



Neutral Citation: [2024] UKFTT 00716 (TC)

Case Number: TC09256

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By telephone hearing

Appeal reference: TC/2023/07924

*CORONAVIRUS SUPPORT – payments claimed in respect of increased salary – assessment made under paragraph 9 Finance Act 2020 - whether terms of coronavirus job retention scheme met – no – appeal dismissed*

**Heard on:** 25 April 2024

**Judgment date:** 1 August 2024

**Before**

**TRIBUNAL JUDGE AMANDA BROWN KC  
PATRICIA GORDON**

**Between**

**KINGDOM TRAVEL SERVICES LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Mr M Abdelbadia, director of the Appellant

For the Respondents: Ms A Thanda, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This appeal concerns assessments (**Assessments**) raised by HM Revenue & Customs (**HMRC**) pursuant to paragraph 9 Schedule 16 Finance Act 2020 (**FA20**) issued to Kingdom Travel Services Limited (**Appellant**) in respect of payments concluded by HMRC to have been incorrectly made to the Appellant under the coronavirus job retention scheme (**CJRS**).
2. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal's video platform. A face-to-face hearing was not held because it was expedient not to do so. The documents to which we were referred were containing in a single bundle of 922 pages including the statement of case prepared by the Respondent and all legislation and authorities.
3. 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.
4. Mrs M Mamoud was in attendance as an interpreter for Mr Abdelbadia. Mrs Mamoud began translating all dialogue. However, Mr Abdelbadia indicated that he did not require a translation of the full proceedings as he was able to understand them. He asked that Mrs Mamoud only translate matters which he indicated he could not follow. The point would be repeated in English and then translated. Absent any objection from the Respondents we proceeded on that basis. Mrs Mamoud was periodically called upon to translate a number of points.

### BACKGROUND

5. The Appellant was registered for PAYE on 13 June 2017 under registration number 120/MB62941. In the period from March 2020 to March 2021 the Appellant made 19 claims through its PAYE registration for CJRS support payments in respect of salary payments said to have been made to three employees: Mr M Abdelbadia, Mrs Abdelbadia and Ms Al-Shemery. The claims were based on monthly salaries of £2000 per employee.
6. On 21 September 2020 HMRC wrote to the Appellant to advise that they proposed checking the Appellant's claims to CJRS. Over the period until December 2021 HMRC sought and were eventually provided with information and documentation in relation to the Appellant's business in the period in which the claims were made and in respect of those claims.
7. Taking account of the information provided HMRC considered that the Appellant had received coronavirus support payments to which it was not entitled as the amounts claimed were not calculated in accordance with the terms of the various Treasury Directives issued pursuant to section 76 Coronavirus Act 2020 (**CA20**) and by which entitlement to CJRS was determined. Accordingly, HMRC issued the Assessments in respect of the accounting period ended 31 March 2021 and 31 March 2022 in the sums of £35,469.36 and £18,110 respectively on 9 June 2022.
8. We understand that in addition to the Assessments HMRC issued penalties against the Appellant. No appeal was lodged in respect of the penalties (despite the Appellant having professional representation at the time the appeal was lodged, though not before us) and any appeal would now be out of time. Absent an appeal in respect of the penalties we have no jurisdiction to determine whether the Appellant's behaviours justified the imposition of those penalties.

9. For the reasons explained in our extempore judgment and as set out below we dismissed the appeal

#### RELEVANT LAW

10. CJRS was facilitated and enabled by section 76 CA20 which granted HMRC such functions as may be directed by the Treasury in relation to coronavirus.

11. Pursuant to section 78 CA the Treasury issued seven Directions providing the framework pursuant to which CJRS payments were made. In this appeal the critical Directions are the First (dated 15 April 2020) (**First Direction**) and Fifth (dated 12 November 2020) (**Fifth Direction**).

12. CJRS was introduced under the First Direction and responsibility for its payment and management was delegated to HMRC. The purpose of the scheme was set out in paragraph 2 which, so far as relevant to this appeal provided:

“2.1 The purpose of CJRS is to provide for payments to be made 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 and coronavirus disease.

2.2 Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates.”

