



Neutral Citation: [2024] UKFTT 00399 (TC)

Case Number: TC09166

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/19787

*Coronavirus Job Retention Scheme (CJRS) – appeal against assessment under Schedule 16 Finance Act 2020– relevant CJRS day – qualifying costs - whether reasonable excuse could apply – no – appeal dismissed*

**Heard on:** 28 February 2024

**Judgment date:** 9 May 2024

**Before**

**TRIBUNAL JUDGE SUSAN TURNER  
MEMBER JULIAN SIMS**

**Between**

**DIGITAL BUYING PARTNERS LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Sanjeev Verma, Managing Director

For the Respondents: Ashleigh Lafaurie, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. Digital Buying Partners Limited (DBP) appeal against an assessment to income tax under para 9, sch 16 Finance Act 2020 in an amount of £11,590.17. The proportion of this assessment under appeal is £11,208.05. This appealed amount was claimed and received by DBP under the Coronavirus Job Retention Scheme (CJRS) in respect of two employees (the CJRS Employees) who were eligible for employment from February 2020 but who were not included in real time information (RTI) submitted to HMRC on or before 19 March 2020.
2. The CJRS was introduced in April 2020 under the Coronavirus Act 2020 to provide funding for employers who furloughed their employees during the coronavirus lockdown. One of the conditions for receipt of a CJRS payment for the period under appeal was that the employee in question had been included on an RTI return which had been submitted to HMRC by 28 February 2020 or by 19 March 2020.
3. HMRC claimed that the failure to include the CJRS Employees in the RTI return on or before 19 March 2020 meant that these claims did not count as “qualifying costs” under the CJRS and they issued an assessment to claw back them back.
4. The form of the hearing was V (video) and all parties attended remotely using the Tribunal’s video hearing platform. We referred to a document bundle of 818 pages prepared by HMRC. We also referred to a series of documents provided the day before the hearing on behalf of the Appellant, including three witness statements, two from individuals who had been directors of DBP during 2020, and one from Mr Verma’s wife, CRJS guidance and case law relating to “reasonable excuse”. Ms Lafaurie did not object to the admission of these documents.
5. At the hearing, we heard witness evidence from Mr Murali Nair, who provided payroll services to DBP, and from Ms Zajackowska, the HMRC officer who issued the CJRS assessment. We also heard from Mr Verma on behalf of the Appellant.
6. 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.

### THE FACTS

7. The CJRS Employees were both Tier 2 migrant workers who had visas making them eligible to work from late February 2020. The first of the CJRS Employees had been included on an RTI return submitted on behalf of DBP on 1 May 2020 and the second of the CJRS Employees was included on an RTI return submitted to HMRC on behalf of DBP on 14 May 2020. That the CJRS Employees may have begun their employment with DBP before 19 March 2020 was not disputed. Nor was it in dispute that they were not included on an RTI return on or before 19 March 2020.
8. On 24 September 2020, Ms Zajackowska opened a compliance check into DBP’s CJRS claims.
9. Mr Verma responded on behalf of DBP on 8 October 2020. This response was followed up by a telephone meeting between Mr Verma and Ms Zajackowska on 21 October 2020 and further information was provided by Mr Verma to Ms Zajackowska on 19 November 2020.
10. Having considered all of the information provided, Ms Zajackowska notified DBP on 24 November 2020 that a CJRS overclaim had been identified in respect of the following:

(1) claims made between 1 April 2020 and 31 August 2020 in respect of the CJRS Employees who were ineligible as they had not been included on DBP's RTI submission to HMRC before 19 March 2020.

(2) an overpayment in respect of two further employees. This part of the assessment is not in dispute and is not under appeal.

11. Further correspondence took place between Ms Zajackowska and Mr Verma during February 2021, and on 18 May 2021 a letter was sent to DBP maintaining there had been an overclaim of CJRS payments.

12. On 16 June 2021, a notice of assessment was issued to DBP in the sum of £11,590.17.

13. Mr Verma requested a review of the assessment on 15 July 2021 and a letter dated 19 July 2021 confirmed to DBP that a review would be undertaken. The result of that review, upholding the assessment, was issued to DBP on 26 November 2021.

14. Mr Verma submitted his notice of appeal to the Tribunal on 24 December 2021.

15. The issue in dispute in this appeal is the eligibility of the CJRS Employees for CJRS payments.

#### **THE LAW**

##### **Coronavirus Act 2020**

16. 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**

17. Pursuant to these powers, on 15 April 2020 the Chancellor of the Exchequer signed a Direction, entitled "The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction" (the First Direction). The main body of the First Direction 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.

18. The substance of the CJRS was set out in the schedule to the First Direction.

19. After an introduction to the CJRS and its purpose, the schedule defines qualifying employers at para 3 (essentially any employer with a PAYE scheme registered on HMRC's RTI system on 19 March 2020). It is agreed that DBP meets this requirement.

