Neutral Citation: [2025] UKFTT 26 (TC)

Case Number: TC09398

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/16048

INCOME TAX – CJRS – whether recoverable by HMRC – director worked during the period of the claim – appeal refused

Heard on: 25 November 2024
Judgment date: 9 January 2025

Before

TRIBUNAL JUDGE ANNE REDSTON
MR LESLIE HOWARD

Between

SWG POLYMER SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Steve Glasby, director of the Appellant

For the Respondents: Mr Jordan Ness, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Coronavirus Job Retention Scheme ("CJRS") was introduced following the announcement of lockdown on 23 March 2020. The CJRS provided funding for employers who furloughed their employees rather than making them redundant.

2. On 26 May 2023, HMRC issued SWG Polymer Services Limited ("SWG") with an assessment of £2,671.60 for 2020-21 and an assessment of £3,325.78 for 2021-22, to recover CJRS previously claimed by SWG. The total assessed was thus £5,997.38, and it related to the following periods:

   (1) *1 March to 18 March 2020*. This predated the beginning of lockdown. There was no dispute that Mr Glasby, SWG's director, and Ms Kim Hagan, Mr Glasby's wife, were both working for SWG during that time and were not furloughed..

   (2) *19 March 2020 to 30 June 2020*. Mr Glasby told both HMRC and the Tribunal that he was working between these dates. He was therefore not furloughed, so SWG could not make a valid CJRS claim.

   (3) *1 July to 30 October 2020*. During this period employers were allowed to claim CJRS for employees who were working on a flexi-furlough basis. However, such claims could only be made in respect of employees who previously been furloughed. As Mr Glasby had not been furloughed, no flexi-furlough claim could validly be made for him.

3. The Tribunal thus agreed with HMRC and upheld the assessments. At the end of the hearing, Mr Glasby said he was content with a short decision; this was issued by the Tribunal Service on 6 December 2024. However, on 11 December 2024, SWG applied for a full decision, and this is that decision.

EVIDENCE

4. The Tribunal was provided with a bundle of 507 pages, which included:

   (1) correspondence between the parties, and between the parties and the Tribunal;

   (2) minutes of a meeting between Mr Glasby and Mr Ken Maving, HMRC's investigating officer;

   (3) various internal printouts from HMRC's system; and

   (4) various emails between Mr Glasby and SWG's current accountant, MW Accounting Services Ltd ("MWA"), and one email between Mr Glasby and SWG's previous accountant, Mazuma Money Ltd ("Mazuma").

5. Mr Glasby provided a short witness statement and gave oral evidence. He was cross-examined by Mr Ness and answered questions from the Tribunal. He gave credible and straightforward answers.

6. On the basis of the evidence summarised above, we make the following findings of fact, none of which was in dispute.

FACTS

7. SWG was established in June 2005; Mr Glasby is its only director and shareholder. It provides services repairing and maintaining injection moulding machines, using Mr Glasby's engineering skills. SWG's services are provided either in person via visits to the clients' premises, or remotely via phone, video calls or WhatsApp.

8. Mr Glasby's wife, Ms Hagan, worked for the company at all relevant times; her role was to seek new business by visiting customers. Bookkeeping was carried out by Stacie, Mr Glasby's daughter-in-law, on a freelance basis until May or June 2021, after which she was employed by SWG.

9. SWG's operations continued normally until lockdown was announced on Monday 23 March 2020. The business then came to a standstill for a few days, after which Mr Glasby began taking calls from customers and providing help and advice remotely. He initially told HMRC that he worked for around 45 hours between the beginning of lockdown and 30 April 2020, but he later revised this figure to 18 hours.

10. We find as facts on the basis of Mr Glasby's own evidence that:

(1) throughout the pandemic, Mr Glasby was available to assist clients with problems and provide assistance, and he supplied those services;

(2) between the beginning of lockdown and 30 April 2020 he worked for at least 18 hours;

(3) he continued to provide services to clients after 30 April 2020; but

(4) Ms Hagan did not work for SWG at least until July 2020.

11. Mazuma was SWG's accountant until around May 2021. On behalf of SWG it submitted the first CJRS claim from 1 March 2020 based on Mr Glasby's and Ms Hagan's salary. Mazuma then made subsequent claims for both employees until May 2021, when responsibility moved to MWA. In total, SWG claimed a total of £27,665.84 in CJRS grants during the pandemic. In addition, it claimed and was paid a bounce-back loan of £26,000.

