



Neutral Citation: [2023] UKFTT 00473 (TC)

Case Number: TC08833

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/13649

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 purpose of the Coronavirus Act 2020 – 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: 30 May 2023

Judgment date: 02 June 2023

Before

**TRIBUNAL JUDGE ANNE SCOTT
MEMBER JAMES ROBERTSON**

Between

TOP-NOTCH ACCOUNTANTS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Nazrul Islam

For the Respondents: Kim Johnson, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is the appellant's appeal against an assessment ("the Assessment") issued on 18 February 2021 pursuant to paragraph 9 of Schedule 16 to the Finance Act 2020 ("FA 20") in the sum of £19,981.47 for the tax year ending 5 April 2021 and relating to the accounting period ending 31 January 2021.
2. The respondents ("HMRC") have requested that the Tribunal exercise its power under section 50(6) Taxes Management Act 1970 ("TMA") to reduce the Assessment to £14,673.47.
3. The Assessment charges income tax as the result of the appellant receiving an amount of Coronavirus Support Payment ("Support Payment") in relation to one employee Mr Arafat (the "Employee") 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. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system.
10. 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.
11. We had a hearing bundle extending to 965 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 Kirsty MacRae and from Mr Nazrul Islam. Mr Islam had produced two witness statements from his wife and from the Employee but they did not attend the hearing.

The facts

12. The appellant is a limited company incorporated on 5 January 2017 and its business is accounting and auditing activities, book keeping activities, and tax consultancy. Mr Islam is

the sole director. The Employee was appointed as an account manager on 20 December 2019. He was reappointed as company secretary on 22 March 2020 in addition to that role.

13. The appellant made claims for Support Payments covering the period from 23 March 2020 and those claims were duly paid. It is now accepted that there was an entitlement to a Support Payment from 1 November 2021 but the quantum is in dispute.

14. On 14 October 2020, HMRC wrote to the appellant advising that they were opening a check into the claims for Support Payments through CJRS. That letter included a schedule of the information required by HMRC in order to enable them to carry out their checks.

15. On 21 October 2020, the appellant provided the information.

16. On 10 November 2020, HMRC responded requesting copies of bank statements for all business accounts for the period 6 April 2019 to 31 October 2020 and copies of all payslips for the Employee from 20 December 2019 to 31 October 2020.

17. On 16 November 2020, Mr Islam responded enclosing that information.

18. On 9 December 2020, HMRC wrote to the appellant confirming that the appellant was not eligible to claim furlough pay through CJRS in respect of the Employee because the Employee had not been included in the appellant's RTI submissions prior to 19 March 2020. The information held by HMRC was that they had only been notified of his earnings on an RTI submission received on 20 April 2020. (In fact, that is inaccurate since there had been a submission on 16 April 2020.).

19. On 15 December 2020, Mr Islam wrote to HMRC referring to a telephone conversation with Officer Hunter. In that letter he stated:-

“Please note I had submitted the monthly RTI to HMRC correctly, but unfortunately, the RTI was not received by HMRC; however, I got the confirmation email for the submission.

Please note I had contacted HMRC many times (from December 2019 to May 2020) over the phone and online to resolve the issue. But finally, they said there was a system error and they advised me (sic) that I have to resubmit all the RTI, and I had resubmitted all the RTI 2-3 times from April to May 2020.”

20. He enclosed a copy of what he described as the RTI submission reports and HMRC's acknowledgement emails for months 10, 11 and 12 in the year 2019/20.

21. On 17 December 2020, Mr Islam emailed Officer Hunter seeking a response and enclosing further copies.

22. On 26 January 2021, Officer Hunter spoke to Mr Islam. In the course of that telephone conversation, Mr Islam confirmed that:-

(a) The bank statements that had been provided had been downloaded by him, only he and his partner had access to them and that no changes had been made to them. That was in response to the officer enquiring as to whether or not they had been edited.

(b) He confirmed that he had downloaded the FPS submissions which he had submitted and, again having been asked whether they had been edited, he said that he had not made any changes.

(c) He confirmed that he did not wish to make any disclosures.

23. The officer advised Mr Islam that the bank statements appeared to have been manipulated and included a number of transactions where the font had been varied and spelling mistakes made. Mr Islam disagreed and reiterated that he had obtained the statements directly from the

bank. Latterly, he said that he had provided the wrong bank statements and said that he would send the correct ones. He suggested that the “errors” might have been caused when scanning the documents. The officer said that since those bank statements were not credible, further bank statements should be provided directly by the bank.