20. Paragraph 5 of the schedule is headed “Qualifying costs” and sets out the costs for which a claim could be made under the CJRS:

5. The costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which –

(a) relate to an employee –

(i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,

(ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and

(iii) who is a furloughed employee (see paragraph 6), and

(b) meets the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.

21. It is not disputed 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 para 13.1 of the schedule:

13.1 For the purposes of CJRS –

(a) a day is a relevant CJRS day if that day is –

(i) 28 February 2020, or

(ii) 19 March 2020.

22. Paragraph 12 of the schedule to the First Direction made it clear that payments under that Direction could only be made in respect of the period from 1 March 2020 to 31 May 2020.

### **Subsequent CJRS Directions**

23. In relation to payments made in respect of later periods, further directions, issued in the same way and under the same authority, apply. They 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, extend the CJRS to 30 June 2020 and 31 October 2020 respectively, but the relevant CJRS day remains the same, ie 19 March 2020.

24. 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 the schedule applies to the period 1 November 2020 to 31 January 2021. It is relevant to this appeal in that DBP seek to rely on para 33 of the schedule to the Fifth Direction, as set out from [26] below, which reads as follows:

#### **Time limit for making CJRS claims pursuant to this direction**

33.1 CJRS claims made pursuant to this direction must not be made after the CJRS deadline day relating to the CJRS extension calendar month in which the CJRS claim period of the claim occurs.

33.2 The CJRS deadline days are-

(a) 14 December 2020 in relation to the November 2020 CJRS extension calendar month;

(b) 14 January 2021 in relation to the December 2020 CJRS extension calendar month;

(c) 15 February 2021 in relation to the January 2021 CJRS extension calendar month.

33.3 HMRC may accept a CJRS claim made after the relevant CJRS deadline day if-

- (a) there is a reasonable excuse for the failure to make the claim in time, and
- (b) the claim is made within such further time as HMRC may allow.

33.4 A request to amend a CJRS claim to increase the amount claimed at the time when the claim was made may be accepted by HMRC provided the amendment is not made after the CJRS claim amendment deadline day relating to the CJRS extension calendar month in which the CJRS claim period of the claim occurs.

33.5 The CJRS claim amendment deadline days are-

- (a) 29 December 2020 in relation to the November 2020 CJRS extension calendar month;
- (b) 28 January 2021 in relation to the December 2020 CJRS extension calendar month;
- (c) 1 March 2021 in relation to the January 2021 CJRS extension calendar month.

33.6 HMRC may accept a request to amend a CJRS claim made after the relevant CJRS amendment deadline day if-

- (a) there is a reasonable excuse for the failure to make the amendment in accordance with paragraph 33.4 in time, and
- (b) the amendment is made within such further time as HMRC may allow.

## **Finance Act 2020**

25. Paragraphs 8 and 9 of sch 16 Finance Act 2020 provide for liability to assessment as follows:

### **Charge if person not entitled to coronavirus support payment**

#### **8**

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.

### **Assessments of income tax chargeable under paragraph 8**

#### **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.

(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.

#### **PARTIES' SUBMISSIONS**

##### **Submissions for DBP**

26. DBP did not dispute that the CJRS Employees were not included in any RTI submitted to HMRC on or before 19 March 2020. Rather, DBP sought to persuade the Tribunal that there had been a reasonable excuse for the failure to include the CJRS Employees in such a return on the following grounds:

(1) There had been significant uncertainty about whether Tier 2 migrant workers were eligible for CJRS payments. Mr Verma told the Tribunal that, given Tier 2 migrant workers would not normally be eligible for “public funds”, this caused some confusion about their eligibility for furlough payments, and that this had contributed to the failure of DBP to include the CJRS Employees on the RTI return on or before 19 March 2020.

(2) Mr Verma was ill during March 2020. As he was responsible for the employment of the CJRS Employees and their inclusion on the RTI return on or before 19 March 2020, his illness meant that he had not been aware of the relevant CJRS day and he had not been able to give Mr Nair the information on time. He instructed Mr Nair to include the CJRS Employees in the CJRS claim at the end of April / early May.

27. DBP submitted that there were instances where lateness and reasonable excuse had been allowed by HMRC when assessing similar claims. Mr Nair recounted an instance of a similar experience, in respect of which he told the Tribunal that an investigating officer had allowed a claim.

28. Mr Verma drew our attention to the following sources relevant to reasonable excuse:

(1) The guidance manual with reference CH160300 which sets out that HMRC would usually accept a reasonable excuse where a taxpayer has been unable to meet an obligation on time because of the impact of COVID-19;

(2) Case law where Tribunals have considered “reasonable excuse”, specifically *Perrin v HMRC* [2018] UKUT 156 (TCC), *Marlow Rowing Club v Revenue and Customs* [2020] UKUT 20 (TCC), and *Bachir Mohamed Belloul v Revenue and Customs* [2020] UKFTT 312 (TC);

(3) Paragraph 33 of the schedule to the Fifth Direction set out at [24] above. He submitted that, contrary to the decision of Judge Staker in *Raystra Healthcare Limited v Revenue and Customs* [2023] UKFTT 496 (TC) at [21], this demonstrated that “reasonable excuse” was a concept contemplated by the CJRS “surrounding legislation” and that the Tribunal should therefore consider his reasonable excuse as set out at [26] and [27] above.