13. A qualifying employer was defined in paragraph 3. Under the First Direction a qualifying employer, as defined, was required to have had a pay as you earn (**PAYE**) real time information (**RTI**) system registered with HMRC on 19 March 2020. Qualifying costs were defined in paragraphs 5 and 7. They were costs:

- (1) relating to a furloughed (and current) employee;
- (2) to whom the qualifying employer had made a payment of earnings in the tax year 2019-20 which had been shown in a PAYE return submitted prior to the relevant CJRS day (defined as 28 February or 19 March 2020);
- (3) related to the payment of earnings during the period of furlough;
- (4) which did not exceed 80% of the employee’s reference salary capped at £2,500.

14. For a fixed rate employee the reference salary was simply the amount “payable” to the employee in the latest salary period ending on or before 19 March 2020 (subject to exclusions not relevant in this appeal).

15. A fixed rate employee was defined in paragraph 7.6 as:

“A person ... if-

- (a) the person is an employee ...,
- (b) the person is entitled under their contract to be paid an annual salary,
- (c) 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”),
- (d) the person is not entitled under their contract to a payment in respect of the basic hours other than an annual salary,

(e) 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

(f) the basic hours worked in a salary period do not normally vary according to business, economic or agricultural seasonal considerations.”

16. Paragraph 7.7 provided:

“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 (but disregarding anything which is not regular salary or wages as described in paragraph 7.3).”

17. The Fifth Direction extended the scheme in consequence of the second lockdown which began on 5 November 2020.

18. Under the extended scheme employers who had taken on new staff post 19 March 2020 became entitled to make claims for CJRS in respect of those employees by reference to the salaries paid to such employees in the last pay reference period prior to 30 October 2020. However, by virtue of the provisions of paragraphs 11.1 – 4 of the Fifth Direction, for employees who were in employment on 19 March 2020 and continued in employment through to 1 November 2020 the relevant reference salary remained that paid in the last pay reference period prior to 19 March 2020.

19. Schedule 16 FA20 provides the statutory infrastructure for the taxation of coronavirus support payments including CJRS payments. Paragraph 8 introduced a charge to income tax in respect of amounts paid by way of coronavirus support payment including, inter alia, by way of CJRS, to which the recipient was not entitled. The amount of the charge is equal to the amount of the coronavirus support payment incorrectly paid. Paragraph 9 provides the power for HMRC to assess for the charge arising under paragraph 8.

20. Section 34 Taxes Management Act 1970 (TMA) requires that the general time limit for raising an assessment is 4 years from when the tax became due. In accordance with paragraph 8 Schedule 16 FA 20 income tax becomes due upon each and every payment of CJRS that was made to the extent that the recipient was not entitled to receive the support payment.

#### **BURDEN OF PROOF**

21. It was for HMRC to show that the Appellant companies received payments to which they were not entitled under the CJRS because the Appellants failed to comply with the terms of the Treasury Directions making claims for fixed rate employees in excess of the reference salary and that the assessments were made within the relevant statutory time limits.

22. The standard of proof is the civil standard of on the balance of probabilities.

#### **ISSUE TO BE DETERMINED**

23. The sole issue we must determine is whether the claims made to CJRS were made in accordance with the provisions of the Treasury Directions.

#### **FINDINGS OF FACT**

24. The findings of fact we need to make in this appeal are limited. There were a number of factual assertions made on behalf of the Appellant through the period in which HMRC were checking the claims which HMRC questioned and/or considered to have no foundation.

However, in the end they did not form any part of the decision to assess, and we need not therefore make findings on them. For that reason, we do not set them out.

25. HMRC provided the witness statement of Mrs Rosemary Marinelli, the officer who had been responsible for the check into the Appellant's CJRS claims. As Mr Abdelbadia had not read Mrs Marinelli's statement (though he had received a copy of it) and so Mrs Marinelli read out her statement. Mr Abdelbadia confirmed, paragraph by paragraph, that he understood the statement. We ensured that Mr Abdelbadia was informed that he must cross examine Mrs Marinelli on every matter with which he disagreed. The only points on which Mr Abdelbadia sought clarification by way of cross examination concerned the protected length of the check and as to why HMRC had permitted him to continue to make CJRS claims during the check. These matters were not relevant to our decision for the reasons we address this below. Mr Abdelbadia was not asked to give formal sworn testimony but explained the difficulties faced by the business in the period 2020 – 2021 and the decisions it made.

26. The bundle of documents provided to us included all correspondence between the parties but there was very little documentary evidence.

