



[2022] UKFTT 24 (TC)

**TC 08376/V**

*Corporation tax: R&D tax credits – HMRC guidance – appeal against amendment to claim on grounds of fairness and unreasonableness on the part of HMRC*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/662**

**BETWEEN**

**MEGABLUE TECHNOLOGIES LTD (IN  
LIQUIDATION)**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE CHARLES HELLIER**

**The hearing took place on 14 December 2021. With the consent of the parties, the form of the hearing was by video on the Tribunal video platform. A face to face hearing was not held because of the covid 19 pandemic**

**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.**

**Martin Priestley for HMRC  
Mark Stevens for the liquidator of the Appellant**

## DECISION

### Introduction

1. This appeal concerns an application for the payment of an R&D tax credit under the provisions of Part 13 Corporation Tax Act 2009 ("CTA") and HMRC's refusal to make payment.
2. The core of the company's complaint is that it was treated unfairly by HMRC in the light of the purposes of the legislation and the guidance published by HMRC as to its operation.

### The Legislation

3. There is no dispute about the relevant legislation or its meaning. Chapter 2 part 13 CTA provides a generous regime for relief for R&D expenditure by small or medium sized entities ("SMEs"). Where the conditions of the Chapter are fulfilled, a company is entitled to an enhanced deduction for qualifying expenditure in computing its trading profits. For the 2015/16 year that deduction was 130% of the actual expenditure.

4. Further, sections 1054ff provide for the payment of an "R&D tax Credit" if a company obtains such an enhanced deduction and makes a trading loss in the relevant period. It may surrender the loss in return for the tax credit. The amount of that tax credit was, in 2015/16, 14.5% of the loss as reduced by other reliefs which the company could claim.

5. Section 1054(4) provides:

"If a company makes a claim for an R&D tax credit to which it is entitled for an accounting period, an officer of Revenue and Customs must pay the company the amount of the credit."

6. That is stated to be subject to section 1060 which permits the credit to be offset against certain other tax liabilities of the company, and that, where an enquiry is opened into a company's tax return:

"(5)...(a) no payment in respect of the R&D tax credit for the period need be made before the officer's enquiries are completed..."

(b) The officer may make payment on a provisional basis of such amount as the officer thinks fit."

7. It will be seen that the legislation imposes no date on which payment must be made although the provisions of section (5)(a) cited above indicate that there was, at the least, an emphasis in the legislation on the duty to make payment.

8. The right to the additional deduction and the availability of the R&D tax credit are restricted by sections 1046 and 1057 respectively. The first of these sections provides that a company may make a claim for the additional deduction only if at the time of the claim it is a going concern. For these purposes subsection (2) provides that a company is a going concern if its latest published accounts were prepared on the basis that it was such a concern so long as noting in those accounts indicates that they were only prepared on that basis because of the expectation of R&D tax credits. Section (2A) provides:

"(2A) A company is not a going concern at any time if it is in administration or liquidation at that time."

9. The second section makes similar provision but also provides:

"(2) If a company ceases to be a going concern after making a claim under section 1054 [R&D tax credit] it is to be treated as if it had not made the claim..."

(3) Subsection (2) does not apply so far as the claim relates to an amount which was paid or applied [against other liabilities] before the company ceased to be a going concern.”

10. The effect of these provisions is that if a company makes a claim to an R&D tax credit and then goes into liquidation, any amount of the claim unpaid at the time of the liquidation is no longer payable, but there is no liability of the company to repay amounts properly paid at an earlier date.

### **The Guidance**

11. HMRC publish guidance on their approach to R&D tax credit claims. Mr Stevens cited the following passages from that Guidance

“The Specialist R&D units have a role in promoting the R&D tax relief schemes and they will also focus on improving the consistency of claims treatment, in helping companies to prepare accurate claims to R&D relief.

...

“For most SME R&D payable tax credit claims, within 28 days, we will aim to either pay the payable tax credit, or contact you regarding the claim, in 95% of cases...If we decide not to make a payment because we think the claim may be incorrect, then we will aim to open an enquiry within 60 days of receiving the claim. To avoid doubt, this statement does not replace the statutory time limits for making enquiries into corporation tax returns. If we decide to make a payment then we may still make an enquiry into the claim within the statutory time limit.”