12. Mazuma also submitted SWG's corporation tax ("CT") return for the year ended June 2020, which declared that SWG had turnover of £52,796 but nil profits. The CT return for the following year was submitted by MWA on 28 March 2023; it declared turnover of £38,517 and profits of £13,283. The boxes in that return headed "coronavirus support schemes and overpayments" had been left blank; there were no equivalent boxes in the previous year's return.

13. On 2 September 2022, HMRC opened a compliance check into SWG's CJRS claims. Mr Maving interviewed Mr Glasby on 5 April 2023, and on 11 May 2023 Officer Thomas Lodge issued assessments to recover amounts HMRC considered had been overpaid, on the following basis:

(1) In relation to Mr Glasby and Ms Hagan, for the period 1 March to 18 March 2020. This predated the beginning of the first possible CJRS claim and no employee was furloughed;

(2) for the period 19 March 2020 to 30 June 2020, on the basis that Mr Glasby was not furloughed; and

(3) for the period 1 July to 30 October 2020, because claims for flexible furlough could only be made in respect of employees who were furloughed in the previous period, and Mr Glasby had not been furloughed.

14. The assessments were £2,671.60 for 2020-21 and £3,325.78 for 2021-22, so a total of £5,997.38. Mr Glasby appealed the assessments and then notified the appeal to the Tribunal.

THE LEGISLATIVE STRUCTURE

15. 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:

> **"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."

16. The law which governed CJRS payments was therefore made by a series of Treasury Directions. The First Direction was issued on 15 April 2020, and provided:

> "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."

17. The substance of the CJRS was set out in the Schedule to the First Direction. There were six further Directions, each with related Schedules, until the CJRS ceased at the end of September 2021. This decision only sets out the paragraphs of those Schedules which relate to the issues raised by SWG's appeal.

THE FIRST DIRECTION

18. Para 6 of the First Direction is headed "furloughed employees" and subpara 1 reads:

> "An employee is a furloughed employee if-
>
> (a) the employee has been instructed by the employer to cease all work in relation to their employment
>
> (b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and
>
> (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease."

19. Para 7 is headed "qualifying costs - further conditions" and begins:

> "Costs of employment meet the conditions in this paragraph if
>
> (a) they relate to the payment of earnings to an employee during a period in which the employee is furloughed…"

20. Para 12 is headed "duration of CJRS" and reads:

> "CJRS has effect only 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 and employer national insurance contributions and directed pension payments paid or payable in relation to such earnings."

THE SECOND DIRECTION

21. The Second Direction extended the duration of CJRS from 1 June to 30 June 2020, so covered earnings to furloughed employees in respect of that period; there were no relevant substantive changes to the conditions.

THE THIRD DIRECTION

22. The Third Direction extended the duration of CJRS from 1 July to 31 October 2020, and it also introduced the concept of "flexible furlough". Para 7 is headed "Entitlement to make a CJRS claim" and reads:

> "A CJRS claim may be made by a qualifying employer in respect of an employee who is a flexibly-furloughed employee in a CJRS claim period."

23. The definition of a "flexibly furloughed employees" is at para 10, and includes the requirement that the employee is "a qualifying employee for the purposes of CJRS", see subpara 1(a). Para 10(2) explains the meaning of that term, saying that an employee is a qualifying employee for the purposes of CJRS if "paragraph 10.3 applies in relation to the employee", or the employee is "a family leave returner" or "armed forces reservist". Para 10(3) then reads:

> "This paragraph applies in relation to an employee if-
>
> (a) on or before 31 July 2020, the employee's employer makes a CJRS claim in accordance with the original CJRS directions in respect of the employee for a period ending on or before 30 June 2020, and
>
> (b) the employee ceased all work (whether directly or indirectly) for the employer (or a person connected with the employer) for a period of 21 calendar days or more beginning on or before 10 June 2020."

CLAWBACK PROVISIONS

24. Paragraph 8 of Schedule 16 to the Finance Act 2020 is headed "Charge if person not entitled to coronavirus support payment" and so far as relevant provides:

> "(1) A recipient of an amount of a coronavirus support payment is liable to income tax under this paragraph if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made.
>
> …
>
> (5) The amount of income tax chargeable under this paragraph is the amount equal to so much of the coronavirus support payment
>
> (a) as the recipient is not entitled to, and
>
> (b) as has not been repaid to the person who made the coronavirus support payment."

