



Neutral Citation: [2023] UKFTT 00660 (TC)

Case Number: TC08881

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/02705

*SELF-EMPLOYMENT INCOME SUPPORT SCHEME ('SEISS') – Treasury Direction and SEISS Schedule – whether the appellant met the criteria for being a 'qualifying person' as defined by the relevant legislation; no – paragraph 9 Schedule 16 Finance Act 2020 – recovery of SEISS grants by assessment – appeal dismissed*

**Heard on:** 17 April 2023

**Judgment date:** 28 July 2023

**Before**

**TRIBUNAL JUDGE HEIDI POON  
MEMBER JULIAN SIMS**

**Between**

**NOEL SPENCER**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Noel Spencer in person

For the Respondents: Kim Johnson, Litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. This is an appeal by Mr Noel Spencer (the ‘appellant’) against an assessment issued by the respondents (‘HMRC’) on 7 December 2022 (the ‘Assessment’).
2. The Assessment in the quantum of £2,563 is in relation to the tax year ending 5 April 2021, and raised pursuant to para 9 of Schedule 16 to the Finance Act 2020 (‘Sch 16 FA 2020’).
3. The Assessment charges income tax as a result of the appellant receiving an amount of Coronavirus Support Payment consequent on two claims made under the Self-employment Income Support Scheme (‘SEISS’).
4. The issue for determination in this appeal is whether the appellant was eligible to make the claims under SEISS in the relevant period.
5. HMRC have issued a penalty questionnaire with a view to assess the appellant to ‘non-deliberate’ penalties in relation to the SEISS claims. The penalty assessment has not been raised, possibly pending the outcome of this appeal.

### EVIDENCE

6. The Tribunal has been provided with a core hearing bundle of 369 pages, of which 136 pages relate to legislation and case law.
7. Officer Suzanne Donkin, who was the compliance officer carrying out the check into the appellant’s SEISS claims that resulted in the Assessment, lodged a witness statement and was cross-examined. We find Officer Donkin a credible and reliable witness and accept her evidence as to matters of fact.
8. Mr Spencer is a litigant in person and he gave evidence to the Tribunal and was cross-examined. We have no issue with Mr Spencer’s credibility as a witness, and accept his evidence as to matters of fact. Aspects of Mr Spencer’s evidence touched on his interpretation of the relevant legislation, which we heard as his submissions, and make no findings of fact thereof.

### RELEVANT LEGISLATION

#### ***SEISS Schedule to the Treasury Direction***

9. The statutory basis of the Scheme is set out in sections 71 and 76 of the Coronavirus Act 2020 (‘CA 2020’) which provides the Treasury with the power to direct HMRC to administer functions in relation to the COVID-19 pandemic. A Treasury Direction by the title ‘The Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs’ Direction was published on 30 April 2020 (the ‘Treasury Direction’) and set out the eligibility rules, grant calculation and claim window, with further directions being published ahead of each new grant claim period. The Treasury Direction published on 1 July 2020 superseded the April Direction.
10. In all, there were five SEISS grants covering (mostly) quarterly periods up to 30 September 2021 (which had a five-month claim period from 1 May 2021). The present appeal is concerned with the first two SEISS grants,
  - (1) SEISS 1: claim period unspecified, claim deadline 13 July 2020, up to £7,500.
  - (2) SEISS 2: claim period for 14 July 2020 to 19 October 2020, claim deadline by 19 October 2020, up to £6,670.

