Neutral Citation: [2023] UKFTT 496 (TC)

Case Number: TC08838

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/11165

INCOME TAX — Coronavirus Job Retention Scheme (CJRS) — employees employed prior to 19 March 2020 but not included in any RTI return prior to that date due to RTI returns not being filed between November 2019 and April 2020 — whether RTI returns could be corrected after 19 March 2020

Heard on: 9 June 2023
Judgment date: 12 June 2023

Before

TRIBUNAL JUDGE CHRISTOPHER STAKER
PATRICIA GORDON

Between

RAYSTRA HEALTHCARE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: K Adeniji, director of the Appellant

For the Respondents: K Johnson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

1. Permission for a late appeal is granted.

2. The assessment issued on 24 February 2021 pursuant to paragraph 9 of Schedule 16 to the Finance Act 2020 is reduced to £15,170.48.

3. The appeal against that assessment is otherwise dismissed.

REASONS

SUMMARY

4. The Appellant appeals against an assessment issued by HMRC to recover payments made to the Appellant under the Coronavirus Job Retention Scheme ("CJRS").

5. The CJRS was introduced in April 2020. An employer was eligible to receive a payment under the CJRS in respect of an employee only if a payment of earnings to that employee had been shown in a In Real Time Information ("RTI") return made on or before 19 March 2020.

6. The Appellant made no RTI returns after 13 November 2019 until 24 April 2020. After submitting returns on 24 April 2020, the Appellant applied for and received payments under the CJRS. HMRC issued the assessment under appeal to recover the CJRS payments made in respect of six employees who had not been included in any RTI return made on or before 19 March 2020.

7. The Appellant contends as follows. In November 2019 it upgraded the software that it used to submit RTI returns. The software thereafter ceased to submit RTI returns to HMRC, as it had been set to "test" mode during the upgrade. The Appellant became aware of this only on 24 April 2020, and rectified the matter the same day. The six employees had begun working for the Appellant prior to 19 March 2020, but their employment had not commenced early enough for payments of earnings to them to have been included in any of the RTI returns submitted up to 13 November 2019. But for the problem caused by the software upgrade, payments of earnings to them would have been included in later RTI returns submitted before 19 March 2020.

8. This decision finds that the Appellant was not entitled to the CJRS payments in respect of those six employees because payments of earnings to those employees had not been shown in any RTI return made on or before 19 March 2020. This would be so, even if the Appellant had intended to submit a RTI return prior to 19 March 2020 including payments of earnings to these employees, and even if its failure to do so was not its fault.

FACTS

9. On 24 April 2020, HMRC called Mr Adeniji, director of the Appellant, in response to a call made by Mr Adeniji to HMRC on 22 April 2020. In that call, HMRC advised Mr Adeniji that HMRC had received no RTI information from the Appellant since 13 November 2019, and that because of this, HMRC had since then been creating specified charges which were estimates of what HMRC considered was due. Following this telephone call, Mr Adeniji submitted RTI information on the same day. The Appellant then applied for and received an amount of Coronavirus Support Payment under the Coronavirus Job Retention Scheme ("**CJRS**") between 30 April 2020 and 25 August 2020.

10. On 25 September 2020, HMRC wrote to the Appellant, advising that they were opening a check into the payments received under the CJRS. On 19 November 2020, HMRC

identified six employees who were not contained in the Appellant's RTI submissions received by HMRC prior to 19 March 2020.

11. Following exchanges between the parties, HMRC issued the assessment under appeal, to recover the CJRS payments in respect of those six employees.

12. On 24 March 2021, the Appellant appealed against the assessment. On 6 April 2021, HMRC issued a review conclusion letter upholding the assessment.

13. On 27 October 2021, the Appellant made a late appeal to the Tribunal.

14. At the hearing, it was common ground that no RTI returns were in fact submitted by the Appellant to HMRC between 13 November 2019 and 24 April 2020.

15. The Appellant's case is as follows. After its RTI return was submitted on 13 November 2019, the Appellant upgraded the software that it used to make RTI returns. This upgrade was made remotely by the Appellant's software provider. Following the upgrade, the software provider left the software in "test" mode, such that it thereafter did not in fact submit any RTI information to HMRC. The Appellant was totally unaware of this, until Mr Adeniji called HMRC on 22 April 2020, due to problems he was having applying for CJRS. HMRC returned his call on 24 April 2020, and it was only in the course of that conversation that he discovered that no RTI returns had been made since 13 November 2019. He immediately took steps to resolve the problem, and then made RTI returns that same day. The six employees in question had in fact begun working for the Appellant prior to 19 March 2020, but their employment had not commenced early enough for payments of earnings to them to have been included in any of the RTI returns submitted up to 13 November 2019. They would have been included in RTI returns submitted prior to 19 March 2020 if the software had not been left in "test" mode, and indeed, until 24 April 2020, Mr Adeniji thought that RTI returns that included these employees had been submitted in December 2019, and January, February and March 2020.