24. She explained that the FPS submissions also did not appear to be credible. The officer pointed out that the alleged March submission contained the reference number for a May submission so therefore those documents appeared to be unreliable. He responded stating that that was probably because there had been errors in his submissions. He had received messages saying that the submissions had been received correctly but when he submitted the CJRS claim, he was told that there had been an error.

25. He advised the officer that he had spoken with HMRC on multiple occasions and so HMRC must have deleted the submission and told him to resend it. The officer pointed out that there was no note of any calls made to HMRC or of any changes made by HMRC. Mr Islam could not recall with whom he had spoken and when he had spoken to them.

26. The officer explained that she would issue a decision letter and the amounts claimed would require to be repaid. He was advised of his appeal rights. He argued that repayment would affect business continuity. The officer undertook to speak to a manager and the extra support team and would call him the following day.

27. At 18:52 that evening Mr Islam emailed Officer Hunter and apologised for sending bank statements “erroneously”. He stated that he had checked all of the statements and thought that he had made mistakes when downloading them. He stated that:-

“The bank statements were downloaded in QIF format instead of PDF incorrectly, and I have tried to find employee’s payments by searching their name for marking, but I never thought that something is happened (sic) mistakenly in between. I believe the data was misdirected at that time.”

28. He asked her to ignore those bank statements. He went on to state that:-

“I have never thought that the RTI was not submitted correctly. I was informed on April 20 when I had tried to submit the CJRS claim. Then, I called HMRC to resolve the issue. I got advice from them for resubmission of all previous RTI, and I did that on April 20. After resubmission (sic) the RTI, I have applied for CJRS claims. No one said from HMRC that my employee is not eligible for CJRS.”

29. Later that evening he forwarded new copies of bank statements. He sent numerous further emails in the course of that evening. Six enclosed copies of emails from HMRC acknowledging receipt of FPS submissions dated January to May 2019 inclusive and 20 April 2020.

30. He sent six further emails enclosing copies of emails from HMRC dated 20, 21 and 22 April 2020. Four stated simply that HMRC would respond within two working days and one that his query would be assigned to a colleague.

31. The substantive response from HMRC was an email dated 20 April 2020 at 16:27 which stated:

“If you are receiving error message ‘the number of employees cannot be more than the number of employees you operate PAYE for’ you should check you have submitted a Full Payment Summary (FPS) during this period for all the furloughed employees you are trying to claim for.

If you need to change the number of employees...”

32. On 27 January 2021, Mr Islam emailed Officer Hunter enclosing what he described as additional information.

33. On 27 January 2021, Officer Hunter telephoned Mr Islam advising him that she had reviewed the additional emails and bank statements but that they had not changed her current view of the matter. The bank statements that had been provided only covered a small portion of 2020 and did not explain the changes to the bank statements that he had already provided. The officer explained that the RTI submission receipts provided were only evidence that he had submitted an FPS. It was not evidence of the contents of those submissions. She intimated that she would be raising formal assessments to cover all CJRS payments. She also indicated that her view was that a penalty based on deliberate and concealed behaviour, because of the edited bank statements, would be raised.

34. Mr Islam said it had been a simple mistake and that the statements that he had provided were from a bank reconciliation which he had edited to adjust for cash payments. He said that those had been intended for internal use only and had been sent in error.

35. He advanced an argument that he had downloaded the bank statements as a PDF and used Adobe to open these with Excel. He then made the relevant adjustments for cash payments that he had made to employees. He said that he then saved the documents again as a PDF.

36. The officer's response was that she found that that was an incredible argument and it would have been more reasonable if he had sent the documents to her in an Excel format. The PDF statements which had been submitted showed only a handful of changes made directly to his employee and no other transactions appear to have been affected. She pointed out that it was highly unlikely in any event because the formulas are not retained in a PDF document and therefore he would have to input the formulas and drag that through the document which would mean that a balance would show in each row. It did not. She stated that she would require statements from the bank.

37. On 31 January 2021, Mr Islam emailed Officer Hunter with two versions of his bank statements. He said that:-

“...we usually download the bank statements from online in word & Excel formate (sic) every month. We do reconcile of its every transaction as necessary, and then we keep it in save folder in pdf format for our future use and annual accounts (sic).”