11. The Treasury Direction requires HMRC ‘to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule’ (the ‘SEISS Schedule’) accompanying the Direction. The claims in this appeal are governed by the Treasury Direction published on 30 April 2020 and its accompanying Schedule, which provides under:

- (1) Paragraph 2: ‘The purpose of SEISS is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease’.
- (2) Paragraph 3 provides for the conditions to be met for a claim under SEISS, including the condition that a claim ‘must be made by a qualifying person’.
- (3) Paragraph 4 defines a qualifying person for a claim under SEISS as follows:
  - ‘4.2 The person must –
  - (a) carry on a trade the business of which has been adversely affected by reason of circumstances arising a result of coronavirus or coronavirus disease,
  - (b) has delivered a tax return for a relevant year on or before 23 April 2020,
  - (c) have carried on a trade in the tax years 2018-19 and 2019-20,
  - (d) intend to continue to carry on a trade in the tax year 2020-21,
  - (e) if that person is non-UK resident ... [not relevant to this appeal]
  - (f) be an individual, and
  - (g) meet the profits condition.’
- (4) Paragraph 13 on ‘Interpretation’ of the SEISS Schedule defines ‘*trade*’ as:

“‘trade’ means a trade, profession or vocation the profits of which are chargeable to income tax under Part 2 of ITTOIA 2005 (trading income) and in this definition “trade” has the same meaning as in section 989 of ITA 2007;’

### ***Schedule 16 FA 2020***

12. The heading for Schedule 16 FA 2020 is: ‘Taxation of Coronavirus Support Payments’; under paragraph 8 ‘*Charge if person not entitled to coronavirus support payment*’, it is stated:

- ‘8(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. [...]
- 8(4) Income tax becomes chargeable under this paragraph –
- (a) in a case where the person was entitled to an amount of a coronavirus support payment paid under the coronavirus job retention scheme but subsequently ceases to be entitled to retain it, at the time the person ceases to be entitled to retain the amount, or
  - (b) in any other case, at the time the coronavirus support payment is received.
- 8(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.’

13. Paragraph 9 of Sch 16 FA 2020 is entitled '*Assessments of income tax chargeable under paragraph 8*' and provides, inter alia, as follows:

'9(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.

9(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.'

## **THE FACTS**

### ***Background***

14. The appellant's line of work is to produce bespoke signage by computer design. The signage is used in display such as billboards, posters, and screen printing. The base of his work is from a shared workshop on premises run by Workshop & Artists Studio Provision Scotland Ltd ('WASPS').

15. The appellant said that he was 'running two companies'. The first one was a private limited company by the name Sign Directory (Leith) Limited, which was incorporated on 19 August 2005 and was the main trading vehicle for the appellant's business. The business of Sign Directory was struggling prior to its dissolution (date unspecified). It is inferred that Sign Directory was coterminous with the second company for a short period before its dissolution.

16. In October 2019, the appellant incorporated Bare Branding as a Community Interest Company ('CIC'), which is a private limited company by guarantee with no shares issued. As a special type of corporate structure, CIC was introduced in 2005 for social enterprises or not-for-profit projects. A company can be set up as a CIC by applying to Companies House with a 'community interest statement', which is an explanation of what the proposed business plans to do to benefit the chosen community. A CIC is liable to corporation tax, and is expected to reinvest the profit to achieve more of its social objectives, although a proportion of profit can be paid out to owners or investors in the form of dividends, subject to 'dividends cap'.

17. Mr Spencer stated in evidence that Bare Branding aims to serve the community of vulnerable people who have health or mental health issues, and provides services to assist artists in terms of 'equipment and knowledge', and to help artists get into the market place to sell their goods. A Community Interest Company Report on Form CIC 34 for Bare Branding CIC for the accounting period ending 31 October 2019 includes a statement of 'General Description of the Company's Activities and Impact', which states:

'Bare Branding operates an open access workshop that teaches and provides digital printing facilities for groups and individuals.

Bare Branding has become a major local asset to the Leith community and has assisted numerous charity groups and individuals with various projects from outdoor events to the development of craft products.

We offer free computer tuition and access to digital printing equipment that would not normally be financially accessible to all those in our community.

Sustainability and inclusion is uppermost in our commitment to all who work with us and we have developed a programme that allows our community to be part of a circular economy in cutting out waste from design to print.

We have visited schools and other local organisations and have provided talks on sustainability in partnership with Zero Waste Scotland and The Leith Collective.’

