the Appellant. However, the Appellant's liability arises because the Appellant made its CJRS claim in relation to Ms Muntean on the basis of her reference salary being £3000 per month when, as we have found, the claim ought properly to have been made on a reference salary of £600 per month as that is the amount of salary Ms Muntean was being paid prior to 19 March 2020.

65. Consistent with the above, the appeal is allowed to the extent that the first assessment should be reduced so as to reflect that the Appellant's CJRS claim as it related to Mr El Sayed was based on the correct reference salary. Otherwise, the appeal is dismissed.

66. Having considered the submissions made by the parties in relation to the issue of quantum, we accept the re-calculation submissions made by HMRC, and conclude that the first assessment should be reduced to £7735. The Appellant argued that the first assessment should be reduced by the *entire* CJRS amount claimed by the Appellant in relation to Mr El Sayed. However, that is a flawed approach. The first assessment did not, by the first assessment, seek to recover the *entire* CJRS amount that had been paid to the Appellant in relation to Mr El Sayed. Rather, the first assessment sought only to recover the amount that HMRC considered had been overclaimed in relation to Mr El Sayed. Accordingly, given HMRC now accept that there was no overclaim by the Appellant in relation to Mr El Sayed, the first assessment should be reduced by the amount HMRC had previously alleged had been overclaimed (£1325).

67. The second assessment related to a period in which the Appellant made no CJRS claim in relation to Mr El Sayed. In the Appellant's written submissions in relation to the revised quantum of the first assessment, the Appellant submitted that there were errors in the calculation of the second assessment. Given, as notified to the Appellant by way of the summary decision, we had dismissed in full the appeal against the second assessment, these submissions went beyond the issue (quantum of the revised first assessment) that we had invited written submission on. However, for the avoidance of doubt, the written submissions in relation to the quantum of the second assessment made by the Appellant would not have altered our decision to dismiss the appeal in relation to that assessment given those submissions seemed to argue that HMRC may have adopted an overly generous approach when calculating the CJRS payment that the Appellant was entitled to claim in July, August and October in 2020 relation to Ms Muntean.

68. To the extent that Ms Muntean submitted that she has overpaid tax and national insurance (because those payments were calculated by reference to the CJRS payments which were based on a reference salary of £3000), that is something that the Appellant/Ms Muntean will need to take up with HMRC. It is not a matter that is before the Tribunal in this appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

69. 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.

**DAVID BEDENHAM  
TRIBUNAL JUDGE**

**Release date: 05<sup>th</sup> APRIL 2023**