38. He also attached a spreadsheet with what he described as “a detailed clarification about the differentiated transactions between non reconciled (sic) and reconciled bank statements”.

39. In summary, he explained that the entries in the reconciled bank statements, being the original ones sent to HMRC, when compared with unedited or non-reconciled bank statements, showed a reconciliation of cash payments and payments for Microsoft 365.

40. On 18 February 2021, HMRC raised the Assessment in the sum of £19,981.47. The covering letter stated that:-

(a) The copies of the FPS acknowledgements for February 2020 and March 2020 were not credible because the information within those documents did not match the data held by HMRC, and the reference numbers within the documents provided, related to submissions received on 2 May 2020. Accordingly HMRC had been provided with misleading information.

(b) Although Mr Islam had claimed to have contacted HMRC in April 2020 and been told to resubmit the previous RTI submissions, there was no record of that call or any evidence to suggest that that advice had been given. On the contrary the emails produced by the appellant showed that HMRC had told the appellant to check whether he had

submitted an FPS during the relevant period for all furloughed employees and HMRC had provided details of how to change the number of employees for which there were claims.

(c) She pointed out that his original explanation as to the format utilised for downloading the bank statements conflicted with the later information.

(d) The creation date on the reconciled statements provided was between 27 January 2021 and 29 January 2021 so if the company did retain edited PDF documents to reconcile payments, as alleged, the documents supplied would be historic showing a creation date for each relevant month. As the documents were created following the telephone conversations it appeared to the officer that they had been created for the purposes of the enquiry and not for use in the preparation of accounts.

(e) The edited bank statements sent on 16 November 2020 covered the period April 2019 to October 2020 which did not reflect the statement that Mr Islam had made that the reconciled statements were downloaded and saved monthly. Further the PDF was created on 14 November 2020, so any edits would have been made months after they took place.

(f) Multiple payments to the Employee had been inserted into the bank statements which were not shown on the original documents. The most recent explanation was that that was due to cash payments made to the Employee. However, in order to maintain the bank statement balance, multiple transactions had been edited. The officer gave examples of payments to Companies House and payments from clients. She stated that it was not credible that clients had paid small amounts through the bank and then paid large sums in cash to exactly the value required to bring the bank balance back to its original value.

41. On 15 March 2021, the appellant appealed the Assessment and reminders were sent on 10 April and 3 May 2021.

42. On 3 June 2021, HMRC issued their View of the Matter letter upholding the Assessment.

43. On 24 June 2021, the appellant requested an independent review.

44. On 4 November 2021, the Review Conclusion letter was issued. It intimated that the Assessment should be varied from £19,981.47 to £15,373.47.

45. On 26 November 2021, the appellant appealed to the Tribunal.

The Law

46. 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

47. 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”).

48. 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.

49. 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.

50. 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.”

51. 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.”

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

53. 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 and 31 October 2020 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.

54. 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.

55. 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).

56. 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

57. It is not disputed that:

- (a) The appellant employed the Employee from 20 December 2019.
- (b) The appellant did lodge FPS returns in each of the months in question.
- (c) Those FPS returns all included details of Mr Islam's wife who was employed by the appellant.
- (d) An RTI submission in relation to the Employee was received by HMRC on 16 April 2020. That was before 30 October 2020 so the appellant was eligible for the CJRS Extension Scheme from November 2020. Therefore the assessment fell to be varied.
- (e) The relevant payslips for the Employee showed only a gross income of £1,920.

58. Turning firstly to the CJRS Extension Scheme payments Mr Islam argued that the payments should have been predicated upon the Employee's gross salary of £2,400. That is quite simply incorrect. The RTI submission on 27 October 2020 shows that the Employee's income was £1,920 and that is the figure on the payslip. Had the appellant included the figure of £2,400 then that is the figure upon which PAYE tax and National Insurance contributions would have been calculated. It was not.

59. As can be seen from paragraph 50 above, the only costs of employment in respect of which a claim can be made are those shown in the RTI submission before the relevant day and in this case that is £1,920. The appeal in that regard therefore fails.

60. Whilst we note that Mr Islam argues that the Employee was always in employment and should have benefitted from the CJRS, 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.

61. In this case that is the clear statutory requirement that before the relevant day, that is to say 19 March 2020, the appellant had made an RTI submission that included details of the Employee.

