Neutral Citation: [2023] UKFTT 550 (TC)

Case Number: TC08849

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/11722

Coronavirus Job Retention Scheme – clawback of payments – payments made in respect of employee where first RTI return post-dated 19 March 2020 – Carlick considered and followed – appeal dismissed

Heard on: 1 June 2023
Judgment date: 26 June 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR JOHN ROBINSON

Between

SENTINEL FIRE AND SECURITY SYSTEMS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr John Flynn, director of the Appellant

For the Respondents: Ms Sophia Taj, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the Coronavirus Job Retention Scheme ("**the Scheme**"). Under the Scheme employers could apply for and receive Coronavirus Support Payments ("**support payments**") in respect of employees who the employer had furloughed as a result of the lockdown announced in March 2020.

2. However, claims for such support payments could only be made in respect of qualifying employees, and one of the eligibility criteria to be a qualifying employee was that an RTI submission had been made in respect of that employee on or before 19 March 2020.

3. In this case it is common ground that no such RTI submission was made in respect of one of the employees for whom a support payment was sought and paid. The question that we have to decide is whether HMRC's assessment which effectively claws back that support payment should be upheld. That assessment, the final version of which was issued on 18 August 2021, assesses the appellant to £17,777.81 ("**the assessment**").

4. For the reasons given later in this appeal, we uphold the assessment and thus dismiss the appeal.

THE LAW

5. 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.

6. Pursuant to these 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**"). 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.

7. The substance of the CJRS was then set out in the schedule to the First Direction, running

to some 11 pages.

8. After an introduction to the CJRS and its purpose, the schedule specified in paragraph 3 the employers to which it applied (essentially any employer with a PAYE scheme registered on HMRC's real time information system on 19 March 2020). It is agreed that the appellant meets this requirement.

9. Crucially, paragraph 5 of the schedule, headed "Qualifying costs", set out the costs for which a claim could be made under the CJRS:

> 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.

10. It is agreed 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:

> 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.

11. Paragraph 5 of the First Direction refers to Schedule A1 to the PAYE Regulations ("**Schedule A1**"). Paragraph 67B of the PAYE Regulations states that:

> "On or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation".

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

13. There were four subsequent coronavirus directions which covered periods not covered by the First Direction. They did not affect the fundamental criterion that an RTI employer must have delivered the RTI information to HMRC on or before 28 February 2020 or 19 March 2020

in respect of an employee for that employee to qualify for a support payment.

14. Paragraph 8 of Schedule 16 to the Finance Act 2020 makes a recipient of support payments under the Scheme liable to income tax where a claim is made incorrectly. Paragraph 8(4) details when income tax becomes chargeable and, in this appeal, income tax is chargeable at the time the support payment was received as the parameters of entitlement were not satisfied at the outset of the claim.

15. Paragraph 8(5) details the amount of income tax chargeable as being equal to the amount of support payment to which the applicant was not entitled and has not been repaid.

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

EVIDENCE AND FACTS

17. We were provided with a bundle of documents. Mr John Flynn gave oral evidence on behalf of the appellant. Officer Dominika Zajackowska gave oral evidence on behalf of HMRC. From this evidence we make the following findings of fact:

(1) At the time of making the application for a support payment in respect of the employee Mr Boddice, the appellant had a PAYE scheme registered on HMRC's real time information system ("**RTI**") it was therefore a qualifying employer for the purposes of the Scheme.

(2) Mr Boddice started employment with the appellant on 25 February 2020. However, as the appellant processed its payroll so that payment could be made on the last Friday of each month, the payroll for February 2020 was processed on or around 24 February 2020 so Mr Boddice was not included on the February payroll nor the February RTI submission.

(3) His part salary for February 2020 was included with his salary for March 2020. However, although Mr Boddice was included on the RTI submission for March 2020, that submission was not made on or before 19 March 2020. The appellant accepts, and HMRC's records confirm, that the RTI information for Mr Boddice was only sent to and received by HMRC on 25 March 2020.

(4) On 20 April 2020 the appellant submitted a claim for support payments under the Scheme in respect of a number of employees including Mr Boddice.

(5) The appellant claimed support payments for Mr Boddice for the period March/April 2020 to January 2021. The support payments were in the sum of £17,777.81.

(6) On 30 October 2020 HMRC opened a compliance check into the appellant's claim for support payments under the Scheme. During the following six months or so there was considerable correspondence between the appellant and HMRC during which the appellant provided all of the information requested by HMRC. Following an analysis of that information HMRC provided a calculation of the amount which they considered to have been overpaid by way of support payment in respect of Mr Boddice. Their original figure was revised by the appellant. On 12 May 2021, HMRC issued an assessment for £17,777.81, against which the appellant appealed.

(7) In June 2021, the appellant informed HMRC that an incorrect UTR had been used for the 12 May 2021 assessment.

(8) On 12 August 2021 HMRC withdrew their original assessment and 18 August 2021 issued the assessment (with the correct UTR).

(9) HMRC closed their compliance check on 21 June 2022, and on 30 June 2022 the appellant appealed to the tribunal.

DISCUSSION

Burden and standard of proof

18. It is for HMRC to show that, on the balance of probabilities, the assessment is a valid in time assessment which assesses the appellant for the correct amount. Having considered the evidence, it is our conclusion that the assessment is a valid in time assessment which assesses the appellant to the correct amount. Indeed, the appellant mounts no serious challenge to the validity or quantum of the assessment.

