Neutral Citation: [2024] UKFTT 995 (TC)

Case Number: TC09343

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/10257

INCOME TAX - Coronavirus Job Retention Scheme – assessments under paragraph 9 Schedule 16 FA 2020 –claims for support payments based on future agreed earnings which were never paid rather than using the look back or averaging methods permitted by Paragraph 7.2 of the relevant Coronavirus Direction – appeal dismissed

Heard on: 17 October 2024
Judgment date: 31 October 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MISS PATRICIA GORDON

Between

SINTER SITE SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Seymour, Director of the Appellant

For the Respondents: Louise Hartstill, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns claims made by the appellant in respect of coronavirus support payments ("**support payments**") under the Coronavirus Job Retention Scheme ("**CJRS**" or "**the scheme**") on 21 occasions from 3 April 2020 to 30 September 2021 in respect of Mr David Seymour ("**Mr Seymour**"), his wife and their three sons (together "**the employees**").

2. These claims for support payments amounted in total to £175,689.59. It is HMRC's view that these claims are excessive and have assessed the appellant under paragraph 9 of schedule 16 to the Finance Act 2020 in the total sum of £87,958.82, for the three accounting periods ending 31 August 2020 (£27,028.76), 31 August 2021 (£56,669.40) and 31 August 2022 (£4,260.66) ("**the assessments**").

3. The fundamental issue in this appeal concerns the basis on which support payments should be calculated. It turns on a short point of statutory interpretation. The appellant has based its claims for support payments on wages which it had agreed to pay to the employees with effect from April 2020 (but because of the onset of Covid was unable to do so). HMRC say that this is incorrect and given that these were variable-rate employees, the claims should have been based on the formula in paragraph 7.2 of the Coronavirus Direction ("**Paragraph 7.2**").

4. For reasons given later in this appeal, we agree with HMRC's position and therefore dismiss the appeal.

THE LAW

5. There was little disagreement between the parties about the relevant law which we set out in the appendix to this decision. Expressions defined in the appendix have the same meanings in the body of this decision. Any reference to a "**Paragraph**" is to a paragraph in the appendix.

EVIDENCE AND FINDINGS OF FACT

6. We were provided with a bundle of documents. Mr Seymour who represented the appellant also gave oral evidence on its behalf. Oral evidence on behalf of HMRC was given by officer Alexander Leung ("**Officer Leung**"). From this evidence we find as follows:

(1) Mr Seymour and his sons are skilled craftsmen. They work in the construction industry as structural steel workers, and work on jobs as large as football stadia as well as on domestic houses. Up until 2016, they were employees of an independent employer.

(2) In 2016 Mr Seymour left that employer, only to find that after his departure his sons, who continued in employment with that employer, were being poorly treated.

(3) And so, the employees set up the appellant (or "**the company**") as a family company, which then employed them.

(4) The terms of that employment were never reduced to writing.

(5) The appellant was a small business. Characteristically, therefore, money was tight. It was capitalised by Mr Seymour and his wife. They purchased two vans on a leasing basis. Payments for these vans under the leasing arrangements was paid off by Christmas 2019.

(6) Because money was tight, the employees were paid well below the market rate which they could have obtained if they had exploited their skills on the open market. The idea was that when trading picked up, so too would their remuneration. Until then the money generated by the activities of the appellant should be retained in the business.

(7) It was not until Christmas 2019 that this became possible. Mr Seymour's evidence was that because of their respective personal positions, his sons were keen for their remuneration to be increased and wanted to take more money from the company.

(8) Between 2016 and 2019, the company was growing. All VAT and direct taxes were paid on time.

(9) Mr Seymour's evidence was that at Christmas 2019, at a family meeting (and we think this is probably the meeting which is reflected by the minutes which we have seen dated 22 November 2019) it was agreed that with effect from April 2020, his sons will be paid an increased wage plus an increased rate of overtime (although his wage would remain the same) (the "**increased wages**"). This was financially feasible as the van leases would have been paid off by then and the company was profitable. We accept Mr Seymour's evidence that had Covid not happened in March 2020, it was likely that the company could afford and would have paid the increased wages.

(10) The increased wages reflected the skills of the employees and were commensurate with the quality of the work that they were doing with effect from April 2020. Up until then they were being paid well below the going rate. They were, however, never actually paid due to the onset of Covid in March 2020.

(11) The claims for the support payments were based on the increased wages which Mr Seymour, who made the claims, calculated at 80% of the increased wages subject to a maximum of £2,500.

(12) HMRC's RTI records for 2019 show that the employees were paid on a weekly basis, and that the amounts varied from week to week.

(13) Officer Leung was tasked, in November 2021 to undertake a compliance check in relation to the appellant's claims for support payments.