27. From the evidence available (which was sufficient) we find the following facts:

(1) The Appellant operates a travel business principally providing chauffeur services to passengers arriving and leaving Heathrow and Gatwick. It owns some cars but does not employ drivers who are subcontracted.

(2) Prior to February 2020 the Appellant had 5 employees but 2 of those employees ceased employment in February 2020. The remaining 3: Mr Abdelbadia, Mrs Abdelbadia and Ms El-Shemery continued in employment throughout the period March 2020 to March 2021 but were furloughed throughout that period.

(3) In the PAYE return made on 29 February 2020 Mr Abdelbadia was shown as having been paid £900.00 (gross), Mrs Abdelbadia £700.00 (gross) and Ms Al-Shemery £811.04 (gross). Those salary payments reflected the payments made to those employees in the months prior to February 2020.

(4) Each of the 19 claims to CJRS were made on the basis that each of the employees was a fixed rate employee earning £2000 per month and not the reference salary shown in the PAYE return submitted on 29 February 2020. The £2000 was said to have been used as, on 22 February 2020, Mr Abdelbadia had notified each employee that they were to receive a salary increase payable from 1 March 2020. There was a dispute between the parties as to the integrity of that assertion. We do not need to determine whether Mr Abdelbadia did or did not increase the salaries as a matter of contract between the Appellant and the employees as it is irrelevant to the issue we have to decide. The reference salary for the purposes of the CJRS was determined in the pay reference period ended prior to 19 March 2020 and those figures are as set out at paragraph (3) above.

(5) HMRC determined that the Appellant's entitlement to CJRS was limited to the reference salaries through the period in accordance with paragraphs 7.7 of the First Direction and 11.1 – 4 of the Fifth Direction.

(6) The Assessments were issued on 9 June 2022.

## DISCUSSION

28. The Appellant's entitlement to CJRS was as prescribed in the Treasury Directions. As the employees were all paid on a basis meeting the description of a fixed rate employee and

had been furloughed the Appellant was entitled to claim 80% of £900.00 for Mr Abdelbadia, 80% of £700.00 for Mrs Abdelbadia and 80% of £811.40 for Ms Al-Shemery.

29. The Treasury Directions did not make provision for salary increases either immediately before or during the operation of the scheme. The country was in a time of crisis. The purpose of the schemes were, as stated: “to provide for payments to be made to employers ... 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 and coronavirus disease.” The scheme did not provide for the funding of salary increases for employees whilst on furlough.

30. Having been calculated to deny the Appellant the amount of CJRS payments made over and above the entitlement the Assessments were validly made. They were raised within 4 years of the earliest period to which they pertain and are therefore in time.

31. Before us Mr Abdelbadia’s principal concern was that HMRC should not have permitted the Appellant to continue to make the claims at £2000. He said that if he had known that the claims would be disallowed, he would not have continued to pay the staff £2000 per. He also claimed that if the CJRS payments were restricted then he should be entitled to reimbursement of the PAYE tax on the £2000.

32. As we explained in the hearing, it is not for us to determine whether as a matter of contract between the Appellant and the employees they were entitled to £2000. If they were not so entitled the position for the Appellant in connection with the CJRS overpayments would be significantly more serious as claims would have been made in respect of sums to which the employees were never entitled. If the payments were contractually made then the PAYE, NICs and pension contributions would have been calculated correctly irrespective of the Appellant’s entitlement to CJRS under the terms of the Treasury Directions.

33. As to Mr Abdelbadia’s complaint that HMRC should have stopped the payments. That too is not for us to determine. We are a statutory tribunal, and our jurisdiction is as prescribed by the provisions of the various taxes acts, in respect of this appeal: FA 09 and TMA. We have no jurisdiction to consider HMRC’s conduct generally and in particular the decisions they take on how to assess risk to the revenue. During the period 2020 – 2022 with a mind to the difficulties faced by legitimate business in our experience HMRC did take a less aggressive position than at other times. In general, business benefitted from that approach. Mr Abdelbadia took the decisions on behalf of the Appellant as to how much he paid the employees and what to claim. The Appellant made claims to CJRS to which it was not entitled. The Assessments look only to recover the those for which there was no entitlement. The Appellant received the full benefit to which it was entitled under the terms of the Treasury Directions.

34. For these reasons we dismiss the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

35. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

**AMANDA BROWN KC  
TRIBUNAL JUDGE**

**Release date: 01 AUGUST 2024**