62. Ms Johnson invited the Tribunal to find that Mr Islam was not a credible witness and for the following reasons we agree with her.
63. As can be seen from the narrative of the facts, the evidence and arguments advanced by the appellant have changed over the period of the enquiry. At a minimum, there are significant incongruities in the appellant's evidence.
64. The evidence produced by HMRC is very clear and inherently consistent. Every printout for a RTI submission includes a "Correlation ID" ("the ID") which is unique to that submission and the date and time of the submission and response.
65. The first four entries in the ID on the printout produced by the appellant, purportedly, for the submission on 24 January 2020 were C892 and the time was 08.42. The actual entries on HMRC's exhibits were 3DF4 and the time was 08:41.
66. Firstly, there cannot be two IDs for the same submission. Secondly there was only one submission on that date. We know from other records produced by HMRC that the submission with the C892 ID was lodged by Mr Islam on 2 May 2020.
67. There were three submissions on 2 May 2020, two of which were accepted.
68. Furthermore the same issues arise with the February and March 2020 submissions.
69. Curiously, in the hearing, Mr Islam relied upon HMRC's versions and not the versions that he had lodged with HMRC. He offered no explanation.
70. The ID and time for February 2020 were 8CFF and 16:41 whereas in the version sent to HMRC by Mr Islam they were 794B and 16:42. 794B was also a submission made on 2 May 2020. The equivalents for March 2020 were 4202 and 07:21 whereas Mr Islam's version were 64A5 and 7:22. Again 64A5 was a submission on 2 May 2020 but at 14:00:55.
71. Mr Islam continued to insist at the hearing that this was a result of an unspecified software change as to which there was no evidence. That is frankly incredible as was the suggestion (see paragraph 25 above) that HMRC must have deleted the submission(s).
72. Furthermore, HMRC's PAYE records make it very clear that for months 9 to 12 inclusive in 2019/20 the PAYE returns were late. It is only in the month of June 2020 that the submission is recorded as being on time. That certainly does not support the assertion that RTI submissions for the Employee were lodged before 19 March 2020.
73. Mr Islam conceded in oral evidence that PAYE and NIC had not been paid on time. Mr Robertson put it to him explicitly that, in the bank statements, the first evidence of payments to HMRC was to be found in August 2020 when £208.36 was paid by direct debit. In the face of that, Mr Islam conceded that cash flow had been an issue. He later argued that payments had not been made because HMRC's year end figures had not been correct.
74. We found that to be an unusual argument and it was unsubstantiated. Mr Islam had lodged copies of the Employee's account with HMRC showing that his income from the appellant in 2019/20 had totalled £8,172. We found that to be wholly unconvincing. Those copy statements were undated and, pertinently, HMRC stated that the appellant had submitted those figures, which did not add up to the totals, and the appellant had "made some changes to the information they gave us. These came after the end of the tax year...".
75. Those copy statements simply do not demonstrate what information was lodged with HMRC and when. We know from HMRC's records that the "RTI Earlier Year Update Record Information" for 2019/20 shows that the Employee's income had been £8,172. The very name of that record tells us that it was information that was latterly provided to HMRC.

76. We were bemused by Mr Islam’s insistence in oral evidence that HMRC’s email dated 20 April 2020 (see paragraph 31 above) did not relate to the Claim for Support Payments but rather to the alleged resubmission of RTI information. It is clear from the wording that it related to the CJRS. Furthermore that is not consistent with his earlier statement (see paragraph 27 above) that he had tried to submit the CJRS claim on 20 April 2020.

77. The original bank statements have been very obviously altered. A mere glance demonstrates that. Whilst Mr Islam now accepts that that is the case, having denied it previously, he does not accept that what he describes as the RTI confirmations that he produced had been altered or edited. On the balance of probability, for the reasons set out above, they had been.

78. We agree with, and adopt, the conclusions of Officer Hunter set out in her letter of 18 February 2021 which we have detailed at paragraph 40 above.

79. In summary, HMRC’s records are consistent and clear. The appellant’s explanations and exhibits are inconsistent and lack credibility. In particular, we find that the “reconciled” bank statements were not an error and were deliberately manipulated by the appellant to ensure that the balance figures remained consistent. The alleged RTI confirmations from HMRC submitted by the appellant are not accurate.

80. We do not accept that the appellant submitted RTI information for the Employee before 19 March 2020. The first RTI information for the Employee was lodged with HMRC on 16 April 2020.

Decision

81. For all these reasons the appeal is dismissed and we vary the assessment to £14,673.47.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. 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: 02nd JUNE 2023