25. Paragraph 9 is headed "Assessments of income tax chargeable under paragraph 8" and so far as relevant reads:

> "(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.
>
> (2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.
>
> (3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to

> an assessment under sub-paragraph (1) (for example, section 31 makes provision about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment)."

THE APPEAL GROUNDS

26. Mr Glasby accepted that SWG had overclaimed CJRS, and also accepted that the overclaim should have been included on the 2021 CT return. However, he said MWA had been unaware of the need to complete the boxes on that return because of inadequate government guidance. His skeleton said:

> "Had the correct information and guidance been available for the 2020-2022 [sic] tax return, my accountant and I would have been made aware of any discrepancies or over-claimed amounts immediately after that initial filing period. As this crucial information was not accessible, I was unable to identify the over-claim at that time, resulting in continued over-claims."

27. Mr Ness said this was not relevant to whether the overclaim could be recovered by HMRC, and we agree. This is not an appeal against a penalty for incorrectly completing the CT return, or even for making incorrect claims. It is, instead, an appeal against assessments made by HMRC under the clawback provisions set out at §24ff. The basis of those assessments is that SWG was not entitled to be paid a total of £5,997.38; SWG's failure to report the overpayments on the CT return does not prevent HMRC from raising assessments to recover them

28. We add that the last overclaim was for the month of October 2020, over two years before MWA submitted the 2021 CT return, so even if MWA had understood the CT guidance, it would not have prevented the overclaims.

THE THREE PERIODS

29. There were three periods in issue: 1 March to 18 March 2020; 19 March 2020 to 30 June 2020, and 1 July to 30 October 2020.

The first period

30. Manzuma, acting for SWG, claimed CJRS for Mr Glasby and Ms Hagan from 1 March 2020. Although para 12 of the First Direction allowed CJRS to be claimed from that date, any such claim was conditional on the employees in question being furloughed.

31. It was common ground, and we have found as a fact, that SWG's business continued normally until lockdown was announced; it follows that no member of staff was furloughed during the first period.

32. Although lockdown did not begin until 23 March 2020, HMRC have only sought to recover the CJRS paid in relation to the period from 1 March to 18 March. Mr Ness did not ask the Tribunal to increase the assessment to include further four days (although the Tribunal has that power under Taxes Management Act 1970, s 50), and we did not do so.

The second period

33. Para 7 of the First Direction provided that a CJRS claim was only valid if it related "to the payment of earnings to an employee during a period in which the employee is furloughed. Para 6 defined "furloughed employees" as those who had been instructed to "cease all work in relation to their employment" because of the pandemic, for a period of at least 21 days. The Second Direction made no relevant change to those provisions.

34. We have found as a fact, on the basis of Mr Glasby's own evidence, that he worked throughout the pandemic responding as required to customer queries and providing assistance, and that this included at least 18 hours between 19 March and 30 April 2020.

35. Mr Glasby was thus not a "furloughed employee" because he did not meet the statutory description. HMRC were therefore correct to recover the CJRS paid in relation to Mr Glasby during the second period.

The third period

36. The Third Direction introduced the concept of flexible furlough, but the only employees who were entitled to that basis were those for whom the employer "makes a CJRS claim in accordance with the original CJRS directions in respect of the employee for a period ending on or before 30 June 2020".

37. We read the reference to "makes a CJRS claim" as meaning "makes a valid CJRS claim". SWG did not make a valid CJRS claim for Mr Glasby for a period ending on or before 30 June 2020, and Mr Glasby could not be flexibly furloughed. It follows that HMRC were also correct to recover the CJRS paid in relation to Mr Glasby during this period.

CONCLUSION, TTP AND APPEAL RIGHTS

38. For the reasons explained above, SWG's appeal is refused and HMRC's assessments upheld.

39. Both in his skeleton argument, and at the hearing, Mr Glasby asked for a time to pay ("TTP") arrangement. The Tribunal explained that we could not direct HMRC to agree to a TTP arrangement, and SWG would need to liaise directly with the relevant HMRC department.

Right to apply for permission to appeal

40. This document contains full findings of fact and reasons for the Tribunal's decision. Any party dissatisfied with our 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.

41. The application must be received by this Tribunal not later than 56 days after the Tribunal's 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.

Release Date: 09th JANUARY 2025