19. The burden of proof then switches, and it is up to the appellant to show that the assessment overcharges it. Again, it must do this on the balance of probabilities.

The parties' respective arguments

20. Ms Taj submitted:

(1) The First Direction made it clear that the purpose of the Scheme was to provide for reimbursement of costs relating to furloughed employees arising as a result of the coronavirus pandemic. However, a valid claim could only be made if the claimant complied with the detailed criteria set out in the First Direction.

(2) The eligibility criteria set out in paragraph 5 of the First Direction protects against fraudulent claims. The need for RTI data before the cut-off date of 19 March 2020 was introduced to ensure that HMRC had verifiable PAYE payroll data in the form of RTI returns for eligible employees for the relevant tax year.

(3) In this case the evidence is clear, and the appellant accepts, that Mr Boddice was not included in any RTI submissions made by the appellant before 19 March 2020. An RTI return for him was only sent and received by HMRC on 25 March 2020. So even though he was employed by the appellant before then, that is, of itself, does not satisfy the eligibility criteria for a support payment under the Scheme.

(4) In the F-tT decision in *Carlick Contract Furniture Ltd v HMRC* [2022] TC 02434 ("***Carlick***") Judge Poole had stated at [37];

> "37. The First and Second Directions covered amounts paid or payable to employees for the period up to 30 June 2020 (and associated NI and pension costs). In respect of that period, I agree with Ms Johnson. Whilst I have every sympathy with the Appellant's position, the legislation is quite clear: for payments to (or in respect of) an employee to qualify under the CJRS, payment of earnings to that employee must have been included in an RTI PAYE submission not later than 19 March 2022, and unfortunately payments to Ms Coleman and Mr Boales were not".

(5) The date of 19 March 2022 in this extract is incorrect and should be 19 March 2020. We should adopt the same approach in this appeal as Judge Poole did in *Carlick*.

(6) Furthermore, in respect of the appellant's submission that the legislation, and its application by HMRC in this case, operates unfairly, we have no jurisdiction to consider fairness (see *Carlick* at [39]).

21. Mr Flynn submitted:

(1) The appellant should be able to claim a support payment for Mr Boddice as he was employed by the appellant well before the deadline of 19 March 2020, and it was just unfortunate that he was not included in the February 2020 RTI. This was a result of the way in which the appellant processed its payroll.

(2) Even if not in strict accordance with the legislation of the Scheme, the appellant was clearly within the spirit of the Scheme. It had put all its staff on furlough and provided them with training as it was entitled to do.

(3) The announcement that there would be lockdown was made on 21/22 March, and on 23 March lockdown was imposed. Given that the First Direction was not made until 15 April 2020, it was not possible for the appellant to know of the detailed criteria to make a claim until then. And this was a month after the cut-off date of 19 March 2020.

(4) HMRC clearly knew of the eligibility criteria and should have contacted the appellant and made those criteria clear to it.

Discussion

22. We have found as a fact that the RTI information in respect of Mr Boddice was not sent to, or received by HMRC, until 25 March 2020. This is after the statutory deadline of 19 March 2020. In these circumstances we are afraid that we have no alternative than to find that the appellant has not complied with the eligibility criteria set out in the relevant legislation.

23. Like Judge Poole in *Carlick,* we too have every sympathy with the appellant's position. But as Judge Poole said at [37] of *Carlick*, the legislation is clear. For support payments in respect of an employee to qualify under the Scheme, payments of earnings to that employee must have been included in RTI PAYE submission made to HMRC not later than 19 March 2020. The earnings of Mr Boddice were not.

24. We also agree with the comments of Judge Poole at [39] of *Carlick* when he said:

> "39. As to the Appellant's argument that the claims were in line with the "spirit" of the CJRS, and it would be unreasonable to exclude them on a technicality such as this, it is clear that this Tribunal has no jurisdiction to entertain such an argument. Its role is to adjudicate on the law and whilst there is some debate about the extent to which "public law" arguments on reasonableness and fairness can properly form part of the Tribunal's decision-making process in some circumstances, there does not seem to me to be any scope for such arguments here, where the Directions draw such a clear bright line to determine eligibility for the scheme".

25. In *HMRC v HOK Ltd* [2012] UKUT 363 (TCC) the Tax and Chancery Chamber of the Upper Tribunal observed at [36] that the Tax Chamber of the First-tier Tribunal:

> "… was created by s3(1) of the Tribunals, Courts and Enforcement Act 2007 "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction [unlike that of the High Court which has an inherent jurisdiction], is derived wholly from statute.

26. The Upper Tribunal went on to note at [56]:

> "… It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct".

27. The appellant asks how it was to know of the 19 March 2020 cut-off date when it was only published on 15 April 2020. Given that the appellant's claim was made on 20 April 2020, we see no merit in this submission.

28. In truth, the appellant recognises that it does not satisfy the eligibility criteria for the support payments made in respect of Mr Boddice. However, it hoped that we might have the ability and inclination to dismiss HMRC's claim to claw back those support payments as the appellant was clearly within the ambit of the intended beneficiaries under the Scheme. Regrettably for the appellant, for the foregoing reasons set out in this decision, we do not have that ability. The appellant has not met the legislative criteria necessary for a valid claim in respect of Mr Boddice and in these circumstances we have no alternative other than to uphold the assessment.

DECISION

29. We dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

30. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 26th JUNE 2023