“Where a payable R&D Credit is withheld during an enquiry, we will keep under review the possibility of making interim payments as the enquiry progresses”

12. To my mind there is in these passages, when taken in the context of legislation which requires payment to taxpayers (rather than the making of payments by them) an attempt to make HMRC as diligent in paying out as they are normally to collect; and thus to encourage R&D Development in the UK by giving taxpayers comfort that HMRC would try to act speedily and generally not exercise the full length of the statutory periods for making payments and opening enquiries. But the comfort falls short of creating obligations so to act: it is about aspiration.

### **The relevant Facts**

13. I had a bundle of copy correspondence and heard oral evidence from Mr Stevens who had been a director of the Appellant.

14. The Appellant company was incorporated in 2009 and developed and provided telecommunications equipment, latterly providing equipment and software for the interception of communications. The changing technology of such communications – from 2G to 3G to 4G – required continual development of its offering. It operates in a small and difficult market and its sales were lumpy.

15. Cash flow can be difficult for an SME involved in novel development: there are expensive technical experts to be paid at regular intervals but only occasional sales.

16. The company made its first R&D tax credit claim for the period to 31 March 2017; a second claim was made for the period to 30 June 2017. Payment was made by HMRC within 28 days of each claim. No enquiry was opened in either case.

17. On 2 November 2018 the company made an R&D tax credit claim for the period to 30 June 2018. The claim was for a payment of £123,416.90.

18. 24 days after the submission of the claim, on 26 November 2018, the company's accountants rang HMRC. They were told they HMRC would not be looking at the claim until mid January 2019, but that they could ring before then to see if the date had been brought forward. On one call made by the accountants they were told that the longstop date would be 11 January.
19. 11 January 2019 came and went, and after further phone calls by the accountants they were told on 16 January 2018 that an officer would be writing to them in a couple of weeks with some questions. Those questions arrived on 21 January 2018 in the form of an enquiry – an enquiry opened 81 days after the making of the claim.
20. HMRC asked a good many difficult questions. Staff at the company were busy: some form of corporate restructuring was being contemplated. The company sought and was given further time to answer the questions; it failed to do so.
21. On 18 June 2019 the company entered voluntary liquidation, and on 19 August 2019 HMRC issued a closure notice disallowing the R&D tax credit claim. They did so on the basis that the company was in liquidation and as a result the going concern condition in section 1057(2) was not met and the claim failed.
22. An amendment was made to the company's tax return which reflected this conclusion.
23. The Directors' report in the Liquidator's Report to Creditors attributed the failure of the company to four factors, an acrimonious trade dispute, the delay in the receipt of the R&D tax credit, lack of orders and the failure to obtain an export licence
24. The company appeals against the amendment to its tax return disallowing the R&D tax credit.

#### **Mr Stevens' submissions**

25. Mr Stevens says that the company was treated unfairly and unreasonably by HMRC:
  - (i) the company was entitled to rely on the Guidance. A lay person cannot be expected to understand complex legislation: where specific guidance was available it must be capable of being relied upon. Given that the company's previous claims had been paid in accordance with that Guidance the company had a legitimate expectation that HMRC would comply with it in relation to subsequent claims;
  - (ii) HMRC failed to comply with the Guidance in two ways in particular:
    - (a) they did not make payment within 28 days; and
    - (b) they did not open the enquiry before the expiration of 60 days;
  - (iii) even if HMRC were not obliged to comply with their Guidance, they were given a direction by the legislation to make a payment on a "provisional" basis. In circumstances where (a) HMRC were in breach of their Guidance, (b) the claim was made through a reputable firm of accountants, and (c) HMRC had paid two previous claims in accordance with their guidance, it was unfair and unreasonable not to make a partial provisional payment in this case;
  - (iv) by delaying the enquiry and the payment, the company's insolvency and liquidation had been precipitated, and that had caused the claim to fail. It was unfair and unreasonable for HMRC to exercise the discretions given to them in relation to the time of payment, the opening an enquiry and the making of a partial payment so as to cause the claim to fail; and

(v) by opening an enquiry and not making any payment HMRC unfairly preferred the company's competitors.

## Discussion

### *(a) the lawfulness of the enquiry, the closure notice and the amendment*

26. The company did not suggest that the statutory conditions for the opening of the enquiry, the closure notice and the making of the amendments had not been met, and on the facts before me I find that they were.

### *(b) Unfairness and unreasonableness*

27. This tribunal (the "FTT") is a creature of statute. It is created by the Tribunals, Courts and Enforcement Act 2009 (the "TCEA") and given authority to hear particular appeals by the provision of Acts which dictate the scope of the appeal and the extent of the tribunal's powers.