### ***The claims for Support Payments under SEISS***

18. The facts in relation to the claims made by the appellant are as follows:

- (1) On 17 June 2020, the appellant applied to HMRC for Support Payments through SEISS, and the sum of £1,367 for the two-month period 13 May to 13 July 2020 was paid on 25 June 2020.
- (2) On 24 August 2020, the appellant made a second claim through SEISS, and the sum of £1,196 for the two-month period from 17 August to 19 October 2020 was made on or around 2 September 2020.

### ***The check into the claims***

19. About a year after the first claim, correspondence commenced between the parties in relation to the appellant’s eligibility for the claims.

- (1) On 4 June 2021, HMRC wrote to ask the appellant to confirm his ‘trading status’ for eligibility for the SEISS grants. The letter was issued because according to the appellant’s tax returns submitted for the two years 2018-19, and 2019-20, he had ceased trading as a self-employed on 5 April 2019.
- (2) On 14 June 2021, HMRC notified the appellant of ‘a formal check’ into the claims as no confirmation of trading status had been received from the appellant.
- (3) On 20 July 2021, HMRC issued a final reminder to the appellant to confirm his trading status.
- (4) On 10 August 2021, the appellant sent an email to SEISS Compliance Team, confirming that he received ‘income support’ and was ‘extremely worried’ that this might be ‘some kind of scam’, which HMRC responded to by an acknowledgement email on 24 August.
- (5) By letter dated 19 September 2021, the appellant replied to HMRC apologising for the delay due to health issues. He stated that his ‘only real income’ was his state pension, that he was using his pension to pay off his bill due to his accountants for Sign Directory.

‘Sign Directory was struggling as a company and I decided to apply for some government money through the SEISS grant, I had all intention to keep Sign Directory going but financially this was not possible.

I have never stopped working and I am still self-employed. In October 2019 I set up ... Bare Branding ... to work alongside Sign Directory sharing the same workshop and equipment, effectively the same company but different name.’

### ***The Assessment and the matter of penalty***

20. Officer Donkin was assigned to respond to Mr Spencer’s letter of 19 September 2021, wherein Mr Spencer had stated that he was still self-employed on the basis that Bare Branding was to work alongside Sign Directory, ‘effectively the same company but a different name’. Officer Donkin checked the appellant’s Self-Assessment (‘SA’) and PAYE records. From the documents lodged in the core bundle, we find the following:

- (1) The return for 2017-18 was received on 21 January 2019, showing self-employment of 'Sign Writing' with a turnover of £20,429, and allowable expenses of £12,541.
- (2) The return 2018-19 was received on 31 January 2020, showing self-employment of 'Sign Writing' with a turnover of £8,023 and allowable expenses of £6,255.
- (3) The date of the business ceasing was stated on the 2018-19 return as 5 April 2019.
- (4) Both returns were submitted by agent Cowan & Partners Limited.
- (5) For the tax year 2019-20, the 'Return Status' on the SA record is shown as 'Not Issued'. No SA return was filed for the appellant for 2019-20.
- (6) The SA Notes entry on 15 July 2021 stated that the appellant's SA record was 'reactivated due to receipt of SEISS grant'; 2020-21 return to be issued for completion.
- (7) The issue date of the 2020-21 return was 22 July 2021, outwith the normal period.
  - (a) Under the heading of 'Self-Employment', a 'Short' SE Page (SA103S) for Self-Employment (marked by the number '1') was recorded as having been filed.
  - (b) The return also recorded dividends received of £514, and State Pension of £2,878 (and tax deducted of £345), and other pensions received of £3,265.
  - (c) The return was filed on 16 May 2022 by Cowan and Partners as agent.
  - (d) For box 20.1 a cross is marked under the heading '*Coronavirus support payments included as taxable income*'.
  - (e) Description of business for the Self-Employment was 'Sign Writer' and the business was stated to have started on *6 April 2020*, and the year's turnover was £1,545 with £1,000 of trading income allowance.