(14) It was his view that the employees were variable rather than fixed rate employees. This was based on his analysis of HMRC's RTI information which showed that the employees were paid weekly, that weekly pay fluctuated, and there was no evidence that they were paid by reference to an annual salary. If there had been an annual salary, albeit paid weekly, he would have expected the weekly amounts to be of consistent and equal amounts.

(15) In these circumstances, it was his opinion that the claim should have been based on the provisions of Paragraph 7.2. This provides that claims can be based on the higher of two methods. Firstly the "averaging method" in Paragraph 7.2(a). And secondly the "look back" method in Paragraph 7.2(b). In simple terms the averaging method means using the average weekly pay for the tax year 2019-2020, whilst the look back method means looking at the actual

amount paid to the employee in the corresponding calendar period in the previous year. The claim can then be the higher of 80% of these amounts subject to a maximum of £2,500.

(16) Using HMRC's RTI information, Officer Leung recalculated the support payment claims. It was his view that those claims overstated the justifiable amounts.

(17) He shared this initial view with Mr Seymour from whom he sought further information regarding the terms of service of the employees and the payments made and due to be made.

(18) Following correspondence in 2022 and 2023, and the provision of further information by Mr Seymour, Officer Leung revised his figures and on 23 May 2023 notified the company that he intended to issue assessments for £87,958.82 to recover overclaimed support payments. He raised these assessments on 10 August 2023 for the three accounting periods mentioned above. It was Officer Leung's evidence that he made his decision to assess (and by this we take that he made his discovery) on 10 August 2023.

(19) On 30 August 2023 the appellant appealed against these assessments, and on 8 October 2023 notified that appeal to the tribunal.

DISCUSSION

7. HMRC accept that the burden of establishing that the assessments are valid in time discovery assessments rests with them.

8. Mr Seymour did not seriously challenge the fact that a discovery was made, nor that the assessments were validly served on the company, nor that they are out of time. It is our view that they were validly made and in time and were properly served on the company and we find this as a fact.

9. The burden then shifts, and it is up to the appellant to show that, on the balance of probabilities, the assessments overstate its liability to tax.

Submissions

10. In summary Mr Seymour submitted as follows:

(1) Using the increased wages as a basis for calculating the support payments was a reasonable basis, something which was permitted by the legislation.

(2) The purpose of the scheme was to assist businesses such as the company who were struggling because of the onset of Covid.

(3) It was clear from the evidence that the company intended to pay the increased wages with effect from April 2020. There is no need to have terms of employment written down. They can be agreed orally.

(4) The employees were entitled to be paid an amount commensurate with their skills and considerably more than the national minimum wage.

11. In summary Miss Hartstill submitted as follows:

(1) The claims must be based on the statutory formula for the calculation of an employee's reference salary. In the case of these variable rate employees, that is in accordance with Paragraph 7.2.

(2) There is no room in the legislation for any alternative basis of calculation no matter how reasonable.

(3) The claims made by the appellant for support payments were based on anticipated future earnings which were never paid. This is not consistent with the statutory formula.

(4) The legislation does not permit a claimant to calculate an employee's reference salary on a "reasonable" basis. It can only be calculated in accordance with the statutory formula. It is, however, reasonable for a claimant to choose between the averaging and look back methods to enable the claimant to maximise its claim.

(5) The method of calculation may mean that the support payment is below the national minimum wage. That is permissible.

(6) The tribunal has no jurisdiction to consider whether the appellant had a legitimate expectation that the scheme should apply to it, nor that it has been treated unfairly.

Our view

12. The starting point is Paragraph 8.1(a) which provides that if a claim is made by an employer for a support payment, the payment may reimburse "the gross amount of earnings paid or reasonably expected to be paid by the employer to an employee…".

13. Gross amount of earnings is then dealt with by Paragraph 8.2. "The amount to be paid to reimburse the gross amount of earnings must… not exceed the lower of £2,500 per month, and the amount equal to 80% of the employees reference salary (see paragraphs 7.1 to 7.15)" (emphasis added).

14. So, in order to determine the gross amount of earnings for which an employer can be reimbursed, one needs to determine an employee's reference salary, and that is determined in accordance with paragraphs 7.1 to 7.15. It cannot be determined in any other way, no matter how reasonable that alternative method of calculation. The legislation itself prescribes the way in which an employee's reference salary is to be determined and leaves no room for an alternative.

15. It is HMRC's view that the employees are variable rate employees and thus the relevant paragraph pursuant to which the employees reference salary should be calculated is Paragraph 7.2. Mr Seymour did not seriously challenge HMRC's submission that the employees are variable rate employees, and we agree with HMRC that they are variable rate employees for the reasons given by Officer Leung.