16. The Appellant argues as follows. The fact that the software was left in "test" mode when it was upgraded was not the Appellant's fault. There was no way that the Appellant could have known that the software was in "test" mode. There was nothing that indicated to the Appellant that RTI returns were not being received by HMRC after 13 November 2019. When the Appellant was thereafter notified by HMRC of specified sums that the Appellant was required to pay, there was nothing to indicate to the Appellant that these were estimated amounts rather than amounts based on RTI returns submitted by the Appellant. Mr Adeniji took immediate action to rectify the problem once he became aware of it on 24 March 2020. The Appellant has cooperated fully with HMRC throughout, and has not sought to hide anything. If the Appellant had not upgraded its software, it would not be in this situation. The Appellant has at no time knowingly done anything wrong. The Appellant has not benefitted financially from the error, since the amounts received under the CJRS were passed on to furloughed employees and were not kept by the Appellant. The Appellant cannot now recover these amounts from the employees in question, and cannot afford to repay these amounts. The employees in question were ultimately included in RTI returns in respect of periods prior to 19 March 2020, even if the returns themselves may not have been submitted to HMRC until 24 April 2020. A compassionate approach should be taken to the Appellant's circumstances.

17. The Appellant requests the Tribunal to allow the appeal, and to set the assessment aside.

18. HMRC state that, on review, they do not intend to claim back the national insurance contributions claimed, and therefore request the Tribunal use its powers under s 50(6) of the

Taxes Management Act 1970 to reduce the assessment to £15,170.48. HMRC request the Tribunal otherwise to dismiss the appeal.

19. HMRC do not dispute that the Appellant has produced evidence, in the form of bank statements, to show that the employees in question were indeed employed by the Appellant prior 19 March 2020. However, HMRC contend that it was a strict requirement for eligibility for these payments that they related to an employee a payment of earnings to whom was shown in a RTI return made on or before 19 March 2020. That requirement is not satisfied here.

REASONS FOR DECISION

20. Permission for a late appeal is granted, given that HMRC have expressly stated that they do not object.

21. The Appellant was not eligible to receive the CJRS payments to which the assessment under appeal relates because no payments of earnings to any of the employees in question were shown in any RTI return made by the Appellant on or before 19 March 2020.

(1) To be eligible to receive payment of an amount under the CJRS in the period material to this appeal, it was a requirement of the wording of the CJRS that the employee to whom the CJRS payment related was an employee to whom the employer had made a payment of earnings shown in a RTI return made on or before 19 March 2020.

(a) The CJRS as first established is contained in the Schedule to "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction", issued by the Chancellor of the Exchequer on 15 April 2020 pursuant to powers under ss 71 and 76 the Coronavirus Act 2020 (the "**First Direction**").

(b) Paragraph 5 of that Schedule provided that:

> 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 [Real time returns] to the PAYE Regulations that is made on or before a day that is a relevant CJRS day, …

(c) Paragraph 13.1 of the Schedule provided that:

> 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.

(d) The First Direction provided for payments "in relation to amounts of earnings paid or payable by employers to furloughed employees in respect of the period beginning on 1 March 2020 and ending on 31 May 2020".

(e) A further direction under ss 71 and 76 of the Coronavirus Act 2020 was issued by the Chancellor of the Exchequer on 2 May 2020 (the "**Second**

Direction"). This extended and modified the CJRS, covering earnings paid or payable to furloughed employees in respect of the period beginning 1 March 2020 and ending on 30 June 2020. The Second Direction made no material changes to paragraphs 5(a)(i) and 13.1(a) of the First Direction.

(f) A further direction under ss 71 and 76 of the Coronavirus Act 2020 was issued by the Chancellor of the Exchequer on 25 June 2020 (the "**Third Direction**"). This extended and modified the CJRS, covering earnings paid or payable to flexibly furloughed employees in respect of the period beginning on 1 July 2020 and ending on 31 October 2020. The Third Direction provided that an employee under the new flexible furlough scheme could only qualify for a CJRS claim by the employer if the employee in question was subject to a claim made in accordance with the original CJRS directions. This must be understood as a reference to a *valid* claim made in accordance with the original CJRS directions (*Carlick Contract Furniture Limited v Revenue & Customs* [2022] UKFTT 220 (TC) ("***Carlick***") at [24] and [38]). This means that under the Third Direction, it was also a requirement that the employee to whom the CJRS payment related was an employee to whom the employer made a payment of earnings shown in a RTI return made on or before 19 March 2020, since otherwise no valid CJRS claim could have been made in respect of that employee under the First Direction or the Second Direction.