21. Apart from the appellant's SA records, Officer Donkin reviewed Companies House records for further evidence to ascertain if Mr Spencer was continuing to trade after 5 April 2019. A review of Companies House record showed the following:

- (1) Mr Spencer was an active Director of Bare Branding CIC since 19 October 2018.
- (2) Mr Spencer was a director of Bare Hub CIC, which dissolved on 26 March 2019.

22. The section of 'Additional Documents' in the bundle would appear to be appended as the end section after the 'List of documents' and legislation plus case law have been compiled and indexed. The Additional Documents comprise the Report and Accounts of Bare Branding CIC for the two accounting periods: 8 October 2018 to 31 October 2019 ('APE2019'), and the year to 31 October 2020 ('APE2020'). From these Additional Documents, we find the following:

- (1) Mr Spencer was the named director along with Agne Smilgaite, who was described by Mr Spencer as 'being good with paper work'.
- (2) In APE 2019, the Turnover was 18,732 and cost of sales £6,127 and administrative expenses £7,357, (of which £3,933 was Directors' remuneration per the detailed profit and loss account), resulting in a pre-tax profit of £5,248 and tax thereon of £305.
- (3) In APE 2020, the Turnover was 17,353 and cost of sales £17,741 and administrative expenses £7,233, resulting in a loss of £7,621. (There is no detailed

profit and loss account included for this period to state the amount that had been paid as Directors' remuneration.)

23. To establish whether Mr Spencer had ceased self-employment with Sign Directory but continued to trade with Bare Branding CIC, Officer Donkin sought internal technical advice on CIC, which was provided on 30 September 2021 as follows:

- (1) A CIC is the same as an ordinary company and is not a sole-trade or partnership.
- (2) As an active Director of Bare Branding, that cannot be taken as evidence of self-employment to be eligible for SEISS.
- (3) While one can be a director of a limited company and also be self-employed, evidence needs to be provided which shows the separate trading.

24. In October 2021, Officer Donkin contacted Mr Spencer by email and by telephone to request evidence of continued self-employment trading through Bare Branding to be provided by 15 October 2021. A follow-up call was made by a different compliance officer on 15 October 2021, and Mr Spencer was asked if he had only been trading through Bare Branding CIC, and he confirmed that was the case. The compliance officer explained to Mr Spencer that he would need to repay the grant.

25. During the October 2021 call, the compliance officer also raised the matter of penalty with Mr Spencer, and that it is important for Mr Spencer to read the Human Rights Act factsheet before responding to any questions. A questionnaire was issued on 18 October 2021 for the purpose of assessing penalties, which was responded to by 18 November 2021 as required.

26. The response to the penalty questionnaire was reviewed by another officer who concluded that the SEISS claims were to be assessed as non-deliberate for penalty purposes.

27. On 7 December 2021, HMRC issued the notice of assessment under the heading of 'recovery of incorrectly claimed' SEISS payments for the year ending 5 April 2021.

### ***Appeal and review***

28. Mr Spencer appealed against the Assessment by letter dated 15 December 2021. The appeal was reviewed by a higher compliance officer, and was rejected on the basis that Mr Spencer did not meet the criteria of self-employed trading in the tax years 2019-20 and 2020-21, and a View of the Matter ('VOM') letter was issued on 12 January 2022.

29. On 23 February 2022, Mr Spencer wrote to request a review. A review conclusion was issued by letter dated 21 March 2022, which upheld the Assessment and the VOM letter.

### **THE APPELLANT'S CASE**

30. Mr Spencer's submissions at the hearing did not depart from the case as stated in his letter to HMRC by letter dated 15 December 2021, which was taken by HMRC as an appeal against the notice of assessment issued on 7 December 2021. Mr Spencer's appeal response addressed the questions in HMRC's October 2021 questionnaire in turn, and the numbering of paragraphs in his appeal letter follows the order of the questions in the questionnaire.