28. The High Court has an intrinsic power of judicial review, sometimes described as a general supervisory jurisdiction. Under that jurisdiction it may examine whether HMRC has exercised its powers "reasonably" and grant relief where they have acted as no reasonable body could under the powers given to them. The TCEA confers the same jurisdiction on the Upper Tribunal in certain limited cases. But the FTT has no such *general* supervisory power because no statute confers such a power upon it. There are however provisions which relate to certain appeals where the FTT is given power to declare, applying quasi judicial review principles, the action or decisions of HMRC unreasonable and to grant relief. But whether or not an appeal brings with it such jurisdiction depends on the words of the statutes conferring on the FTT the power to hear the appeal and dictating the procedure it must follow.

29. Sch 18 Finance Act 1998 deals with company tax returns and enquiries. It provides for the making of an enquiry and its completion (paras 24 to 32). Paragraph 34 requires a closure notice to make amendments to the company's tax return to give effect to the conclusions in a closure notice and paragraph 34(3) provides that an appeal may be brought against such an

"amendment of a company's return"

30. There is no section conferring a right of appeal to this tribunal against the actions of HMRC in managing the R&D tax credit system or in relation to its exercise of its power to enquire. Thus unless the words just quoted, or those of any statute which relate to such an appeal confer a power to consider the reasonableness or fairness of HMRC's actions this tribunal cannot entertain an appeal on such grounds. But the right of appeal in paragraph 34 is to appeal against the amendment not against the decision to make it.

31. Section 50 TMA, which applies by virtue of section 48 TMA to appeals under para 34 Sch18, provides for the procedure on such an appeal. It provides so far as relevant:

"(6) If on an appeal notified to the tribunal the tribunal decides-

- (a) that the appellant is overcharged by a self-assessment;
- (b) that any amounts contained in a partnership statement are excessive; or
- (c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides

- (a) that the appellant is undercharged to tax by a self-assessment

- (b) that any amounts contained in a partnership statement are insufficient; or
- (c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim...which was the subject of a decision contained in a closure notice should have been allowed or disallowed to an extent different from that contained in the closure notice, the claim shall be allowed or disallowed to the extent the tribunal decides but otherwise ...shall stand good.”

32. Thus the question is whether these words and those of para 34(3) give the tribunal power to consider whether HMRC have acted unreasonably and to give a remedy. The words of section 50(6) were considered in *Aspin v Estill* [1987] STC 723 (a case referred to by the Upper Tribunal in *KSM* at [47]). In that case the taxpayer wished to argue that because the Revenue had told him that certain income was not assessable it would be unfair and “unreasonable” for the Revenue to assess him on it. The Court of Appeal held that the General Commissioners' jurisdiction was only to 'see whether the assessment has been properly prepared in accordance with [the] statutes'. Nicholls LJ drew the following distinction ([1987] STC 723 at 727, (1987) 60 TC 549 at 557-558):

The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.'

In *KSM*, the Upper Tribunal found that, given the limitation in s 50 on the actions the General Commissioners could take (“otherwise the assessment shall stand good”), it was not surprising that Nicholls LJ considered that they had no power to set aside a liability which arose under the legislation.

33. The reasoning of Court of Appeal’s description of the effect of section 50 is binding on this tribunal and is as applicable to section 50(7A) as it is to subsection (6). As a result, even if I considered that HMRC’s conduct was unreasonable or unfair I would have no power to grant any remedy: my task is limited to determining whether the amendments were made in accordance with the provisions of the Acts. In doing so I can have regard to material outside the Acts only if the Acts give permission for me to do so; and they do not.

34. Mr Stevens did not contend that the conclusions reached by HMRC and the consequent amendments were not in accordance with the provisions of CTA 2009, and, on the facts as I have found them, they were in accordance with those provisions.

### **Conclusion**

35. As a result, I must dismiss the appeal.

#### *Remedies in other fora*

36. It may be that the company could succeed in an action for judicial review of HMRC’s actions. But given the caveats in the Guidance it seems to me that this would be a difficult

course to pursue successfully, and would depend on the reasons for HMRC's actions - of which I know little.

37. There may be scope for the company to use HMRC's complaints procedure in relation to the delay in opening the enquiry and the failure to make payment; and if HMRC's complaints procedure is exhausted the Adjudicator's office might review the complaint. However, I neither encourage nor discourage such action – to do so would be wholly outside my remit.

### **Rights of Appeal**

38. 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.

**CHARLES HELLIER**  
**TRIBUNAL JUDGE**

**Release date: 18 JANUARY 2022**