(g) Further details of the applicable legislation, and of the directions issued by the Chancellor of the Exchequer, are set out in *Carlick* at [12]-[27]; *Oral Healthcare Ltd v Revenue and Customs* [2023] UKFTT 357 (TC) ("***Oral Healthcare***") at [33]-[43] and *Luca Delivery Ltd v Revenue and Customs* [2023] UKFTT 278 (TC) ("***Luca***") at [35]-[48].

(2) Neither the wording of the CJRS, nor of the surrounding legislation, provides for any exception to this particular requirement in circumstances where an employee was in fact employed prior to 19 March 2020, and where the failure to submit a RTI return prior to that date showing payment of earnings to that employee was due to circumstances that are not the employer's fault.

(3) There is no basis for finding that the CJRS or the surrounding legislation provides for any such exception by implication.

(a) If any such exception had been intended to exist, it can be expected that it would have been provided for expressly. For instance, provisions in tax legislation imposing penalties for failing to meet a deadline typically contain express provisions to the effect that the penalty will not apply if there is a reasonable excuse for the failure to meet the deadline, and to the effect that the amount of the penalty can be reduced where there are special circumstances. The absence of such provisions in relation to the CJRS if anything suggests an intention to exclude such an exception.

(b) It cannot be said that any ambiguity or uncertainty exists in relation to the meaning of the provisions set out above relating to the CJRS.

(c) The Appellant has identified no basis for finding that the existence of such an exception is an implied term of the wording of the CJRS or surrounding legislation.

(d) No judicial decision has been cited in which any such exception has been found to exist.

(e) While previous decisions of the First-tier Tribunal (Tax Chamber) are not binding on this Tribunal, it is noted that at least three previous decisions have found no such exception to exist.

(i) In *Luca* at [6] and [60], it was found that no such exception would exist, even where the failure to include the employee in a RTI return made prior to 19 March 2020 was due to the fault of a third party which was responsible for running the employer's payroll.

(ii) While the precise circumstances of each of these previous cases may have differed in various ways from those of the Appellant in the present case, the decisions in those earlier cases did not turn on the details of their own particular circumstances.

(iii) Rather, they all turned on the simple fact that payments of earnings to the employees in question had not been shown in any RTI return made on or before 19 March 2020. That being the case, CJRS payments could not be made in respect of the employees in question (*Carlick* at [37]; *Oral Healthcare* at [51]), even if they were in fact employed prior to 19 March 2020, and even if RTI returns in respect of the period prior to 19 March 2020 that included those employees were subsequently filed after that date (*Luca* at [58]-[60]).

(4) No payments of earnings to any of the six employees in question in this appeal were shown in any RTI return made by the Appellant on or before 19 March 2020. The Appellant has not disputed this.

22. HMRC were therefore entitled to issue an assessment pursuant to paragraph 9 of Schedule 16 to the Finance Act 2020 to recover the CJRS payments to the Appellant in respect of these six employees.

(1) Paragraph 9(1) of Schedule 16 to the Finance Act 2020 provides that if an officer of HMRC considers 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.

(2) Paragraph 8 provides that the amount of income tax chargeable under that paragraph is the amount of the coronavirus support payment that the recipient is not entitled to and that has not been repaid to the person who made it.

23. The Tribunal has no discretion to allow an appeal of this kind on compassionate grounds.

(1) Thus, in *Oral Healthcare* the appeal was dismissed, notwithstanding that the Tribunal (at [44]) found that case to be "very sad case", and notwithstanding that the Tribunal had sympathy with those involved. See also, for instance, *Carlick* at [39].

(2) It is therefore unnecessary to examine in further detail the facts of this specific case, which have only needed to be dealt with very briefly above. In particular, it is unnecessary for the Tribunal to determine whether the failure of the Appellant to submit RTI returns between 13 November 2019 and 24 April 2020 was due to

circumstances beyond its control and for which it was blameless, or whether this was due to a lack of appropriate care by the Appellant.

24. The Tribunal is satisfied that the assessment under appeal was issued correctly under Schedule 16 to the Finance Act 2020. The Appellant has not raised any contention to the effect that it was not. In particular, the assessment was issued within the 4-year time limit under paragraph 9(2) of Schedule 16 to the Finance Act 2020 and ss 34 and 36 of the Taxes Management Act 1970.

25. However, the Tribunal accedes to the request made by HMRC, referred to at paragraph 18 above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

26. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

Release date: 12th JUNE 2023