'4) I thought that by trading as Bare Branding I assumed that there was no difference to my sole trader status as I continued to work doing the same work at the same place. I therefor [sic] didn't understand that I was not eligible.

5) I did read the eligibility criteria and still thought that I was in my rights to apply as a sole trader.

6) I don't understand the difference between a Community Interest Company and a sole trader when it refers to employment.

7) ... I could not consult with an accountant as I was in debt with my fees to them, this debt [is being paid off] from my pension.

8) I did some research and thought that the self employed support was the only one that I may have been eligible for, there may have been other grants that our government could have provided.

Given my circumstances it may have been easier to have kept on trading as Sign Directory and go bankrupt or become unemployed and claim state benefit.

9) I didn't think I was not eligible for assistance.

10) I didn't applied [sic] for further SEISS assistance as I had turned 66 years old and qualified for my state pension which is ample for me to live off.

11) I was totally unaware that I was not eligible to keep the grant.

I feel my human rights may be compromised if I have to repay this grant with the understanding that I would may [sic] at the time been eligible to access the same amount of financial assistance from other government schemes.

I do trust that you accept my explanation as to why I applied for this assistance and that I did not try to take any money that I thought I was not eligible to receive.'

#### **HMRC'S CASE**

31. The respondents' case is that the appellant did not meet the statutory criteria to be eligible for the Support Payments under the SEISS because:

- (1) The appellant ceased to be self-employed from 5 April 2019;
- (2) No return was filed for the tax year 2019-20 to indicate that there was any trade being carried on for the appellant to be eligible for the SEISS grant payments;
- (3) Bare Branding CIC became the appellant's trading medium and trading through a company was not self-employment.

#### **DISCUSSION**

32. The burden of proof in this appeal lies with Mr Spencer as the claimant of the SEISS grant payments that he met the statutory conditions for the claims as a 'qualifying person' in terms of paragraph 4(2) of the Treasury Direction published on 30 April 2020. That is to say, at the point of claim for SEISS 1 on 17 June 2020, and SEISS 2 on 24 August 2020, apart from meeting the criterion of being 'an individual', Mr Spencer 'must' also meet the relevant criteria:

- (1) carry on a trade the business of which had been adversely affected by reason of circumstances arising as a result of coronavirus;
- (2) have delivered a tax return for the relevant year (i.e. 2018-19) by 23 April 2020;
- (3) have carried on a trade in the tax years 2018-19 and 2019-20;
- (4) intend to continue to carry on a trade in the tax year 2020-21;
- (5) meet the profits condition; (i.e. the return had to show trading income of £50,000 or less and represented half or more of the total income of the claimant).



33. In relation to each of the five criteria relevant to Mr Spencer's case under paragraph 4(2) of the SEISS Schedule to the Treasury Direction, we make the following findings of fact in respect of each.

(1) According to the return filed for 2020-21, the start date for a new self-employment was 6 April 2020. We accept that as the commencement date and therefore the appellant was carrying on a trade at the point of making the claims in June and August of 2020. We have not heard extensive evidence as how the appellant's trade had been affected by reason of circumstances arising as a result of coronavirus, but we accept that it was more likely than not that as a signage producer, the appellant's business was so affected.

(2) The appellant's return for 2018-19 was received by HMRC on 31 January 2020, and therefore delivered by the statutory date of 23 April 2020 as per the SEISS Schedule.

(3) While the appellant had carried on a trade (of Sign Directory) in 2018-19, that trade ceased on 5 April 2019 as stated in the return submitted. We have regard to the fact that the appellant's 2018-19 return was filed on 30 January 2020, which was 10 months after the date of cessation as stated on the return. If the appellant declared in January 2020 that there was a cessation of trade some 10 months earlier, the reasonable inference must be that it was a well-established fact by January 2020 for the appellant to be able to state so. The documentary evidence is consistent in pointing to the fact that there was no self-employment trade being carried on from 6 April 2019. There is no contrary evidence to suggest that an alternative trade as a self-employed was being continued after the cessation of the trade as Sign Directory after 5 April 2019. Consequently, the third criterion is not met, since it is not sufficient to be carrying on a trade for 2018-19, but that the appellant must be carrying on a trade for 2019-20 as well.