29. Mr Verma told the Tribunal that it would not be fair to find that the CJRS Employees were ineligible for CJRS payments. He submitted that the purpose of the relevant CJRS day was to avoid fraud and that the claim in respect of the CJRS Employees was genuine and therefore should not be excluded.

30. Finally, Mr Verma submitted on behalf of DBP that the legislation was intended to help employers to help employees in extraordinary circumstances. There was extreme pressure on employers and payroll agents at this time. Mr Verma could only submit the claim once he

knew it would be permitted in respect of Tier 2 migrant workers and it was in the spirit of the legislation and fairness to allow the claim.

### **Submissions for HMRC**

31. Ms Lafaurie submitted for HMRC that the CJRS assessment in respect of the CJRS Employees was raised correctly and in time in accordance with paragraphs 8 and 9 of schedule 16 Finance Act 2020.

32. As the CJRS Employees were not included on any RTI return submitted to HMRC on or before 19 March 2020, they did not satisfy the requirements of para 5(a)(i) of the First Direction and payments to the CJRS Employees cannot constitute qualifying costs recoverable as CJRS payments.

33. Ms Lafaurie referred us to *Carlick Contract Furniture Limited v Revenue and Customs* [2022] UKFTT 220 (TC) in which Judge Poole at [39] said that the Tribunal had no jurisdiction to entertain arguments that the claims were made in the spirit of the legislation. She also submitted that it was not within the Tribunal's jurisdiction to discharge the assessment because of unfairness or legitimate expectations.

34. Ms Lafaurie submitted that the Tribunal had jurisdiction to consider "reasonable excuse" only where provided for expressly by statute and that there was no scope to consider reasonable excuse in respect of the relevant CJRS day.

35. Finally, Ms Lafaurie submitted that para 33 of the schedule to the Fifth Directive is not applicable to the relevant CJRS day.

### **DISCUSSION AND DECISION**

36. Having considered all of the evidence and submissions made to the Tribunal, we find that HMRC were entitled to raise the assessment under paragraphs 8 and 9 of schedule 16 Finance Act 2020 for the amounts paid to the CJRS Employees and under appeal before this Tribunal. The assessment was made on time.

37. We find that the CJRS Employees were not eligible for CJRS payments because they were not included in an RTI return on or before 19 March 2020, as required by the relevant legislation set out above.

38. While the RTI inclusion dates are not disputed, Mr Verma sought to persuade us that the circumstances of this particular case should be taken into account in determining whether the CJRS Employees could be eligible for CJRS payments. We find that it is not necessary to consider the circumstances of the failure to include on the RTI return. Previous decisions of *Carlick* at [37], *Oral Healthcare Limited v Revenue and Customs* [2023] UKFTT 00357 (TC) at [51], and *Luca Delivery Limited v Revenue and Customs* [2023] UKFTT 278 (TC) at [58-60], with which we agree, are entirely clear that CJRS payments could not be made, even where employees were employed prior to 19 March 2020, where those employees had not been shown on any RTI return on or before 19 March 2020.

39. We do not agree with Mr Verma's submission that this Tribunal could consider a reasonable excuse for failure to include those employees on the RTI by the relevant CJRS day. While there are provisions in the Fifth Directive which allow for reasonable excuse for submission of a late claim, this appeal is not concerned with a late claim, but with the inclusion of the CJRS Employees on the RTI return on or before the relevant CJRS day of 19 March 2020.

40. The guidance Mr Verma referred us to regarding reasonable excuse applies to specific legislation imposing penalties under the Finance Act 2007 to the Finance Act 2013 and is not therefore relevant to this appeal.

41. Mr Verma argued that the claims made by DBP were in line with the spirit of the CJRS. We agree with the decision in *Oral Healthcare Limited v Revenue and Customs* [2023] UKFTT 00357 (TC) that the Tribunal has no jurisdiction to entertain such an argument. As set out at para [57] of that decision, with which we agree, 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. In a similar vein, as the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) made clear, the Tribunal has no jurisdiction to consider whether or not the law is fair.

42. For the reasons set out above, we find that the assessment was raised correctly and in time. We DISMISS this appeal and uphold the assessment in respect of the CJRS Employees in an amount of £11, 208.05.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

43. 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.

**SUSAN TURNER  
TRIBUNAL JUDGE**

**Release date: 09<sup>th</sup> MAY 2024**