16. Paragraph 7.2 is set out below

> "7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-
>
> (a) the average monthly (or daily or other appropriate pro-rata) amount paid to the

employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and

(b) the actual amount paid to the employee in the corresponding calendar period in the previous year".

17. The first of these is the look-back method, the second of these is the averaging method. And, as can be seen, the claimant is given the benefit of being able to choose between the two methods in order to ensure that the claim is the "greater".

18. However, what is crucial, in both cases, is that not only are these "looking back" at wages paid in earlier periods, they can only take into account amounts "paid" (in the case of the averaging method) or "actually paid" (in the case of the look-back method). Wages which are not paid or actually paid cannot be taken into account as a matter of principle.

19. In the case of the support payment claims made by this appellant, the appellant has used the increased wages which were never actually paid. They were due to be paid with effect from April 2020. They could not, therefore, have been paid in the tax year 2019-20 (and thus couldn't be used for the averaging method). Nor, since they were not actually paid in any corresponding calendar period in the previous year, could they be used in the look-back method.

20. It is worth pointing out that even if the employees were fixed rate employees, the appellant would face the same difficulty. The reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020. The increased wages were neither actually paid, nor due and payable, until April 2020.

21. We accept the evidence of Mr Seymour that the company always intended to pay the increased wages with effect from April 2020, and we fully understand the commercial and domestic reasons for this.

22. Regrettably for the appellant, however, the legislation is highly prescriptive. For variable rate employees such as the employees, the basis of computing an employee's reference salary can only be in accordance with the provisions of Paragraph 7.2.

23. We agree with Miss Hartstill that we have no jurisdiction to consider whether the legislation operates in an unfair manner towards this appellant. Nor can we see any justification for any submission made by the appellant that it had a legitimate expectation that it could use the increased wages when calculating its claim for support payments. Furthermore, the legislation is clear on its face.

24. It is clear that with the onset of Covid, the government was put in a difficult position. It decided to assist employers by introducing the scheme. Essentially the burden of paying employees wages shifted from the employer to the taxpayer. It was wholly justifiable, therefore, that the basis of computing an employee's reference salary was tied to the wages which that employee had actually been paid before the introduction of the scheme.

25. We make no criticism of Mr Seymour. In our view, he genuinely thought that he could use the increased wages, which had been agreed between the company and the employees and which would be paid with effect from April 2020, as the basis for the claims for support payments. And this is reflected by the fact that HMRC have not sought to visit penalties on the appellant.

26. Unfortunately, for the appellant, this is not a statutorily permitted basis for calculating the employees' reference salaries. That could only be done in accordance with the provisions of Paragraph 7.2. This is the exercise undertaken by Officer Leung and is reflected by the liabilities set out in the assessments. The appellant has not displaced the amounts assessed.

DECISION

27. Accordingly, we uphold the assessments and dismiss the appeal

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 31st OCTOBER 2024

APPENDIX

THE RELEVANT LAW

1. Under paragraph 2.1 of the Schedule to the Coronavirus Direction dated 15 April 2020 ("**the Coronavirus Direction**"), the CJRS was established to provide support payments to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus. The scheme allowed a qualifying employer to apply for reimbursement of the expenditure incurred by the employer in respect of the employees entitled to be furloughed under the scheme.

2. Sections 71 and 76 of the Coronavirus Act provide the Treasury with the power to direct HMRC's functions in relation to coronavirus.

3. Pursuant to these powers, the Treasury introduced the Coronavirus Direction to govern HMRC's administration of the CJRS on 15 April 2020 (subsequently followed by a number of updated Directions in relation to CJRS during the pandemic).

4. Under paragraph 3 of the Coronavirus Direction, an employer can make a claim for Support Payments under the CJRS if they have a PAYE scheme registered on HMRC's Real Time Information (RTI) system for PAYE by 19 March 2020.

5. Paragraph 5 of the Coronavirus Direction details Qualifying Costs an employer is entitled to claim for under the CJRS.

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

6. Paragraph 5 of the Coronavirus Direction refers to Schedule A1 to the PAYE Regulations. Paragraph 67B of the PAYE Regulations states that "on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation".

7. Schedule A1 details what information regarding payments to employees must be given to HMRC. This information includes the date of the payment made and the employee's pay frequency.

8. Relevant day is defined by paragraph 13.1 of the Coronavirus Direction as 28 February 2020 or 19 March 2020.

9. Paragraph 8 ("**Paragraph 8**") of the Coronavirus Direction sets out what expenditure can be reimbursed in a CJRS claim. The reimbursement is the lower of £2500 per month and an amount equal to 80% of the employee's reference salary. Paragraph 8.2(b) makes reference to an employee's "reference salary" and instructs consideration of paragraphs 7.1 to 7.15 when calculating this.