(4) The emphasis of the fourth criterion is continuity, in that the qualifying person must have continuously traded from 2018-19, into 2019-20 and intended to continue to trade in 2020-21. On the face of the documentary evidence, the appellant had ceased trading on 5 April 2019, and did not trade in the year 2019-20, and started trading on 6 April 2020. Even if we were to accept that the business that was carried on through Bare Branding CIC was with the appellant in a self-employment capacity as stated in the required return for 2020-21, that would not have enabled the appellant to meet the criterion of having been continuously trading because the year 2019-20 remained a year with no trading activity. (For the avoidance of doubt, we make no finding as to whether the appellant was trading as a self-employed through Bare Branding CIC from 6 April 2020 as declared in his SA return. It is not necessary to make this finding of fact to determine the appeal.)

(5) It is not relevant to consider the profits condition if there was a missing year of trading in 2019-20.

34. To be a qualifying person, all the criteria relevant to Mr Spencer need to be met, and failure to meet any of the criteria means that Mr Spencer is not a qualifying person in terms of paragraph 4(2) of the Treasury Direction. We conclude that the third and fourth criteria are not met; there was not a continuing trade that spanned the entire period of 2018-19 to 2020-21 for Mr Spencer to be a qualifying person to be eligible for the SEISS grants.

35. We note that in APE2019, Bare Branding paid £3,933 as Directors' remuneration, which could have been paid to Mr Spencer in the accounting period 8 October 2018 to 31 October 2019. However, the payment of £3,933 noted as Directors' remuneration in the

accounts for Bare Branding in that period is not sufficient to establish that there was a continuing trade being carried on by Mr Spencer as a self-employed under Bare Branding in APE2019; nor would it bridge the remaining gap of trading from 1 November 2019 to 5 April 2020 (prior to the commencement date of 6 April 2020 in the SA return filed for 2020-21).

36. The parties have made various submissions on the structure of a CIC and whether as a director of Bare Branding CIC, Mr Spencer could have been supplying his service as a self-employed to the CIC. While we have heard parties' submissions, we have not heard sufficient evidence for us to make a relevant finding of fact in this respect. In any event, the determination of this appeal does not require us to make such a finding.

37. The appellant has raised arguments as regards fairness of the recovery of the grants in his case where he could have made claims under different schemes if he had not made the SEISS claims in error. The Tribunal's jurisdiction over this appeal is strictly limited to the subject matter in front of us, which is whether the appellant was eligible for the SEISS 1-2 grants. This Tribunal has no jurisdiction to hear public law issues in terms of fairness; nor can we consider whether Mr Spencer could have been eligible for some other schemes at the relevant time to entertain any possibility of an offset.

38. We note that a penalty assessment *may* follow the determination of this appeal. We do not doubt that Mr Spencer believed himself to have been continuously trading under Bare Branding after cessation of Sign Directory. We have a great deal of sympathy for the situation in which Mr Spencer found himself, and infer that due to financial constraint, he was unable to ask his accountants for advice before making the SEISS claims. While we find Mr Spencer to be entirely credible, and that he held a genuine belief that he was carrying on the same trade under the auspice of Bare Branding as previously under Sign Directory, albeit at a reduced level on reaching pensionable age, we can make no findings of fact as regards the relevant issues for consideration such as 'special circumstances' (para 11 Sch 24 FA 2007) because the penalty assessment has not been raised, and the matter is not part of the present appeal.

#### CONCLUSION

39. The appeal is accordingly dismissed.

40. 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.

**HEIDI POON  
TRIBUNAL JUDGE**

**Release Date: 28<sup>th</sup> JULY 2023**