10. Paragraph 7 of the Coronavirus Direction details what is a qualifying cost. Paragraph 7.1 states:

> 7.1 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, and
>
> (b) the employee is being paid-
>
> (i) £2500 or more per month (or, if the employee is paid daily or on some other periodic basis, the appropriate pro-rata), or
>
> (ii) where the employee is being paid less than the amounts set out in paragraph 7.1(b)(i), the employee is being paid an amount equal to at least 80% of the employee's reference salary.

11. Paragraph 7.2 states:

> 7.2 Except in relation to a fixed rate employee, the reference salary of an employee or a person treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership) is the greater of-
>
> (a) the average monthly (or daily or other appropriate pro-rata) amount paid to the employee for the period comprising the tax year 2019-20 (or, if less, the period of employment) before the period of furlough began, and
>
> (b) the actual amount paid to the employee in the corresponding calendar period in the previous year.

12. Paragraph 7.3 states:

> In calculating the employee's reference salary for the purposes of paragraphs 7.2 and 7.7, no account is to be taken of anything which is not regular salary or wages.

13. Paragraph 7.4 provides the definition of "regular salary or wages" as follows:

> 7.4 In paragraph 7.3 "regular" in relation to salary or wages means so much of the amount of the salary or wages as–
>
> (a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d),
>
> (b) is not conditional on any matter,
>
> (c) is not a benefit of any other kind, and
>
> (d) arises from a legally enforceable agreement, understanding, scheme, transaction or series of transactions.

14. An employee's reference salary is calculated with reference to one of two tests set out in the Coronavirus Directions depending on whether an employee is a "fixed-rate" employee. A fixed-rate employee is defined at paragraph 7.6:

> 7.6 A person is a fixed rate employee if–
>
> the person is an employee or treated as an employee for the purposes of CJRS by virtue of paragraph 13.3(a) (member of a limited liability partnership),
>
> (a) the person is entitled under their contract to be paid an annual salary,
>
> (b) the person is entitled under their contract to be paid that salary in respect of a number of hours in a year whether those hours are specified in or ascertained in accordance with their contract ("the basic hours"),
>
> (c) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,
>
> (d) the person is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month in equal weekly, multiple of weeks or monthly instalments ("the salary period"), and
>
> (e) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.

15. Paragraph 7.7 states that:

> the reference salary of a fixed rate employee is the amount payable to the employee in the latest salary period ending on or before 19 March 2020.

16. Following the initial Coronavirus Direction there are several further directions. These directions do not alter the legislation set out at paragraph 7.7.

17. Paragraph 7.12 states that where –

> (a) in the period beginning on 1 March 2020 and ending on the third day after the making this direction an amount by way of wages or salary is paid in respect of a period of employment ("the original payment") to an employee,
>
> (b) the original payment is less than the amount required by paragraph 7.1(b)(ii) for the purpose of claiming CJRS,
>
> (c) before making a CJRS claim in respect of the original payment the employer pays the employee a further amount ("the further amount") in respect of the period of employment to which the original payment relates, and
>
> (d) the sum of the original payment and the further amount meets the requirements of paragraph 7.1(b)(ii).

18. Paragraph 8 of Schedule 16 to Finance Act 2020 makes a recipient of Support Payments under CJRS liable to income tax where a claim is made incorrectly. Paragraph 8(4) details when income tax becomes chargeable, and in this appeal, income tax is chargeable at the time the Support Payment was received as at the time the Support Payment was received only part of the amount claimed

was due to the appellant.

19. Paragraph 8(5) details the amount of income tax chargeable as being equal to the amount of support payment to which the applicant was not entitled and has not been repaid. In addition, and as regards Corporation Tax computations, no deduction is allowed in respect of the payment of income tax under paragraph 8(8).

20. Paragraph 9 affords HMRC the power to make assessments to income tax as chargeable under paragraph 8. An Officer, under paragraph 9(1), may make an assessment where he considers that a person has received an amount of Support Payment to which he was not entitled in an amount which ought in the Officer's opinion to be charged under paragraph 8.

21. The assessment may be made at any time under paragraph 9(2), but subject to the statutory assessing time limits pursuant to sections 34 and 36 of the Taxes Management Act 1970 ("**TMA**"). Parts 4 to 6 of the TMA also apply to this appeal, particularly those relating to the appeal provisions.

22. When a person liable to income tax charged under paragraph 8 of Schedule 16 to FA 2020 is a Company that is chargeable to corporation tax, then paragraph 11 also applies. Paragraph 11 sets out how the income tax charge operates in relation to the Company's calculation of their corporation tax liability.